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(191 Cal. 501)

**HOTALING et al. v. SUPERIOR COURT,
CITY AND COUNTY OF SAN FRANCISCO
et al. (S. F. 10288.)**

(Supreme Court of California. July 13, 1923.)

1. Contempt §3—Contempt of court is criminal offense.

Contempt of court is a specific criminal offense.

2. Contempt §40—Contempt proceeding not a civil action.

A contempt proceeding is not a civil action, either at law or in equity, though it may be ancillary thereto, but is a proceeding of criminal nature and summary character, in which the court exercises but a limited jurisdiction, and in which the people prosecute.

3. Contempt §54(2), 58(1), 61(1)—Affidavits on which citation is issued constitute complaint, and defendant's affidavits the answer; hearing had on issues made by pleadings.

In a prosecution for constructive contempt, affidavits on which citation is issued constitute the complaint and affidavits of defendant the answer, and the issues of fact are framed by the respective affidavits serving as pleadings, and hearing must be had on these issues, at which competent evidence must be produced, under Code Civ. Proc. §§ 1218, 1220.

4. Contempt §60(3) — Witnesses §293½—In contempt proceeding mere preponderance of evidence insufficient, and defendant cannot be compelled to be sworn as witness.

A proceeding for constructive contempt is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient, and defendant cannot be compelled to be sworn as a witness nor convicted on the uncorroborated testimony of an accomplice.

5. Certiorari §64(1)—Writ extends to whole record of court below.

While the writ of certiorari is not a writ of error, it nevertheless extends to the whole of the record of the court below, and to evidence where necessary to determine jurisdiction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Certiorari.]

6. Contempt §67—In reviewing contempt proceeding, evidence, judgment, and findings construed in favor of accused.

In certiorari to review a contempt proceeding, the charge, evidence, findings, and judgment are strictly construed in accused's favor, and no intendments or presumptions can be indulged in in aid of their sufficiency.

7. Certiorari §28(2) — Unwarranted order subject to review by direct attack on writ of certiorari.

An unwarranted order is subject to review by direct attack on a writ of certiorari where the court's power to make the order depends on existence of facts as to which there is no evidence; the question presented in such case being one of law.

8. Contempt §21—Facts alleged held not to amount to contempt of court where order was not made in execution of final decree.

Where on going down of remittitur an order was made directing defendants to transfer shares of stock and issue new certificates therefor not in the name of the judgment plaintiff, but in the name of a trustee, a stranger to the action, all of which was claimed to be made in execution of the final decree, in refusing to cause transfer of stock to be made to the trustee, defendants cannot be guilty of contempt as violating the terms of the final decree.

9. Contempt §21—To constitute constructive contempt for disobedience of court order, there must be omission to perform act required by order.

To constitute a constructive contempt for failure to obey an order carrying into effect a final decree after going down of remittitur, there must have been an omission to perform an act which was required by the terms of the original order.

10. Contempt §2—Violation of law not per se contempt of court.

A violation of law does not per se constitute contempt of court.

11. Contempt §20—Violation of rights of ownership, though declared by judgment, not per se contempt.

A violation of rights of ownership, even though they have been ascertained and declared by judgment, unless it consists in doing something which was prohibited or in failing to do something which was required by the terms of the judgment, is not contempt.

In Bank.

Original application for certiorari by Richard M. Hotaling and others against the Superior Court, City and County of San Francisco, and others, to review an order of that court. Order annulled.

Peter F. Dunne, W. H. Metson, R. G. Hudson, and I. P. Nieto, all of San Francisco, for petitioners.

Gavin McNab, Nat Schmulowitz and R. P. Henshall, all of San Francisco, for respondents.

MYERS, J. Petitioners applied for a writ of certiorari to review an order of the court below, after the going down of the remittitur in the action in this court, wherein Lavinia J. Hotaling was plaintiff and Richard M. Hotaling and the Hotaling Estate Company were defendants (*Hotaling v. Hotaling*, 187 Cal. 695, 203 Pac. 745), adjudging petitioners in contempt of court, and directing said Hotaling Estate Company and Richard M. Hotaling, as its president, and C. N. Taylor, as its secretary, to cancel certificate No. 15 for 2,499 shares of its capital stock, standing in the name of Richard M. Hotaling and indorsed in blank by him, and delivered to Lavinia J. Hotaling, and also indorsed in blank by Lavinia J. Hotaling, upon presentation thereof by the Union Trust Company, and thereupon to reissue to and in the name of the said Union Trust Company a certificate for one share of said stock and 10 certificates for 125 shares each, and one certificate for 1,248 shares of said stock. Said demand for the cancellation and reissuance of said stock was made by said Union Trust Company and Lavinia J. Hotaling, as assignor of said Union Trust Company, accompanied by the necessary stamps required for said purpose, requesting that the president and secretary of said corporation do each make the proper indorsement and writing, to accomplish said transfers. It was claimed in connection with said transfers that legal assignments of said stock had been made from Lavinia J. Hotaling to said Union Trust Company. Said demand for transfer was in writing, signed by said Lavinia J. Hotaling and said Union Trust Company, for a transfer out of her name into that of the Union Trust Company. It was made in pursuance of a clause in the final decree in the said cause of *Lavinia J. Hotaling v. Richard M. Hotaling and Hotaling Estate Company*, as finally affirmed by this court, as follows, to wit:

"II. That the plaintiff, Lavinia J. Hotaling, be and she is hereby declared to be the owner and entitled to immediate possession of 2,499 shares of the capital stock of the Hotaling Estate Company represented by certificate No. 15, issued in the name of Richard M. Hotaling, free and clear of all claims on the part of said Richard M. Hotaling."

Richard M. Hotaling, personally and as president of the Hotaling Estate Company and the Hotaling Estate Company, were each a party to said decree and were bound by its terms. C. N. Taylor, as secretary of the Hotaling Estate Company, was also bound by the decree as fully as if he had been a formal party thereto. His functions as such secretary were confined to carrying out the directions of his principal, and in so doing he would be acting as the agent of his principal. All the parties to the present proceeding for review were therefore bound to obey the terms of the decree.

The rights of an owner of shares of stock in a corporation of the character of the Hotaling Estate Company, with respect to the possession and transfer of the same, are set forth in section 324 of the Civil Code. It provides that, when the capital stock is divided into shares, and certificates therefor are issued—

"such shares of stock * * * are personal property, and may be transferred by indorsement by signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of the transfer. * * * Whenever any officer of any corporation shall refuse to make entries upon the books thereof, or to transfer stock therein, or to issue a certificate or certificates therefor to the transferee as provided by this and the next preceding section, such officer shall be subject to a penalty of four hundred dollars, to be recovered as liquidated damages, in an action brought against him by the person aggrieved."

The preceding section (323) provides that the corporation must issue certificates for stock therein when fully paid up, signed by the president and secretary. There are special provisions directing the course to be taken when the stock is not fully paid up, but they do not apply in this case, for this stock was fully paid.

The order here under review presents two aspects: In one it adjudges the petitioners guilty of contempt, and imposes a penalty; in the other, it commands them to make the transfer of the stock upon the corporate books in accordance with the demand made as above recited.

[1, 2] Contempt of court is a specific criminal offense. *McClatchy v. Superior Court*, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691; *Ex parte Gould*, 99 Cal. 360, 33 Pac. 1112, 21 L. R. A. 751, 37 Am. St. Rep. 57; *Ex parte Hollis*, 59 Cal. 408; *Reymert v. Smith*, 5 Cal. App. 380, 90 Pac. 470. A contempt proceeding is not a civil action, either at law or in equity (*Gale v. Tuolumne Water Co.*, 169 Cal. 46, 145 Pac. 532; *Ex parte Gould*, supra), though it may be ancillary thereto (*Mitchell v. Superior Court*, 163 Cal. 423, 125 Pac. 1061), but is a separate proceeding of a criminal nature and summary character (*McClatchy v. Superior Court*, supra; *In re McCarty*, 154 Cal. 534, 98 Pac. 540; *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580; *Selowsky v. Superior Court*, 180 Cal. 404, 181 Pac. 652), in which the court exercises but a limited jurisdiction (*In re McCarty*, supra; *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853; *Reymert v. Smith*, supra), and in which the people of the state prosecute the action (*Ex parte Gould*, supra).

[3, 4] In a prosecution for constructive contempt the affidavits on which the citation is issued constitute the complaint. *Hutton v. Superior Court*, 147 Cal. 156, 81 Pac. 409; *Frowley v. Superior Court*, 158 Cal. 220, 110 Pac. 817; *Selowsky v. Superior Court*, supra. The affidavits of the defendant constitute the answer or plea (*Mitchell v. Superior Court*, supra), and the issues of fact are framed by the respective affidavits serving as pleadings (*In re Buckley*, 69 Cal. 1, 10 Pac. 69; *Mitchell v. Superior Court*, supra). A hearing must be had upon these issues (*McClatchy v. Superior Court*, supra; *In re Buckley*, supra; *Code Civ. Proc. § 1217*), at which competent evidence must be produced (*In re Buckley*, supra; *Goodall v. Superior Court*, 37 Cal. App. 723, 174 Pac. 924; *Code Civ. Proc. §§ 1218, 1220*). The proceeding is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient (*In re Buckley*, supra); the defendant cannot be compelled to be sworn as a witness (*Ex parte Gould*, supra), and he cannot be convicted upon the uncorroborated testimony of an accomplice (*In re Buckley*, supra).

The decision of this court in *Ex parte Selowsky* (Cal.) 208 Pac. 99, does not conflict with the foregoing rules. What was there decided was that the failure of the clerk to file the affidavit which constituted the complaint at the time it was presented to the court was a misprision of a ministerial officer, amounting merely to an irregularity; that the rights of the defendant were fully protected by the service upon him of a copy of the affidavit with the order to show cause, and that he could not have been prejudiced thereby. What was there said to the effect that a prosecution for contempt is a proceeding of a civil nature was wholly unnecessary to the decision, and therefore obiter, because whether it be of a civil or criminal nature, the procedural steps therein are undoubtedly those prescribed by sections 1209-1222, *Code of Civil Procedure*.

[5, 6] While the writ of certiorari is not a writ of error, it nevertheless extends to the whole of the record of the court below, and even to the evidence itself where necessary to determine jurisdiction. *Schwarz v. Superior Court*, supra; *McClatchy v. Superior Court*, supra; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35. In reviewing this proceeding, the charge, the evidence, the findings and the judgment are all to be strictly construed in favor of the accused (*Schwarz v. Superior Court*, supra), and no intendments or presumptions can be indulged in aid of their sufficiency (*Frowley v. Superior Court*, supra). If the record of the proceedings, reviewed in the light of the foregoing rules, fails to show affirmatively upon its face the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled. *Frowley v. Superior Court*, *In re McCarty*, and other cases above cited.

[7] The record here shows that many, if not most, of the material facts alleged in the affidavits which constituted the complaint are directly controverted by denials in the affidavits filed in behalf of the defendants. It not only fails to disclose any competent evidence in support of the allegations thus traversed, but it shows that no evidence whatever was received.

"Where * * * the power to make the order depends upon the existence of facts as to which, as here, there is no evidence whatever, the question presented is one of law and subject to review by direct attack on writ of certiorari," and such an order should be annulled. *Goodall v. Superior Court*, supra.

It is true that the defendants' affidavit were not filed on the return day of the citation. But the respondents' return herein shows that they were filed shortly thereafter, pursuant "to an order duly given and made," by which they "were ordered filed as of the 21st day of March, 1922 (the return day), and prior to the submission for decision upon the merits of the application on said date argued and submitted to the respondents herein;" therefore they must be here considered as having been on file at that time.

[8] But we think that, if all the facts alleged in the affidavits constituting the complaint had been proved by competent and conclusive evidence, this order should still be annulled because those facts do not amount to a contempt of court, and because the order goes beyond the terms of the original judgment of which it is claimed to be in execution.

The order here under review directed the petitioners herein to transfer upon the corporate books the shares of stock in question, and to issue new certificates therefor—not in the name of Mrs. Hotaling, the judgment plaintiff, but in the name of the Union Trust Company, trustee, a stranger to the action. It further adjudged the petitioners in contempt of court, and directed that, in the event of their failure to comply with its requirements within seven days thereafter, they should stand committed to the county jail until such compliance. This order is claimed to be, and recites that it is, "made in execution of the final decree," above referred to.

The court found that the petitioners "have willfully and persistently refused to comply with the directions of said final decree in not causing the transfer of the stock to be made to said Union Trust Company of San Francisco, as required by said final decree." (Italics ours.) Concededly, no such requirement, nor anything remotely approaching it, in express terms, is to be found in said decree. The decree contains six different injunctions, four of them prohibitory and two of them mandatory in character, but it is not claimed that any of these injunctive provisions has been violated in any respect. The provision solely relied upon by respondents

is an adjudication "that the plaintiff, Lavinia J. Hotaling, be, and she is hereby, declared to be the owner of and entitled to the immediate possession of 2499 shares * * * free and clear of all claims on the part of the said Richard J. Hotaling." This provision is purely declaratory. A somewhat analogous and even stronger situation is found in *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333. In that case a decree had been entered expressly enjoining Dewey, the defendant therein, "from maintaining a certain dam or other obstructions in Mariposa creek, and from maintaining a certain ditch or canal of defendant in any condition that would interfere with the rights of plaintiff" as decreed in the judgment. Thereafter contempt proceedings were instituted against Dewey for the violation of this injunction in failing to remove the dam or to fill up the mouth of the ditch, and an order was made substantially analogous to the one here under review. Reviewing that order, this court said:

"But notwithstanding the omission of all words of a mandatory character in the original injunction, we find the court, in this proceeding for contempt, and upon the faith of the finding above quoted, 'ordered, adjudged, and decreed that he, the said Henry Dewey, be committed to the custody of the sheriff of Merced county, and that said sheriff confine him in the county jail of this county until all dams and obstructions placed in said Mariposa creek by said Dewey, or through his procurement, which will obstruct the flow of the water therein, be dug out and removed therefrom, and until the ditch leading from said creek be filled up substantially so that the waters of said creek cannot be diverted thereby.' This order we think was clearly in excess of the jurisdiction of the court. It is an order which can only be made upon and in consequence of a conviction for contempt, which 'consists in the omission to perform an act which is yet in the power of the person to perform,' and which *has been required by the terms of the original order* which the party is charged with having violated. Code Civ. Proc. § 1219. The original order or injunction did not require him to perform the act which is by this order enjoined upon him, and for the nonperformance of which it is now ordered that he be imprisoned." (Italics ours.)

[9] If, in the Dewey Case, a command to remove the dam could not be implied from a decree enjoining the further maintenance thereof, certainly in the instant case a command to transfer the stock on the books to the Union Trust Company is not to be implied from a purely declaratory adjudication that Mrs. Hotaling is the owner and entitled to the possession thereof. That case, which has never been overruled, stands as express authority for the rule that, to constitute a constructive contempt of the sort here claimed, there must have been an "omission to perform an act which has been required by the terms of the original order." The terms of the order here relied upon do not expressly

require the performance of any act. They merely declare the fact of the ownership of the stock. There is a complete "omission of all words of a mandatory character." There is not even, as there was in the cited case, a prohibitory injunction which might be said to have a mandatory aspect. Assuming that a contempt can be predicated upon the non-performance of a requirement which is implied but not expressed by the terms of the original order, the most that can be fairly implied herein is that the defendants were required to transfer the stock upon the corporate books into the name of Mrs. Hotaling, so that she could have complete possession thereof. But they are not in default in this respect, because they have never been given an opportunity so to do. They aver that they have always been ready and willing to make this transfer, and there is no evidence to the contrary. If she had demanded the transfer into her own name and that demand had been complied with, then we think the decree would have been fully executed. Suppose, then, that five years later she had demanded another transfer from her own name to the name of the Union Trust Company, and her demand had been refused. Or suppose that five years later she had charged the defendants with misapplying corporate funds, or paying a dividend not earned. Would it be contended that under such circumstances the defendants could be imprisoned for contempt of court, on the theory that their acts were in violation of her rights of ownership as declared by the original decree? The suggested situations are identical, in legal effect, with the one now before the court.

[10, 11] Conceding that Mrs. Hotaling is entitled as of right to have the stock transferred on the books to the trust company, that right is predicated, not upon the judgment, but upon the fact of her ownership, together with the provisions of section 324 of the Civil Code. A refusal to make the transfer may be in violation of her rights of ownership and in violation of the law as there expressed. But a violation of law does not per se constitute contempt of court. Neither does a violation of rights of ownership, even though they have been ascertained and declared by a judgment, unless it consists in doing something which was prohibited, or in failing to do something which was required, by the terms of the judgment.

The same considerations apply with equal force to the Union Trust Company, whether it be regarded as transferee of the shares of stock or as assignee of an interest in the judgment. Conceding that an assignee of a judgment, or of an interest therein, succeeds to all the rights, or to the rights pro tanto, of the judgment creditor, certainly he acquires no greater rights therein or thereunder than were possessed by his assignor. Assuming the validity of the transfer from Mrs. Hotaling to the trust company (which peti-

tioners do not concede), and conceding that the trust company is therefore an assignee pro tanto of the judgment, the fact still remains that the order here under review commands the petitioners to do that which is not required of them by the terms of the original judgment.

The order is annulled.

We concur: WILBUR, C. J.; WASTE, J.; LAWLOR, J.; KERRIGAN, J.; SEAWELL, J.; RICHARDS, Justice pro tem.

62 Cal. App. 443

BISPO v. SURABIAN et al. (Civ. 4553.)

(District Court of Appeal, First District, Division 2, California. June 7, 1923. Hearing Denied by Supreme Court Aug. 6, 1923.)

1. Appeal and error $\Rightarrow$ 1010(1) — Evidence raising mere inference to support finding of malice held sufficient on appeal.

In an action for assault and battery, where the appellate court cannot say there was no evidence to draw an inference of malice in support of the finding, no relief can be granted.

2. Appeal and error $\Rightarrow$ 1004(1)—Showing held insufficient to set aside or reduce judgment.

In an action for assault and battery where the evidence clearly shows that a very minor injury was suffered, in the absence of any showing as to what part of the damages is exemplary and what part actual, the award cannot be disturbed unless it resulted from passion and prejudice.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Tony Bispo against Jack Surabian and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. D. Crichton and K. Ohanian, both of Fresno, for appellants.

Lindsay & Conley, of Fresno, for respondent.

NOURSE, J. This is an appeal from a judgment in favor of the plaintiff for assault and battery. The defendants Sumpat Surabian and Jack Surabian, brothers, were living upon an 80-acre tract of land belonging to them, part of which was planted in melons. About 10 o'clock of the evening of August 27, 1921, they were disturbed by the barking of their dogs on the premises, and one of the defendants, Sumpat Surabian, took his automobile and drove to the county road, where he saw a car parked by his ranch. He then returned to the house and told his brother, Jack Surabian, and his cousin, K. Surabian, what he had discovered, and all three returned to the place, where they discovered a Mexican named Cardenas in their melon

patch. Cardenas informed them that he had a partner with him. While they were questioning him, the plaintiff came up and jumped into his car, the one parked along the highway, and endeavored to drive off. He was unable to do so, because one of the defendants had removed the key to the machine. The defendants then questioned the plaintiff as to what he was doing upon their property, but he refused to answer, and after a heated controversy between the parties the defendant K. Surabian struck the plaintiff over the head with a stick. For the injuries resulting the trial court, sitting without a jury, awarded the plaintiff a judgment in the sum of \$1,500, rejecting defendants' request that the findings designate the amount thereof as actual damages and the amount allowed for exemplary damages.

The appeal is taken under the provisions of section 953a of the Code of Civil Procedure and is based upon four grounds: The insufficiency of the evidence to justify the findings; that the decision is against law; that the judgment allowed is excessive; and errors in law occurring at the trial. Reliance, however, is placed upon the claim of the insufficiency of the evidence and excessive damages.

[1] The argument in support of the first point is that there is no evidence of any nature to support the finding that the attack upon the respondent was malicious. There is much reason in the position taken by the appellants in this regard, but it cannot be said that there is not some evidence from which the trial court could draw the inference of malice in support of this finding. Under repeated rulings of the Supreme Court, this is sufficient to prevent this court from granting the appellants any relief.

[2] On this question of damages, this too, was a matter which the trial court was called upon to determine. The evidence plainly shows that the respondent suffered a very minor injury, so far as actual damages were concerned; but we are unable to say how much of the judgment covers actual damages, and how much covers exemplary damages. It is only in cases where the judgment appears to be the result of passion or prejudice that the appellate court may reduce or set aside the award of damages by the trial court. Though the record discloses a high state of feeling on the part of respondent's counsel against the appellants, and an endeavor in their brief filed in this court to create a state of prejudice against the appellants on account of their race, we cannot say that this was reflected in the trial court, when it fixed the amount of damages to be awarded.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

62 Cal. App. 521

PEOPLE v. COHEN. (Cr. 974.)

(District Court of Appeal, Second District, Division 1, California. June 15, 1923.)

1. Infants ⇐20—Information charging acts tending to cause female infant to lead immoral life need not allege that she is not defendant's wife.

An information charging violation of Juvenile Court Law 1915, § 21 (as amended by St. 1921, p. 773), by acts tending to cause a female under 21 to lead an idle, dissolute, and immoral life, need not allege that such female is not defendant's wife.

2. Infants ⇐20—Female under 21 held sufficiently described as in danger of leading immoral life in information charging acts tending to cause her to so do.

An information charging violation of Juvenile Court Law 1915, § 21, which alleged that complaining witness was a female under 21, "to wit, of the age of 16 years, * * * and was then and there in danger of leading an idle, dissolute, lewd, and immoral life by reason of the acts hereinafter alleged," held not defective as failing to set forth facts showing her within section 1, subdivision 11 of which enumerates, as one class to whom the law applies, any one under 21 "who is leading or * * * in danger of leading" such a life.

3. Infants ⇐20—Unnecessary, in prosecution for improper conduct toward female infant, that she be dependent or delinquent child.

In a prosecution for violating Juvenile Court Law 1915, § 21, by acts tending to cause a female under 21 to lead an idle, dissolute, and immoral life, it is not necessary to allege or prove that complaining witness was a dependent or delinquent person within Juvenile Court Law 1909, § 26, or the law of 1911; it being necessary to show only that she is under 21.

4. Infants ⇐20—Acts tending to cause infant female to lead immoral life violates statute, irrespective of success of defendant's efforts.

One committing acts causing, or manifestly tending to cause, a female under 21 to come within the provisions of Juvenile Court Law 1915, § 1, subds. 1-13, violates section 21, penalizing the commission of acts tending to cause such a person to lead an idle, dissolute, or immoral life, irrespective of the success of his efforts or their effect on her.

5. Infants ⇐20—Evidence held to warrant conviction for tending to cause infant to become in danger of leading immoral life.

That one charged with violating Juvenile Court Law 1915, § 21, by acts tending to cause a female under 21 to lead an idle, dissolute, and immoral life, was assuming to act as a spiritualistic medium and was called on and consulted by complaining witness in such capacity, did not render her testimony as to his acts during the reading insufficient to warrant a conviction.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Harry Y. Cohen was convicted of acts tending to cause a female under 21 to lead an idle, dissolute or immoral life, and he appeals. Affirmed.

Lucas F. Smith, of Santa Cruz, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CURTIS, J. The defendant was convicted of a violation of section 21 (as amended, Stats. 1921, p. 773), of the Juvenile Court Law, approved June 15, 1915 (St. 1915, p. 1246). He appeals from the judgment and order denying his motion for a new trial, mainly upon two grounds: First, that the information does not state any public offense; secondly, that the evidence is insufficient to justify the verdict. The information, omitting the formal parts, is as follows:

"The said Harry Y. Cohen is accused by the district attorney of and for the county of Los Angeles, state of California, by this information, of the crime of a misdemeanor; that the said Harry Y. Cohen, on or about the 11th day of September, 1922, and prior to the filing of this information, at and in the county of Los Angeles, state of California, did willfully and unlawfully commit acts and omit duties hereinafter more particularly set forth, to wit: That at the said time and place one Lillian Alleen Hildreth was then and there in the county of Los Angeles, and was then and there a female person under the age of 21 years, to wit, of the age of 16 years, and was then and there easily coaxed, influenced, and controlled by artful and designing persons, and was then and there in danger of leading an idle, dissolute, and immoral life by reason of the acts hereinafter alleged, and by reason of the personal depravity of the said defendant, Harry Y. Cohen; that at all the times herein mentioned the said Harry Y. Cohen was and is an artful and designing person, and did then and there endeavor and attempt to influence, cause, allow, and to persuade and cause the said Lillian Alleen Hildreth to come within the influence, persuasion, and control of the said defendant, Harry Y. Cohen, and the said defendant, Harry Y. Cohen, at the times and places last aforesaid, did then and there willfully and unlawfully, on or about the 11th day of September, 1922, feel, fondle, and handle the limbs and private parts of the said Lillian Alleen Hildreth, with the intent and purpose of arousing and gratifying the passions of the said defendant, Harry Y. Cohen, and of the said Lillian Alleen Hildreth, a minor child under the age of 21 years, to wit, of the age of 16 years."

[1] The first objection to the information is that it fails to state that the complaining witness is not the wife of the defendant. This allegation is not made necessary by the statute, and the attention of the court has

not been called to any authority, nor has any good reason been advanced, why such a statement is a necessary part of a charge of this nature. We are not able to agree with the appellant that the information is defective in this respect. No doubt, in certain proceedings under this statute, depending largely upon the nature of the charge, proof of the fact that the complaining witness is the wife of the defendant would be a complete defense in the action, but no such evidence was offered in this case. On the contrary, the testimony clearly shows that such was not the fact.

[2] It is next contended that the information is fatally defective, in that it fails to set forth facts showing that the complaining witness, Lillian Alleen Hildreth, came within the provisions of section 1 of the Juvenile Law. Subdivision 11 of said section 1 enumerates, as one class of persons to whom said law applies, any person under the age of 21 years "who is leading, or for any cause is in danger of leading, an idle, dissolute, lewd, or immoral life." The information alleges:

"That at the said time and place one Lillian Alleen Hildreth was then and there * * * a female person under the age of 21 years, to wit, of the age of 16 years, * * * and was then and there in danger of leading an idle, dissolute, and immoral life by reason of the acts hereinafter alleged."

We can hardly see how an allegation could be any more explicit than this, nor how it could more definitely describe the person and condition mentioned in the statute than does this allegation of the information.

[3] It is contended, however, that the information fails to state that Mrs. Hildreth was a delinquent person within the purview of the Juvenile Court Law. The words "delinquent" or "delinquent person" are not found in sections 1 or 21 of the Juvenile Court Law of 1915. In the Juvenile Court Law of 1909 certain persons were designated as "delinquent children," and in the law of 1911 the words "delinquent persons" are used to designate a certain class of persons. And in the cases of *People v. Pierro*, 17 Cal. App. 741, 121 Pac. 689, and *People v. Cruse*, 24 Cal. App. 497, 141 Pac. 936, cited by appellant, but each decided before the passage of the law of 1915, reference is made to "delinquent and dependent persons," but neither of these statutes nor of these decisions can have any bearing upon the law as it now stands and has stood since 1915. The information meets all of the requirements of the statute in force at the time the offense was alleged to have been committed.

Appellant contends that there is no evidence to justify the verdict, in that it fails to show that the complaining witness is, or was at the time of the alleged crime, a person within any of the subdivisions 1 to 13 of section 1 of the Juvenile Court Law, and, furthermore, that the acts of the defendant were not such as "would cause, or manifestly tend

to cause," the complaining witness to become or remain a person within any of said subdivisions 1 to 13.

Regarding the objection that there is no evidence that the complaining witness is such a person as is enumerated in any of the subdivisions 1 to 13 of said section 1, we are of the opinion that no such evidence is necessary as the law now stands. Under former enactments of the Juvenile Court Law, as, for instance, under the law of 1909 (St. 1909, p. 225), section 26 thereof, which corresponds to section 21 of the law of 1915, provided, in substance, that any person who should, by act or omission, contribute to the dependency or delinquency of any dependent or delinquent children, was guilty of a misdemeanor. Section 21 of the present law provides, in substance, that any person who shall commit any act, or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 21 years to come within the provisions of subdivisions 1 to 13 of said section 1, is guilty of a misdemeanor. Under the former acts it was necessary to allege and prove that the complaining witness was either a dependent or a delinquent person before the defendant could be found guilty of improper conduct toward such person, but under the present law it is only necessary to show that the complaining witness is under the age of 21 years. The former act was designed to protect only delinquent and dependent children. The purpose of the present law is manifestly to protect all persons under the age of 21 years. The evidence showed, without any conflict, that the complaining witness was only 16 years of age at the time the offense was alleged to have been committed, and in our opinion this is all that is required under the present statute.

[4] The further objection is made that the evidence fails to show that the acts of the defendant were such as would cause, or manifestly tend to cause, the complaining witness to become or remain a person within any of subdivisions 1 to 13 of said section 1. The complaining witness testified to facts which, beyond question, tended to prove the following allegation of the information:

"That at all the times herein mentioned the said Harry Y. Cohen was and is an artful and designing person, and did then and there endeavor and attempt to influence, cause, allow, and to persuade and cause the said Lillian Alleen Hildreth to come within the influence, persuasion, and control of the said defendant, Harry Y. Cohen, at the times and places last aforesaid, did then and there willfully and unlawfully, on or about the 11th day of September, 1922, feel, fondle, and handle the limbs and private parts of the said Lillian Alleen Hildreth with the intent and purpose of arousing and gratifying the passions of the said defendant, Harry Y. Cohen, and of the said Lillian Alleen Hildreth, a minor child under the age of 21 years, to wit, of the age of 16 years."

Appellant does not contend that such testimony was not given by the complaining witness, but he contends that the testimony further shows that the complaining witness was a strong-minded person and was very determined and decided in her stand against the advances of the defendant, and refused to yield in the least to his solicitations, and therefore that the acts of the defendant did not "cause or manifestly tend to cause" her to lead, or be in danger of leading, an idle, dissolute, or immoral life. Conceding that the testimony established all that the appellant claims for it, still we would seriously question whether the defendant is exculpated thereby. To so hold would be to make the guilt of the defendant depend, not upon his own acts or conduct, no matter how censurable, but upon the character of the minor and her ability to resist his importunities. In the one case, if she accepted his proposal, then he would be amenable to the penal provisions of the statute, but in another case, if she rejected his advances and maintained her uprightness, then he has committed no crime, although his conduct in each case might be identical. We do not believe that the law can be so construed. On the other hand, we are of the opinion that the law, in providing that a person shall be deemed guilty of violating the statute when he commits any act which causes, or manifestly tends to cause, a person under the age of 21 years to come within the provisions of section 1 thereof, means that his guilt attaches whenever he commits such an act, independent of the success of his efforts or its effect upon the minor.

The purpose of the juvenile law as now framed, as we have already seen, is to protect the youth of our state from those evil and designing persons who would lead them astray, and we are not disposed to in any way impair its usefulness by giving any narrow or strained construction to any of its plain and obvious provisions.

In the case of *People v. De Leon*, 35 Cal. App. 467, 170 Pac. 173, while the identical question was not before the court, yet one very similar to that presented in the present case was under consideration, and the court used the following language:

"To require the prosecution to allege and prove that the defendant's breach of duty had resulted in the minor's actual entry upon an idle, dissolute, or immoral life would be to practically nullify the beneficial objects of the law. We find no merit, therefore, in the contention of the appellant that the information fails to state a public offense."

We are unable to agree with appellant in this contention and feel satisfied that the evidence is sufficient to justify the verdict.

[5] The further contention is made by appellant that the testimony of the complaining witness shows that the defendant did nothing to her other than during the ceremony of

a spiritualistic reading. The evidence tends to show that the defendant was assuming to act as a medium, and in this capacity he was called upon and consulted by the complaining witness; but it is clear to us that this assumption upon his part was a mere pretext in order that he might the more easily gain control over the complaining witness. The point is entitled to no further consideration by this court.

The judgment and order denying a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

62 Cal. App. 302

FREEMAN v. WALLACE et al. (Civ. 4550.)

(District Court of Appeal, First District, Division 2, California. May 28, 1923. Hearing Denied by Supreme Court July 26, 1923.)

1. Cancellation of instruments ⚡38—Counterclaim held to state cause of action of rescission.

A counterclaim alleging that defendants gave plaintiff \$3,000 and certain notes for an assignment of a lease, certain personalty and fixtures on the premises, and the agency to handle plaintiff's wares, all of which was part of the same transaction and depended on securing landlord's consent to an assignment of the lease, and on plaintiff's failure to secure such consent defendant surrendered to plaintiff possession of the premises and every other thing or right accruing to them, *held* to state a cause of action for rescission.

2. Pleading ⚡126—Negative pregnant raises no issue.

An answer which is merely a negative pregnant does not raise an issue.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Emma B. Freeman against George J. Wallace and others. From the judgment rendered, plaintiff appeals. Affirmed.

Knight, Boland, Hutchinson & Christin, of San Francisco, for appellant.

William J. Hayes, of Oakland, for respondents.

NOURSE, J. Plaintiff sued in two causes of action, one for the recovery of four months' rent for the premises situated at 386 Sutter street, San Francisco, the other for the recovery of \$110 as moneys advanced by plaintiff for the account of defendants. The defendants answered that one month's rent had been paid and that they had been forced to vacate the premises because the plaintiff had no authority to assign to them the lease

under which they occupied the premises. They also filed a cross-complaint in which it was alleged that a contract of agency was executed by the same parties under which the defendants were authorized to sell on the premises certain personal property of the plaintiff during the term of the lease; that the defendants paid to the plaintiff \$3,000 in cash under the contract and delivered to her their promissory notes in the sum of \$2,000; that, because of plaintiff's failure to secure the landlord's consent to the assignment of her lease to said premises, the defendants were compelled to and did vacate and abandon said premises and surrender the possession thereof to the plaintiff, "together with all that was therein contained belonging to said Emma B. Freeman, as well as surrendering to the said Emma B. Freeman every other thing or right accruing to them from the said Emma B. Freeman, and at the same time delivered to said Emma B. Freeman the keys to said premises, and the said Emma B. Freeman then and there accepted the surrender, aforesaid, and thereupon went into the full possession of said premises, and the use and occupation thereof, and resumed therein the conduct of the business that she had theretofore carried on therein prior to the occupation of said premises by said cross-plaintiffs."

The trial court found in accordance with the allegations of the complaint, except that it found three months' rent to be due instead of four, as alleged. It also found the material allegations of the cross-complaint to be true. Upon these findings judgment was rendered in favor of the defendants for the return of the sum of \$3,000, less the amount of the rentals and the money advanced to the defendants, and for the cancellation of the promissory notes. The appeal is taken from the judgment upon a bill of exceptions.

[1] The only grounds urged in support of the appeal are that the cross-complaint failed to state a cause of action because it did not allege an offer to restore the consideration to the appellant, and that the evidence is insufficient to support the finding that the respondents surrendered to the appellant "every other thing and right accruing to them."

It appears that three contracts were executed by these parties, the assignment of the lease of the premises, the sale of the agency for the handling of appellant's exclusive line of wares, and the agreement of appellant to consign to respondents these wares and of the respondents to purchase certain personal property and fixtures on the premises. It is alleged in the cross-complaint that these agreements were all a part of the same transaction and depended upon securing the landlord's consent to the

assignment of the lease. It is further alleged that when the respondents surrendered to the appellant the possession of the premises they also surrendered "every other thing or right accruing to them." The failure of consideration, as well as the acceptance of the surrender, were also alleged, and these were sufficient to support a cause of action for a rescission.

[2] The evidence fully supports the finding that respondents surrendered to appellant every thing and right accruing to them. Furthermore, the answer to this allegation is merely a negative pregnant which did not put the matter in issue.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

62 Cal. App. 385

PEOPLE v. WALLACH. (Cr. 1099, 2591.)

(District Court of Appeal, First District, Division 2, California. June 5, 1923. Rehearing Denied July 3, 1923. Hearing Denied by Supreme Court Aug. 3, 1923.)

1. Parent and child $\S$ 17(6)—Proof of failure to support during entire period subsequent to desertion is competent.

The offense of wilful failure to support a minor child, under Pen. Code, $\S$ 270, is a continuing one, so that it was not error to admit evidence of nonsupport and of ability to support extending over the entire period between the date alleged in the indictment, on which date defendant left his family, and the date of the trial.

2. Parent and child $\S$ 17(2)—Inability to support child because of illness is "legal excuse."

The inability of a father to support his minor child during a period when he was out of work and ill is a "legal excuse" for his failure to furnish such support, within Pen. Code, $\S$ 270.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Lawful Excuse.]

3. Depositions $\S$ 11—Refusal to order depositions to show attempt to communicate with family held error.

In a prosecution for failure to support a minor child, where the evidence showed that defendant had left home, with his wife's consent, to seek employment, and that the wife had frequently moved the family from place to place without notifying defendant, though she had his address, and defendant testified he made frequent efforts to communicate with his family, it was error to refuse to order the taking of a deposition of defendant's attorney, to whom defendant had delivered the letters he had written to his family and which had been returned by the postal authorities for failure to locate the addressee.

On Rehearing.

4. Criminal law ⚡554—Doubt as to truth of uncontradicted testimony of defendant does not raise conflict in evidence.

The doubt in the minds of a jury as to the truth of defendant's uncontradicted testimony cannot furnish a conflict in that testimony, since the province of the jury is to decide a case in accordance with the evidence.

5. Parent and child ⚡17(2)—Law does not exact diligence of most devoted father in endeavoring to locate family.

The law does not require a father to exercise the diligence which would be exercised by the most devoted father in his efforts to locate his family so as to discharge his duty to support them, in order to escape conviction for willful failure to support, under Pen. Code, § 270, but only requires reasonable diligence on his part, and the wife is under some obligation to keep her husband informed as to the whereabouts of the family.

6. Parent and child ⚡17(2)—Father not obliged to repay sums advanced for support during his absence to avoid prosecution.

Though a father who was absent from his family and unable to communicate with them for a period of years is under a legal and moral obligation to repay sums advanced by others for the support of the family during that period, he is not obliged to make such repayment to escape prosecution for willful failure to support.

7. Depositions ⚡9—Court cannot arbitrarily deny application for deposition.

Though the authority given by Pen. Code, § 1354, to authorize the taking of depositions is discretionary and requires the court to be satisfied of the truth of the facts stated, the court is not vested with an arbitrary discretion and cannot deny the right to take depositions, where defendant's affidavit contained all that the statute requires and was uncontradicted.

8. Depositions ⚡11—Depositions to show contents of letters held not merely cumulative of defendant's testimony.

Letters written by defendant to his wife at the last address known to him and returned by the postal authorities, with notations thereon that the addressee could not be found, are not merely cumulative of his testimony to the effect that he had written such letters, which might not be believed by the jury, and therefore defendant's right to take the deposition of the attorney to whom he had delivered the letters, and thereby compel their production, is not defeated by the fact that after he was denied the right to take the deposition he testified to writing the letters.

Opinion of the Supreme Court Denying Hearing.

9. Parent and child ⚡17(2)—Inability to communicate with family shows failure to support was not willful.

In a prosecution for failure to support a minor child, the defense that defendant, though financially able to furnish the support, was un-

able to locate his family by the exercise of reasonable diligence, is, in effect, a defense that the failure was not willful, within Pen. Code, § 270, so that it was contrary to the presumption created by section 270e that proof of omission to furnish support is prima facie evidence that it was willful.

10. Parent and child ⚡17(2)—“Without lawful excuse” in nonsupport statute refers to omissions other than those not willful.

In Pen. Code, § 270, making willful failure to furnish support to a minor child without lawful excuse an offense, the phrase “without lawful excuse” was intended to cover other cases than omissions to provide support which were not willful.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Without Lawful Excuse.]

Appeal from Superior Court, City and County of San Francisco; Warren V. Tryon, Judge.

Louis Wallach was convicted of willful failure to support his minor child, and he appeals. Reversed.

A. D. Duncan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

LANGDON, P. J. The defendant appeals from a judgment of conviction of a felony, to wit, willful failure, without lawful excuse, to provide for the support of a minor child. Section 270, Pen. Code. The indictment charges the offense as having been committed on the 27th day of June, 1914, at which date the minor was of the age of five years, and that defendant has absented himself from the state since said date.

The testimony was to the effect that at the time alleged in the indictment the defendant was working in San Francisco and receiving a salary of \$18 a week and supporting his wife and children. In July, 1914, the defendant lost his position because of the destruction by fire of the place of business of the company by which he was employed. It was difficult for him to secure work in San Francisco, and he sold some of his clothing and went to Los Angeles on a freight boat. This was with the consent of his wife. For a time his family secured their food upon credit at the grocery store. Defendant testified that he sent small amounts of money to his family during the short time he remained in Los Angeles, although he was able at the time to secure work for only a few days a week. There is, however, conflict in the testimony as to the receipt of this money, but there is no testimony other than that of the defendant as to his ability to support his family during

this period, and his testimony narrated facts which would establish his inability to do so. About November, 1914, defendant lost his position in Los Angeles, because of a fire at his place of employment, and he returned to San Francisco to his family. At that time the family was supported by credit at the grocery store and a small amount of money which defendant had brought with him from Los Angeles and which he stated had been borrowed. Also, at that time, Mrs. Wallach accepted aid from the Eureka Benevolent Society, an organization for the relief of needy persons of the Jewish race. Defendant was again unable to obtain employment in San Francisco, because, as he stated, it was a "dull time of year" in his business of egg candler. Accordingly, after several weeks, he borrowed some money and returned to Los Angeles, and, upon being unable to find employment there, borrowed more money and went to Chicago. There he secured irregular employment for two or three days a week, and the first \$10 he could accumulate, over and above his actual living expenses, he sent to his family. The wife and daughter admit receiving this, which was sent about three weeks after defendant left Los Angeles. The defendant testified that he had sent a second remittance of \$10 to his family, but this is denied by the wife. However, she did acknowledge receipt of the first remittance, and shortly thereafter, in reply to a suggestion by the defendant that he would like to return to San Francisco as he had become very ill, she wrote to him that there was nothing to do in San Francisco and suggested that, as she was being provided for, defendant remain and do the best he could in Chicago. This letter was addressed to the defendant in care of the Egg Inspectors' Union of Chicago. Mrs. Wallach never made any attempt to communicate with her husband after that letter was written, and he testified that mail would always have reached him if intrusted to the office of his union at Chicago, an address which his wife knew and to which she had previously written.

On the other hand, Mrs. Wallach moved very frequently about this time. According to her own testimony, she was living on Webster street and O'Farrell in June, 1914, and moved from there after four months and took up her residence on Golden Gate avenue, from where she moved to a house on Octavia street, where she lived three months, after which time she moved to Webster street, where she remained four months, and then moved again to Webster and Pine. She remained there about two years and then moved to Bush and Fillmore. The last letter she received from her husband was delivered to her at the Golden Gate avenue address. Defendant testified that he wrote at frequent intervals to the Golden Gate ave-

nue address, the only address that he knew, and that the letters were returned to him by the postal authorities with the notation that the house was vacant or that the addressee could not be found. Defendant testified that some of these letters contained money.

The defendant worked intermittently in Chicago for three or four years, during which time he testified he was seriously ill for a part of the time and ailing most of the time, and that he incurred hospital and doctor's bills which consumed all his earnings. He testified that in August, 1916, he journeyed to Detroit, Mich., to ask his niece to write to his wife at the last address he knew, thinking that perhaps the wife would reply to the niece even though she were unwilling to write to him. The envelope addressed to the wife at 857 Golden Gate avenue, written by the niece and mailed at Detroit, Mich., August 28, 1915, was admitted in evidence. It had been returned to the sender by the postal authorities marked "Unclaimed," etc. Defendant testified that many of the other letters written to his wife which had been returned to him were handed by him before his arrest to an attorney in New York City, and he asked permission to take the deposition of said attorney to prove the contents of these letters and the notations of the postal authorities upon their envelopes. This permission was denied, and its refusal is assigned by the appellant as prejudicial error and will be discussed hereinafter.

Defendant testified that in 1917 he was employed by a Chicago firm as a buyer at Dallas, Tex.; that while in Texas he again wrote to his family, addressing one letter to the old address at Golden Gate avenue and another to the United Hebrew Society, 436 O'Farrell street. In 1918 the defendant left Chicago and obtained a position with a firm in Newark, N. J. He now ceased his efforts to locate his family. He testified that about this time, while he was earning \$50 a week, he was ill much of the time and did not work steadily and spent a large amount of money for doctor bills, etc. Later he went to New York City and engaged in numerous enterprises, with varying success, until finally, in September or October, 1921, we find him with a "dairy store" in New York City, retailing eggs, butter, fresh roasted coffee, etc., and making a profit of from \$150 to \$200 a week. Shortly after establishing this business (in October, 1921), defendant retained an attorney, one Fallick, and asked him to locate his family in San Francisco. It was through a communication sent by this attorney to the police department of San Francisco, which was referred by said department to the Eureka Benevolent Society, the benefactor of the family, that knowledge of the whereabouts of defendant was obtained. The Eureka Benevolent Society, through its agents in New York, made an investiga-

tion and caused the arrest and return of defendant to San Francisco under indictment.

At the time of his arrest defendant offered to send \$1,000 for the transportation of his family to New York and to support them there, or to pay them a substantial amount weekly for their support in San Francisco if they desired to remain here. The Eureka Benevolent Society, which conducted the negotiations, telegraphed to its agent in New York City that defendant's family declined to go to New York and declined the offer of future support unless the defendant would either pay in cash or provide a bond to secure the future repayment of over \$3,000 expended by the Eureka Benevolent Society and the city and county of San Francisco for the relief of his family during the period of defendant's absence. This the defendant was unable to do, and his prosecution followed.

[1] The defendant insisted at the trial that the prosecution be limited in its proof to some specific time within which to prove the commission of the offense, but the trial court ruled that proof of nonsupport and of defendant's ability to provide for his family might range over the entire period between the date mentioned in the indictment, to wit, June, 1914, and the date of the arrest, November, 1921. This ruling is assigned as error under the authority of *People v. Williams*, 133 Cal. 168, 65 Pac. 323. In that case the defendant was tried for rape, and it was held to be error to admit evidence of many separate offenses, extending over a considerable period of time. There can be no doubt about the correctness of this ruling, but that case is clearly differentiable from the present one. A prosecution under section 270 of the Penal Code is, necessarily, for a continuing offense. Failure to provide upon one day or another day is not the evil aimed at by the statute. It is the continuing offense, the failure to provide for a substantial length of time, without legal excuse, which constitutes this offense. The instructions and ruling of the trial court that this was a continuing offense were correct. *People v. Stanley*, 33 Cal. App. 624, 626, 166 Pac. 596.

However, it seems to us that the evidence herein narrated as to the earnings and conduct of the defendant during the period in question offered a lawful excuse within the meaning of the statute. It might well be said that a devoted husband and father would have made more persistent efforts to locate his family, and failing in that would have returned to seek them, but we cannot hold that to establish a "lawful excuse" defendant is compelled to show more than a reasonable effort to locate those dependent upon him. Some duty was upon the wife to communicate with her husband and inform him of the whereabouts of herself and her

children and of their needs. That general subject was discussed in the case of *People v. Meads*, 28 Cal. App. 140, 151 Pac. 552, in which it was said:

"When the wife and child left under the circumstances indicated, the defendant was justified in assuming that the mother intended to support and take care of the child and it was not his duty to hunt her up and tender assistance. He could well wait until informed that assistance was needed and would be accepted."

[2] True, the present case does not present the element of the departure of the wife and child from the husband, but the evidence shows that the husband left with the knowledge and consent of the wife, for a legitimate purpose, to wit, to seek a field where he could better earn a living for himself and family, and when the wife wrote to him not to return to San Francisco, and subsequently moved from place to place every few months, it was her duty to inform the defendant of her whereabouts and not to expect him to employ the services of the police department to find her in order to offer her support. The evidence also shows that during the period when the defendant knew the whereabouts of his family he was without work and ill and had no ability to support them. Such inability is a legal excuse. *People v. Forester*, 29 Cal. App. 460, 155 Pac. 1022.

[3] But quite apart from the question of whether or not the defendant has shown a legal excuse, there seems to have been no justification for the refusal to allow the defendant to secure the deposition of the attorney Fallick, whom he had employed in New York to find his family. Defendant stated that he had given to Fallick the conclusive evidence of his numerous efforts to find his family, that is, the returned letters which he addressed to his wife from various parts of the country over a period of years, and which were sent to her last-known address. Defendant was a man of little education and highly excitable, as shown by his outbursts during the trial, and he testified that when he was arrested in New York at the home of his attorney, after he had engaged his services to aid him in finding and providing for his family, he conceived the idea that he had been deceived or betrayed by Fallick and threatened to have him disbarred. He later attempted to chastise Fallick in a public park. The entire situation revealed strained relations between Fallick and defendant, and defendant asserted that Fallick had refused to return his letters. These letters would have been most important and convincing evidence. Defendant was entitled to have them presented to the jury and he was entitled to secure their production by the only means open, which was to take the deposition of Fallick. The denial of this right is, in itself, prejudicial

error and demands a reversal of the judgment.

Under the views just expressed, it is unnecessary for us to consider the point made by the defendant that under the provisions of section 196 of the Civil Code he was released from an obligation to support his minor child because of an order of the juvenile court depriving him of its custody and giving its sole custody to the mother, nor is it necessary to discuss the other assignments of error.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

On Rehearing.

LANGDON, P. J. In the above-entitled matter the respondent has filed a petition for a rehearing, after decision by this court reversing the judgment against the defendant. The earnestness with which the petition is urged, as well as the important question of general public welfare involved in the facts of this case, make it desirable that some reply be made to the points urged in support of the petition for a rehearing.

The opinion heretofore filed herein reviewed the facts disclosed by the evidence and stated that such facts, showing a reasonable effort by defendant over a period of several years to locate his family, without success, would seem to offer a legal excuse for his failure to provide for his minor child. Although the decision was not reached upon that ground, the respondent has taken issue with this portion of the opinion and urges that section 270e, Penal Code, provides that omission to furnish necessary food, clothing, etc., for a child is prima facie evidence that such nonsupport or omission to furnish necessary food, etc., is willful, and this prima facie proof creates a conflict with the testimony of the defendant, which conflict was resolved by the jury. The section of the Penal Code under which defendant was prosecuted (section 270) provides: "A parent of * * * a * * * minor child who willfully omits, without lawful excuse, to furnish necessary food," etc. To say that the willfulness of the act is inferred from evidence of failure to provide does not touch the question discussed by the opinion in this case, which is that, regardless of the fact that defendant's willful failure to provide may have been shown, the evidence discloses facts which, under the decisions of this state, might constitute a lawful excuse. The prosecution must prove not only that there was a willful failure to provide, but that there was no lawful excuse for the omission. *People v. Smith*, 38 Cal. App. 176, 175 Pac. 696. This latter element is an important part of the statute. It is not the purpose of the statute to punish a father for failure to perform his duty as

such, but to secure to minor children necessary food, clothing, and shelter. *People v. Clarke*, 51 Cal. App. 473, 201 Pac. 465.

It was because it appeared to us, for the reasons just stated, that section 270e of the Penal Code was not applicable to the questions presented in this case, that said section was not discussed in the opinion.

Respondent complains that many of the facts recited in the opinion are taken from the testimony of the defendant. This was because that testimony, in our opinion, stands uncontradicted in the record and must be given its full value. As we have stated, respondent urges that the prima facie case made by section 270e, Penal Code, is sufficient to raise a conflict with defendant's testimony and justify the verdict, but, as we have just pointed out, section 270e of the Penal Code has no effect in providing proof that defendant's failure to provide for his child was without lawful excuse, and it was to this point that the defense was directed.

Respondent also asserts that a conflict exists in the evidence because of circumstances from which the jury would be justified in inferring facts contrary to the testimony in the record. The first circumstance relied upon is that the defendant failed to provide for his family for seven years. We fail to see how this conflicts with his testimony regarding his repeated efforts to communicate with his family. It does not raise a conflict in the testimony that defendant wrote to his wife at frequent intervals for several years, sending money in some of the letters, and that these letters were addressed to her last-known address in San Francisco and were returned by the postal authorities; that a letter written by a relative to defendant's wife met the same fate; that defendant, finally, after he had succeeded in securing a regular income, engaged an attorney to locate his family; that it was through the inquiries of this attorney addressed to the police department of San Francisco that defendant was located and arrested. The other testimony relied upon by respondent to create a conflict goes to the question of defendant's ability to support his child. We will concede that the testimony shows his ability to support his child for a large part of the time that he omitted to do so. This the defendant did not deny; his own testimony establishes it. His lawful excuse was that he had made a reasonable effort to locate his wife and had failed to do so; that she never communicated with him during the entire period of his absence, although mail would always have reached him at an address which she knew and to which she had last written; that she moved about frequently and made no arrangements for forwarding her mail or for notifying the defendant of the whereabouts of herself and her family.

[4] Respondent urges that the jury did not

believe the defendant's story of his efforts to find his family. The doubt in the minds of a jury of the only testimony in the record upon a given subject cannot furnish a conflict in that testimony. The province of the jury is to decide a case in accordance with the evidence.

[5] Respondent points out various means by which the defendant might have located his family. It is suggested that defendant might have written the police department or public officials or the Eureka Benevolent Society, which organization he knew had assisted his family before he left San Francisco. Assuredly, he might have and should have done any and all of these things, but he stated that he did not think of them. When an attorney was employed by defendant to locate his family, the attorney thought of one of these methods and located the family through the aid of the police department, which in turn asked the co-operation of the Eureka Benevolent Society. We think the defendant might well have done even more than the things suggested by the respondent. He might well have returned to San Francisco to search for his family. The decision in this case indicates no sympathy on the part of this court with the general conduct of the defendant toward his family, but, as stated in the opinion, the law does not exact of defendant the diligence that would be employed by the most devoted husband and father. It would be impracticable to apply such a standard in criminal prosecutions under section 270, Penal Code. The law can only demand of the defendant reasonable diligence in locating his family, and some duty is also placed upon the wife to keep the defendant informed of her whereabouts, especially when she moves about frequently, as was done in the present case. Some duty is also upon the wife to inform the husband of the need for support for the minor child, especially in view of the circumstances of the present case, where the wife testified that she had worked during the entire time of her marriage, except when she was ill or had a very young child. Under the law it was as much her duty to support the minor child as it was his duty, if she were able to do so, and we think she should be held to some duty, not only to notify the defendant of her whereabouts, but to notify him of her financial needs. *People v. Meads*, 28 Cal. App. 140, 151 Pac. 552.

We are not insensible to respondent's argument that the statute under consideration should be liberally construed to effectuate its purpose, and we realize the social problem involved in cases of this character and the burden placed upon the state and upon such admirable institutions as the Eureka Benevolent Society, which cared for defendant's family during several years of his absence. However, we are also aware that section 270, Penal Code, might be used as an instrument

of oppression and abuse in many conceivable cases unless it be construed by the courts with a view to protecting substantial rights of defendants charged thereunder. The decisions of this state show a wise policy of protection against such possible abuses. In the case of *People v. Forester*, 29 Cal App. 462, 155 Pac. 1023, the court, in considering the section of the Penal Code we are discussing, quotes with approval the following language from another jurisdiction:

"While the law in question is salutary, it nevertheless is of that character which requires it to be administered with some care so as to not produce more mischief by its enforcement in certain cases than can be prevented thereby."

[6] In the present case, as recited in the opinion, the defendant voluntarily engaged an attorney to locate his family, and it was through the communication of this attorney to the police department in San Francisco that the Eureka Benevolent Society learned of defendant's residence in New York. It immediately telegraphed its representative in New York to investigate, and upon such investigation it was learned that the defendant had a dairy store in New York and was making a profit of about \$150 a week from this source. He had only been in business for a few weeks at this time, and he offered to send \$1,000 to San Francisco for the transportation of his family to New York and to support them either in New York or in San Francisco, as they desired. He offered to transfer his interest in his store to his wife as security for the performance of his obligations. This seems, from the record, to have been all he could possibly do. The Eureka Benevolent Society, however, declined this offer unless the defendant would either pay back something over \$3,000 expended by it and the city and county of San Francisco in the support of his family, or give a bond to pay this amount back in installments. The defendant was unable to do this, and his arrest and prosecution followed. There is no question about the defendant's moral and legal obligation to repay the money paid out for the benefit of his family, but we fail to recognize any responsibility to do so to avoid a criminal prosecution. With all due respect to the generosity and good work of the Eureka Benevolent Society, we do not think it is in the interest of public policy that the statute be stretched and distorted against the defendant so that he may be forced to repay the money which the society expended upon his family during his absence.

[7] The foregoing lengthy discussion upon the evidence is indulged in merely in deference to the earnestness of the petition for rehearing. It is not really vitally connected with the decision upon this appeal. The opinion suggested that the evidence probably showed a lawful excuse on the part of the defendant for failing to provide for his child, but

did not place the decision upon that ground. It was held that the trial court committed prejudicial error in refusing to the defendant permission to take a deposition in New York. The facts with relation to said deposition are set out in the opinion and will not be discussed herein. The answer of the respondent in its petition for rehearing is that section 1354 of the Penal Code, under authority of which leave to take the deposition was requested, is discretionary and requires the court to be satisfied of the truth of the facts stated. It is sufficient to say that discretion thus vested is never an arbitrary discretion and that in the present case the facts appearing in defendant's affidavit were uncontradicted. The court therefore was not at liberty to disregard them. In the case of *People v. Lundquist*, 84 Cal. 26, 24 Pac. 154, the Code section under consideration here was discussed. It was said:

"The evidence sought to be elicited was material and important to the defense interposed by the defendant. The showing made contained all that the statute requires, and the reason for not having procured the order and the evidence before was sufficient."

[8] In the present case, as we have stated, defendant's affidavit supporting his motion appears in the record uncontradicted. The evidence sought to be procured was material and very important. Respondent contends that it was cumulative. It was the most convincing evidence of the facts relied upon by defendant to constitute a lawful excuse, and in its absence defendant was forced to offer exceedingly weak evidence of the same facts, and because he did offer what evidence he could on the subject should not militate against his rights when it is apparent that he has been prejudiced by the denial of the privilege of taking the deposition in New York. The defendant, having failed to obtain permission to secure the more convincing evidence of his efforts to locate his family, i. e., the letters returned to him by the postal authorities with the statement that the address could not be found, testified on the witness stand to their existence. There can be no question about the fact that he was prejudiced by being forced to rely upon this weaker evidence of so important a fact in his defense. Naturally, he could not recall the details of the letters, their dates, or contents, and his testimony was without much force because of these circumstances. On the other hand, the evidence of the letters themselves, with the markings of the postal au-

thorities, would have been most convincing proof of his defense of a lawful excuse. Under these circumstances the ruling of the trial court was prejudicial error.

The petition for a rehearing is denied.

We concur: NOURSE, J.; STURTEVANT, J.

Opinion of the Supreme Court in Bank
Denying Hearing.

PER CURIAM. [9] In denying the application for a transfer to this court, we deem it proper to say that we agree with the District Court of Appeal in reversing the judgment of the lower court because the defendant was deprived of the opportunity of fully presenting his defense, namely, that he endeavored to get in communication with his wife and child and had sent his wife money. This evidence would tend to show that the failure of the defendant to support his child was not willful, and it was for the jury to say, from all the evidence, whether or not that defense had been so far established as to raise a reasonable doubt as to whether or not the defendant had willfully failed to provide for his child. The opinion of the District Court of Appeal discusses the proper interpretation of sections 270 and 270e of the Penal Code. It is not necessary to consider the proper interpretation of the phrase "without lawful excuse" contained in section 270 of the Penal Code, for the reason that the defense interposed in this case was, in effect, that the failure of the defendant to provide for his child was not a willful one. It is therefore unnecessary to determine the exact meaning of the phrase "without lawful excuse." Where the legal obligation to support exists, and the defense of the father is his inability to furnish such support, either because of his inability to communicate with his child or because of his lack of means, section 270e applies, and "proof of * * * the omission to furnish necessary food, clothing, shelter, or of medical attendance for a child or children is prima facie evidence that such * * * omission to furnish necessary food, clothing, shelter or medical attendance is willful."

[10] In determining the proper interpretation of section 270 it is evident that the phrase "without lawful excuse" was intended to cover other cases than omissions to provide which were not willful.

The application for transfer is denied.

62 Cal. App. 286

IMPERIAL WATER CO. NO. 1 et al. v. IMPERIAL IRR. DIST. et al. (IMPERIAL LAGUNA WATER CO., Intervener). (Civ. 4171.)

(District Court of Appeal, Second District, Division 1, California. May 24, 1923. Hearing Denied by Supreme Court July 23, 1923.)

1. Contracts ⇐15—"Meeting of minds" defined.

A "meeting of the minds" means a definite proposal made by the one side which was unqualifiedly accepted by the other.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Meeting of Minds.]

2. Appeal and error ⇐1011(1)—Finding on conflicting evidence not disturbed.

A finding of fact based on conflicting evidence will not be disturbed.

3. Appeal and error ⇐1071(6)—No reversal for failure to find on issues where no different judgment could be entered if findings were in appellant's favor.

A failure to find upon material issues is prejudicial error for which a new trial should ordinarily be granted, but a judgment will not be reversed where, if the issues were in appellant's favor, no different judgment could be entered.

4. Appeal and error ⇐1032(1)—Case not reversed unless error prejudicial.

Appellant must not only show error, but must also show that he is harmed, before the appellate court will order a reversal.

5. Witnesses ⇐240(2) — Allowing leading question within trial court's discretion.

It is within the discretion of the trial court to allow a party to ask his witness leading questions, objection to such questions relating more to the weight of the evidence than to its admissibility.

Appeal from Superior Court, Imperial County; S. M. Marsh, Judge.

Action for an injunction by the Imperial Water Company No. 1 and others against the Imperial Irrigation District and others, in which Imperial Laguna Water Company intervened. From a judgment for complainant, intervener appeals. Affirmed.

Chas. L. Childers, of El Centro, for appellant.

Stuart M. Salisbury and Wm. B. Himrod, both of Los Angeles, for respondents.

HOUSER, J. On the 6th day of July, 1917, Imperial Laguna Water Company entered into a contract with the United States government with respect to the diversion and use of water from and of the Colorado river. By the terms of the contract, under certain conditions therein specified, the United States government had the right to cancel the contract. However, without a

formal cancellation of that contract, on October 23, 1918, the United States government entered into another contract with a different company—the Imperial irrigation district—covering practically the same subject-matter as did the former contract between the United States government and the Imperial Laguna Water Company. The respective rights of the two companies being in conflict, an effort was then made by the irrigation district to have the contract between the United States government and the Laguna Company canceled by the United States government. Representatives of each of the two companies were in attendance at Washington, D. C., for a considerable time, and, after a hearing before the Secretary of the Interior on the 8th and the 9th days of April, 1921, the Secretary of the Interior, on the 10th day of April, decided that the said contract should be canceled; the order to that effect being signed by him three days later. Prior to as well as after that time some negotiations had taken place between the representatives of the two separate companies looking to a settlement of the controversy. The case came into court by reason of the fact that certain other independent water companies (the plaintiffs herein), located in the Imperial Valley, considering themselves and their stockholders aggrieved because the irrigation district was about to pay to the Laguna Company a large sum of money on account of an alleged contract of settlement of the controversy between the two companies (which would result in the levy of a tax by the irrigation district against the lands owned by the said stockholders), brought a suit seeking to enjoin the irrigation district from paying the same, and the Laguna Company intervened. The lower court decreed in favor of the complainants and the Laguna Company has appealed.

[1,2] There are several specifications of error and many reasons urged for a reversal—the principal points being with reference to the power or authority of the irrigation district to make any contract of settlement with the Laguna Company; the power or authority of the representatives of the irrigation district to bind it by any contract; the sufficiency of the evidence to support the findings and the judgment; the sufficiency of certain findings by the court; the admission of certain evidence and the rejection of certain other evidence by the court. However, the principal question involved is whether or not there was a "meeting of the minds"—that is to say, was there ever a definite proposal made by the one side which was unqualifiedly accepted by the other. As to that point the court found:

"That no contract has ever been entered into between the said district and the said Imperial

Laguna Water Company, * * * or any one on its * * * behalf."

An examination of the evidence discloses the fact that such finding is amply supported by the evidence, and, while the evidence may be conflicting, the rule of law is of long standing that in such circumstances the finding cannot be disturbed. Such being the case, the questions of the power or the authority of either the corporation or its representatives to enter into a contract of the nature of the alleged contract here under consideration become unnecessary of decision by this court.

Finding No. 13 by the court was as follows:

"That except as herein specially found to be true, all and singular the allegations contained in paragraphs 5, 6, 9, 10, 11, 12, 13, 14, 15, and 16 of the first cause of action of intervenor's complaint, and denied by the plaintiffs or defendants, are untrue."

Many decisions by the Supreme Court of this state are to the effect that a finding of such a nature is so vague and so indefinite that in certain circumstances it may be insufficient to support a judgment. *Ladd v. Tully*, 51 Cal. 277; *Johnson v. Squires*, 53 Cal. 37; *Harlan v. Ely*, 55 Cal. 340; *Bank of Woodland v. Treadwell*, 55 Cal. 379; *Goodnow v. Griswold*, 68 Cal. 599, 9 Pac. 837; *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965; *Perkins v. West Coast Lumber Co.*, 120 Cal. 27, 52 Pac. 118; *Rugg v. Lux Brewing Co.*, 129 Cal. 322, 61 Pac. 1125; *Holt Mfg. Co. v. Collins*, 154 Cal. 265, 97 Pac. 516; *Schwartz v. Carpenter*, 157 Cal. 432, 103 Pac. 318.

Finding No. 13 refers to certain paragraphs of the first cause of action of the complaint in intervention, the gist of which allegations is that the United States is the owner of a diversion dam; that it entered into a contract with intervenor with reference to the water impounded therein; that intervenor has complied with each and all the terms contained within said contract and that said contract has remained in full force and effect from the time it was drawn on July 6, 1917, up to the date of its cancellation on April 13, 1920; that intervenor never waived nor agreed to waive any of its rights thereunder; that certain offers were respectively made and rejected by the Laguna Company to the irrigation district and by the irrigation district to the Laguna Company; that on April 9, 1921, it was agreed between intervenor and the irrigation district to submit the controversy existing between them to an arbitration commission to be appointed by the Secretary of the Interior, who was cognizant of the dispute and differences between intervenor and the irrigation district; that thereafter and on the 13th day of April, 1920, and in pursuance of said agreement to arbitrate, the

Secretary of the Interior canceled the contract between the United States government and the intervenor, and that he thereupon appointed the said arbitration commission; that the reason for the cancellation of said contract was in order that an equitable settlement might be effected as between intervenor and the irrigation district, which cancellation the Secretary of the Interior would not have ordered in the absence of the agreement to arbitrate as between intervenor and the irrigation district; that the arbitration commission made an award in favor of intervenor, no part of which has been paid; and that intervenor, relying in good faith upon said agreement to arbitrate, took no appeal from the said order of cancellation by the Secretary of the Interior.

[3, 4] As heretofore stated, the basic question in this matter upon the decision of which the case must ultimately rest is: Was there ever any agreement between the irrigation district and the Laguna Company? The judge of the superior court before whom the suit was heard has answered that question in the negative, and this court is bound by his conclusion as to the facts in that regard. What effect, if any, is produced on the judgment by a failure (assuming it be such and that a finding covering such allegations is not elsewhere contained within the findings of the court) to find on the issues as presented by the paragraphs of the complaint in intervention to which reference has heretofore been made remains to be determined. The most that could be expected by appellant would be a finding by the court that each fact as alleged in the several paragraphs of its complaint in intervention (other than the fact of the alleged contract between intervenor and the district) is true. But even so, it still leaves appellant without foundation for a judgment in its favor. The failure to find upon material issues is prejudicial error for which a new trial should ordinarily be granted (*Great Western Gold Co. v. Chambers*, 153 Cal. 307, 95 Pac. 151; *Swift v. Occidental M. & P. Co.*, 141 Cal. 166, 74 Pac. 700; *Haight v. Tryon*, 112 Cal. 6, 44 Pac. 318; *Knight v. Roche*, 56 Cal. 17); but a judgment will not be reversed on that account where, if the findings were in favor of appellant, no different judgment could be entered (*Porter v. Woodward*, 57 Cal. 535; *McCourtney v. Fortune*, 57 Cal. 617; *Murphy v. Bennett*, 68 Cal. 528, 9 Pac. 738; *Dyer v. Brogan*, 70 Cal. 136, 11 Pac. 589; *Spotts v. Hanley*, 85 Cal. 156, 24 Pac. 738; *Windhaus v. Bootz*, 92 Cal. 617, 28 Pac. 557; *Southern Pac. R. R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; *Merrill v. Merrill*, 102 Cal. 317, 36 Pac. 675; *Morrison v. Stone*, 103 Cal. 94, 37 Pac. 142; *Gould v. Adams*, 108 Cal. 365, 41 Pac. 408; *Sewell v. Price*, 164 Cal. 265, 128 Pac. 407),

The trial court having found that no contractual relation ever existed as between the irrigation district and the Laguna Company, and all the other allegations being subsidiary and dependent upon that fact so far as the complaint in intervention is concerned, it is immaterial whether the court found for or against such other allegations, or whether there was any finding whatsoever with respect thereto. The determination by the court of the one outstanding issue is sufficient in itself. It absolutely controls the other issues in the case, regardless of any decision which the court might have made with reference to them. Appellant must not only show error, but must also show that it is really harmed thereby before the court, on account of such error, will be justified in ordering a reversal of the judgment. *National Bank of San Mateo v. Whitney*, 40 Cal. App. 276, 180 Pac. 845.

Concerning a question of the failure of the court to find on several material issues and because certain material findings were conflicting and irreconcilable, it is said in *Black v. Harrison Home Co.*, 155 Cal. 132, 99 Pac. 499, that—

"The answer to interveners' claim as to conflicting findings lies in the fact that there is no conflict in the findings as to the execution of the contract. It is positively and unequivocally found that defendant never entered into either of these contracts, and the other findings contain nothing inconsistent with this. In view of the condition of the pleadings and the issues made thereby, these findings wholly dispose of interveners' case, and necessitate judgment against them regardless of the other issues made by the pleadings. It is therefore immaterial here whether other findings are sufficiently supported by the evidence, whether there are findings upon other issues, and whether findings in regard to some other issues are conflicting or unintelligible."

In *Smith v. Smith*, 173 Cal. 725, 161 Pac. 495, which was a suit upon conflicting claims to real property which involved the quieting of title thereto and where the court failed to find upon certain material issues, namely, upon the common grantor's mental condition at the time when one of the deeds was made, upon the matter of alleged unfair advantage over the grantor taken by defendant, upon the question of consideration for the deed to defendant, upon the motives of defendant in marrying the common grantor, and upon the subject of the alleged plan to obtain the property by evil designs, the court said:

"Findings upon these aspects of the litigation were not necessary in view of the judgment that there had been a valid delivery of the deeds to the plaintiffs in escrow and that defendant then had full knowledge of that transaction. The determination of the last-named issues controlled the judgment. This court will not reverse a judgment because of failure to make findings which would not necessitate a different judgment even if they were

made and entered in the appellant's favor. [Citing cases.]"

And see, also, *Fritz v. Mills*, 170 Cal. 449, 150 Pac. 375; *National Bank of San Mateo v. Whitney*, 40 Cal. App. 276, 180 Pac. 845; *Berry v. Crowell*, 55 Cal. App. 534, 203 Pac. 835.

Appellant's objections to certain other findings by the court, which ordinarily might be of some moment, also lose their importance because of the fact that they, too, revolve around and are necessarily controlled by the main issue as to whether or not any contract was ever made between the irrigation district and the Laguna Company.

The judge of the trial court refused to admit in evidence a certain exhibit offered by intervenor for the purpose of showing what had been done by it under its contract with the United States government, in order that the fact might be established that the cancellation of the contract could have been resisted with likelihood of success. But assuming as true all that was claimed would be shown by the exhibit, as well as its possible result on the question of cancellation of the contract by the United States government in view of the decision by the court as to the nonexistence of any contract between the irrigation district and the Laguna Company, such evidence would be immaterial.

[5] Another point urged by appellant relates to the fact that over the objection of intervenor the court, under the provision of section 2055, Code of Civil Procedure, as added by Stat. 1917, p. 58, permitted certain officers and directors of the defendant irrigation district to be examined by the plaintiffs as under cross-examination. The most that can be said against even the cross-examination of one's own witness is that he is thereby permitted to answer leading questions, and it is well understood that answers to leading questions do not deserve, nor are they accorded, the same credence as is given to answers to questions not in that category. It is purely a matter of the weight of such testimony, and the objection to such questions relates more to the weight of the evidence to be received, rather than to its admissibility. If, under the pleadings in this case and the admissions and stipulation of counsel representing respectively the plaintiffs and defendant irrigation district, the examination of the officers of the irrigation district as under cross-examination amounted to nothing more than asking leading questions of such officers, the rule is well settled that such a course may be pursued, dependent upon the discretion of the court. That such discretion was carefully exercised is manifest by an inspection of the record herein. Assuming, without deciding, that in the circumstances of this case, the plaintiffs did not have the right, under section 2055, Code of Civil Procedure, to examine the officers

and the directors of the defendant irrigation district as under cross-examination, still the course pursued by the trial court resulted in no prejudice to the intervener company.

There appears to have been no miscarriage of justice.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

62 Cal. App. 336

**FIRST NAT. BANK OF SAN PEDRO v.
STANSBURY et al. (Civ. 4070.)**

(District Court of Appeal, Second District, Division 1, California. May 29, 1923. Hearing Denied by Supreme Court July 26, 1923.)

1. Partnership — 311(3)—Notes for account stated held to preclude general reopening of account.

Where two partners had agreed on a statement of their account on dissolving partnership, and one of them had given the other his notes for the amount due according to that statement, he cannot have a general accounting of the partnership affairs, without proof of a gross mistake going to the whole accounting, or of fraud by the opposite party, but can only have the account stated corrected as to the items in which he shows there had been a mistake.

2. Account stated — 8—Can be disregarded entirely for mistake only if gross.

An account stated can be disregarded entirely, and the whole account reopened for mistake, only if the mistake is so gross that it affects the entire account.

3. Stipulations — 14(11)—Account stated held not waived by stipulation for reference.

In an action on notes given for the amount shown to be due by an account stated, in which defendant claimed mistake in the statement of the account, a stipulation for a reference to take an accounting as to the correctness of all purported statements, and permitting amendments to the pleadings as further facts should be developed by the report of the referee, did not waive the presumptions in favor of the validity of the account stated, so as to authorize a general reconsideration of the account without reference to the statement.

Houser, J., dissenting.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the First National Bank of San Pedro against Charles Stansbury, in which the defendant filed a cross-complaint against the plaintiff and against John Balch. From a judgment fixing the amount of defendant's liability after a partnership accounting, the plaintiff and cross-defendant appeal. Reversed, with directions.

Richard C. Goodspeed, and Goodspeed & Pendell, all of Los Angeles, for appellants.

K. A. Miller, of Los Angeles, for respondent.

CONREY, P. J. In the year 1911 Charles Stansbury and John Balch entered into a partnership agreement for the purpose of carrying on a contracting and paving business. That business continued until August 28, 1915, when it was terminated. Stansbury then gave to Balch a written memorandum reading as follows:

"This memorandum certifies that the undersigned, Chas. Stansbury and J. Balch, both of Los Angeles, Cal., have this day above mentioned, viz. August 28, 1915, checked up the accounts and transactions affecting the contracts known as the St. Louis, Santa Cruz, Section Three, and Fifth Street of San Pedro, and all other jobs prior to this 28th day of August, 1915, and have agreed by and between themselves that there is a net amount due the said J. Balch from said Chas. Stansbury, amounting to twenty-one thousand seven hundred twenty-four dollars and forty-four cents (\$21,724.44). [Signed] Chas. Stansbury." (Finding VII.)

Between August 28, 1915, and December 16, 1916, Stansbury made some payments on account of said indebtedness, and on said December 16th gave to Balch four notes, being for a total amount of \$16,846, which represented the actual amount then estimated by said parties to be due and owing from Stansbury to Balch, and said notes were given unconditionally in evidence and acknowledgment thereof and for no other purpose. (Finding VIII.)

Under said partnership agreement, Balch was to furnish, and he did furnish, his tools and equipment, contribute his services, and all contracts under the partnership were to be taken in the name of Balch, who was to superintend, and did superintend, look after, and employ all the men in carrying on the said partnership business, subject to advice from Stansbury. Stansbury was to, and he did, figure and advise with Balch on all contracts, furnish bonds for and finance the same, and also furnish such equipment as he then had. It was agreed that a settlement of accounts would be had after each job or contract, and that there would be allowed and paid by Stansbury to Balch interest at 7 per cent. per annum on all moneys furnished by Balch and on his share of the profits from said jobs left with Stansbury. Otherwise, it was agreed that no salaries or other compensation should be drawn by either party, and all profits thereunder were to be divided equally. (Finding IX.)

Prior to the commencement of said partnership the said Balch and Stansbury had mutual interests in certain contracts in which

one John Radich was also a partner, and said Stansbury also made collections on certain contracts belonging to said Balch and Radich. The proceeds of said contracts and of said collections, after settlement had and made by Stansbury with Radich (on February 10, 1912, with reference to the collections on the Balch-Radich contracts, and on February 29, 1912, with reference to the Balch-Radich-Stansbury contracts), were retained by Mr. Stansbury and carried along into the accounts of the new partnership between Balch and Stansbury. (Finding XIII.)

The notes of December 16, 1916, executed by Stansbury to Balch, were thereafter indorsed and delivered by Balch to the First National Bank of San Pedro before maturity in consideration of certain loans and advancements made and to be made by the bank to Balch, and as security for any and all indebtedness then or thereafter existing from Balch to the bank, and also for the purposes of suit on said notes and collection thereof at law or otherwise by the plaintiff for the benefit of Balch after satisfaction of any and all claims of the plaintiff. The plaintiff has been at all times mentioned in the complaint in this action the legal owner and holder of each of the two notes sued upon by the plaintiff in this action, but subject to any sufficient defense that Stansbury may have to said notes or to either of them as against Balch. (Finding III.)

On the 4th day of May, 1917, the bank commenced this action (superior court No. B-50368) to recover on two of the notes, which were for the principal sum of \$4,000 each. Previous to that time the bank prosecuted another action (B-49418) against Stansbury on the other two of the said four notes of date December 16, 1916. In said action B-50368, which is the action in which this present appeal is taken, Stansbury, in addition to certain denials which raised issues upon some of the allegations of the complaint, set forth in his answer an affirmative defense, alleging the said partnership agreement and sundry transactions thereunder, by virtue whereof he claimed to have a good defense against the plaintiff's action.

At the same time with the filing of his answer Stansbury filed a cross-complaint against both the bank and Balch, wherein the cross-complainant set out the said partnership between the parties pursuant to said agreement and demanded an accounting of the partnership matters, and that cross-complainant have judgment that said notes be discharged and satisfied, and that he also have additional relief against said Balch. There followed an answer by the bank to the cross-complaint, an answer by Balch to the cross-complaint, a cross-complaint by Balch against Stansbury and an answer thereto. On April 10, 1918, while the case was on trial, an amended cross-complaint was filed

by Stansbury, to which separate answers were filed by the cross-defendants.

It was alleged by Stansbury that the partnership agreement never was terminated: that at the time when the notes in suit were executed, the partnership was about to enter upon a contract for certain work known as "Fountain Avenue Sewer Contract" for the sum of \$47,900; that the notes in this action, and in said action B-49418, were given solely as collateral security for accommodation of the partnership and to be used in obtaining moneys from the bank for said partnership for certain stated purposes relating to their construction business, to wit, for purchasing material and paying for labor in financing a contract for the improvement of Carolina street at San Pedro; that at no time have any settlements been made between cross-complainant Stansbury and said Balch which were intended to be other than tentative and temporary settlements "subject to any and all corrections, inaccuracies or mistakes, when the accounts between said partners were thereafter accurately determined and settled." But the court found, not only that the notes were given unconditionally, but also that the partnership terminated on the 28th day of August, 1915, and that no work was done thereafter by the partnership.

Paragraph VI of the amended cross-complaint reads as follows:

"This cross-complainant alleges that in the temporary accountings thus taken and in tentative settlements made, the books and accounts were not in such condition to disclose an accurate statement of the partnership affairs, and that since the said tentative settlements have been made this cross-complainant alleges he has discovered and finds that from time to time mutual mistakes had been made, which were not known at the time tentative settlements were had, and large sums of money have been paid by this cross-complainant for and on behalf of said partnership that at no time have been taken into consideration or allowed as credits to this cross-complainant from the said partnership, and through such mutual mistake, accident, inadvertence, and not taken into consideration, the said partnership is indebted to this cross-complainant in the following particular items, to wit: * * * Which above items amount in all to the sum of \$6,316.04, no part of which has been paid by the said partnership to this cross-complainant, nor considered in any tentative settlements heretofore made, and for which the said partnership is now indebted to this cross-complainant, and by the mistake and through the said cross-complainant relying upon the figures of cross-defendant John Balch, same were overlooked and mistakingly not considered in any tentative settlements so made."

In paragraph VII, cross-complainant alleged the payment of attorney fees on behalf of the partnership, the exact amount and nature of which he could not then ascertain or state.

Paragraph VIII reads as follows:

"This cross-complainant further alleges that from time to time large amounts have been expended by this cross-complainant for tools and equipment, to wit: For concrete cement forms purchased and paid for and delivered to the said partnership, amounting to the sum of \$2,902; large amounts of small tools and equipment and unused material paid for, owned and unaccounted for by the said partnership and now in the possession of the said John Balch, belonging to the said partnership, for which there has been paid from said partnership funds a sum of approximately \$5,000; all of which said tools and equipment are now in the possession of the said Balch and for which sums so advanced by this cross-complainant and from the partnership assets, equipment and tools, the said John Balch has failed and refused to account to this cross-complainant. That in addition to the above items, the said cross-defendant John Balch has received from various sources for and on behalf of the said partnership, and now has in his hands large sums of money, and purchased for and on behalf of the said partnership from the said partnership funds large amounts of other equipment and tools and unused material, the exact amount, nature and extent of which it is impossible for this cross-complainant to say until a full and complete accounting is had between the said partners, and which this cross-complainant is informed and believes is of the amount and value of many thousands of dollars."

Paragraph IX declares that on the Carolina street contract and the Fountain avenue sewer contract, and other contracts of the partnership, amounting to \$65,000 or more, and all of which have been completed, large sums of money had been collected and large profits made therefrom, for which Balch had failed and refused to account; that by reason of said transactions Balch was indebted to the partnership and that upon accounting it would be found that he was so indebted to the partnership and to cross-complainant in a large sum. (By reason of the court's finding that the partnership terminated on August 28, 1915, this paragraph IX need not be further considered.)

Paragraph X of the cross-complaint reads as follows:

"Said cross-complainant further alleges that none of the said items herein mentioned have been paid nor credited by the said partnership to this cross-complainant in any tentative or temporary settlements had between this cross-complainant and the said John Balch, and the total sum of said items specifically mentioned are due and owing from the said partnership to this cross-complainant, together with all other sums that an accounting may show when same has been accurately taken of the assets and profits from the said partnership, amounting to, as this cross-complainant is informed and believes and so alleges, more than any indebtedness due or claimed to be due from the said partnership or this cross-complainant to the said John Balch."

As a second cause of action, cross-complainant, in addition to the allegations of

his first cause of action, alleged that Balch was indebted to him on open book account for certain moneys paid out, at the instance and request of Balch (stating the several items), amounting to the total sum of \$764.90. Cross-complainant alleged that no part of these items had been repaid and that the same were now due and owing from Balch to Stansbury.

In July, 1918, both of said actions, B-49418 and B-50368, were pending in the superior court. The two cases were consolidated and were tried and submitted for decision. Thereafter the parties entered into a stipulation (uled August 13, 1918) to set aside the submission and the order consolidating said causes, and providing that the plaintiff bank have judgment in its favor in said action B-49418. In case No. B-50368 it was further stipulated that a referee be appointed to take an accounting between Stansbury and Balch at the cost of Stansbury—

"as to the correctness of all purported settlements had between said John Balch and said Charles Stansbury up to and including the giving of the notes of December 16, 1916, and that said referee report to the court any additions, deductions, errors, omissions, miscalculations, corrections, or mistakes in said accounts or pretended settlements, with a finding showing the true conditions of the accounts between said Stansbury and said Balch growing out of their partnership relations in the contracting business, or with Radich, Balch & Stansbury, or otherwise, and the true amount due from one to the other, after deducting all proper offsets and credits to date, that said settlements and notes be corrected accordingly; said referee, so to be appointed, to be further authorized and directed to examine all books of account, check books, stubs, bank books, ledger sheets, and any and all other accounts kept by the said John Balch and the said Charles Stansbury; to subpoena witnesses or expert accountants, together with such other books and accounts, and to hold such other hearings as may be necessary for the purpose of ascertaining the true status of said partnership relation between said John Balch and said Charles Stansbury."

It was further stipulated that the pleadings might be so amended—

"as to permit the introduction of such further evidence as may be developed by said report of said referee from said accounting, and such other proceedings may be had according to the evidence heretofore taken and such further evidence offered by either party before the court and upon the pleadings as amended; that said case be continued until the report of the referee be made and filed and the further order of this court, notice thereof being hereby waived."

Pursuant to said stipulation, an order of reference was made appointing the referee named in the stipulation. The order provided that the referee so appointed—

"for the purpose of taking an accounting between said Charles Stansbury and John Balch as to the existence of said alleged errors and as

to the correctness of all settlements had between said parties up to and including the giving of the notes of December 16, 1916, and that said referee report to the court any and all additions, deductions, mistakes, miscalculations and errors which have occurred in the said settlements, or any of them, or in any accountings had between said parties, which have been or may to the satisfaction of said referee be shown from the testimony, books and papers heretofore offered in evidence in this cause and from any and all books, papers, checks, or accounts of the said Charles Stansbury and said John Balch, or such other evidence as may be properly laid before said referee. Said referee shall within thirty days make a report to the court showing as nearly as he may be able, the corrections that should be made in said alleged settlements and including therein a statement showing as nearly as said referee can determine the true condition of the account between said Stansbury and said Balch up to the giving of said notes."

The referee's report was not filed until the 24th day of September, 1919. The case came before the court for hearing upon the report of the referee and exceptions filed by the respective parties. Further testimony was given and the cause was submitted upon said testimony and the report of the referee and the evidence taken by the referee and the books and records of the parties, whereupon the court made its findings of fact and conclusions.

The court found that during the pendency of the action, all of the bank's claims against Balch for which it held the notes in suit as collateral security had been paid and that the plaintiff continues to hold said notes only for the purpose of collection and for the use and benefit of Balch.

The court found that the partnership existed under the agreement to which we have referred and found the fact of settlement made which resulted in the execution of said notes of December 16, 1916; also that in the settlement with reference to the Radich jobs and in the settlements between Balch and Stansbury, and particularly in the settlements made on November 27, 1912, August 28, 1915, and December 16, 1916, by reason of the fact that the books and accounts were not in such condition as to disclose an accurate statement of the partnership affairs, various mutual mistakes were made in favor of said Balch and to the prejudice of said Stansbury, which said mutual mistakes were discovered since said notes were given; that since the giving of said notes, the said Stansbury has also been entitled to credits. (Finding XIV.) Without defining what these mistakes were, and without using them as the basis of any deductions from the amounts of the notes, the court, by its referee and by evidence taken before the court, made an independent examination of the transactions and accounts of the partnership, and made its findings and judgments pursuant to that investigation.

In finding XVIII the court refers to the fact that the balance found by the referee in his report was the sum of \$3,309.06 in favor of Balch,

"but the court finds that the same is subject to certain corrections for clerical errors, miscalculations and mistakes in the debits and credits thereof and in the allowances to the two partners, and upon further hearing before the court upon the report of the said referee, the court finds that said report should be modified by deducting from the balance found due to said Balch of \$3,309.06, total credits due to said Stansbury amounting to \$1,740.81, as hereinafter specified, leaving an indebtedness, which the court finds to be due and owing from the said Stansbury to the said Balch in full settlement of all partnership claims of the said Balch against the said Stansbury, amounting to \$1,569.10, which, the court finds, is entitled to draw interest at seven per cent. per annum from the 16th day of December, 1916; that the report of the said referee after deducting the above credits is in all other respects confirmed and adopted as the finding of this court."

The modifications made in said referee's report are then stated in detail, covering eight items of the report.

In finding XIX the court determined that Stansbury should pay the costs of this action and the fee of the referee (\$500) "and the large mixer is the property of Charles Stansbury, and the steel forms, rings, small mixer and other tools are the property of John Balch."

Judgment was entered accordingly, and it was therein provided that upon payment of the judgment the notes in suit be canceled, and that the interests and claims of Balch and Stansbury growing out of said partnership "be and they are declared to be hereby fully settled and determined." From the judgment so entered the plaintiff bank and the said John Balch have appealed.

[1] Primarily, appellant relies upon the proposition that the court erred in undertaking to restate the whole of the accounts between Balch and Stansbury de novo, there being no claim of fraud made against Balch, and no error alleged or shown tainting the whole accounts found to have been mutually settled, and also because of there being no complete statement made or possible. It is true that neither the defense nor the cross-complaint rests upon any claim of fraud. No facts are alleged by respondent tending to show any erroneous method or principle involved in the settlement as made whereby the entire accounting became unreliable or erroneous. Respondent rested his claims upon two contentions, the first of which is that the so-called settlements were only tentative and temporary, really not settlements at all, and the second is that respondent is entitled to sundry credits, which by mistake were omitted from the computations which resulted in the execution of the notes in suit. The court having determined that the partnership

terminated on the date of the settlement of August 28, 1915, and that after some further payments had been made the notes were given unconditionally, the only further questions in the case related to the alleged mistakes in the settlements as made, and the amount by which the correction of those mistakes would reduce the indebtedness shown by the notes. In this state of the case appellants were entitled to rely upon the amount of the notes and upon the resulting inference that respondent's indebtedness should be measured by the sums stated in those notes; subject only to the right of respondent to prove, if he could, any errors which had crept into the settlements by reason of mistakes which had prevented any items from being taken into consideration when the agreements of settlement were made. The burden of proof rested upon respondent to establish the facts by reason of which he would be entitled to these deductions. In addition to the particular errors claimed as pointed out in the pleadings of respondent, it will be remembered that in the stipulation for a reference it was agreed in substance that if in the course of the investigation by the referee facts should develop making it necessary so to do, the pleadings might be so amended as to permit the introduction of further evidence concerning the alleged errors. In other words, it was contemplated by the pleadings of respondent and by the stipulation and order, that the inquiry should be conducted for the purpose and only for the purpose of correcting any mistakes, miscalculations and errors which had occurred in the said settlements and thereby had been carried into said notes.

[2] We cannot see that counsel for respondent would be benefited by the acceptance of his theory that these notes do not represent the result of an "account stated." For his right to insist upon a reopening of the question concerning the amount due on a promissory note cannot be more favorable than his right to inquire into the circumstances of an account stated. Therefore, we think that the rules concerning the surcharging or falsifying of such an account, as shown by the decisions presented to us by counsel for appellant, are applicable to this case. In the early case of *Branger v. Chevalier*, 9 Cal. 353, 361, it was held that accounts stated may be opened and the whole account taken de novo, for gross mistake, in some cases.

"But this can only be done when the gross error affects all the items of the transaction. In case the clear mistake only affects a portion of the items of the stated account, it will be permitted to stand, except in so far as it can be impugned by the party alleging the error. And when the party who seeks to go behind the stated account, goes into particulars, and specifies the items improperly charged or omitted, he is confined to those items, and the remainder of the account must stand."

In that case the court further says:

"In this case certain errors were specified in the complaint, and the plaintiff should have been confined to the items mentioned. The order of reference cannot go beyond the pleadings of the parties; and then the mistake should be clear and material before the court could allow the party even to surcharge and falsify. It is a very dangerous practice to go behind stated accounts, especially as between partners, who alone understand their complicated affairs, and the mode in which their books are kept. If all partnership books were well and carefully kept, upon the same system, then the practice of opening up accounts would not be so doubtful. 4 Cranch, 308; 4 Paige, 495."

In *White v. Thompson*, 40 Cal. App. 447, 449, 180 Pac. 953, 954 (First District, Division 1), the rules governing the correction of an account stated are summarized as follows:

"An account stated does not bar a recovery for items not within the contemplation of the parties when the settlement was made. (*Clarke v. Kelsey*, 41 Neb. 766, 60 N. W. 138; *Lawler v. Jennings*, 18 Utah, 35, 55 Pac. 60); nor for those omitted by mistake; nor for such as were left open for further consideration (*Waldron v. Evans*, 1 Dak. 11, 46 N. W. 607). Parties to an account stated, signed by them, are not concluded by the presumption that it was a final settlement of all valid debts, debits, and credits, as to matters which were not contemplated by them, or which were not included in the settlement, though they existed at the time. *Treacy v. Powers*, 112 Minn. 226, 127 N. W. 936. Where an account has been adjusted by the parties, if any mistake is subsequently discovered, the whole account need not be opened and readjusted, but the mistake may be corrected and the rights of the parties readjusted as to such mistake. *Carpenter v. Kent*, 101 N. Y. 591, 5 N. E. 787."

In *Gardner v. Watson*, 170 Cal. 570, 150 Pac. 994, the court made a statement covering what in law constitutes an account stated. It was there held that the writing constituting an account stated need not aver or at all contain the grounds and reasons for the conclusion and declaration expressed. It is a complete account stated, if it contains a signed and written acknowledgment of a present, unqualified indebtedness or liability, with a promise to pay a named sum. With reference to such an account, the court there said that, while it is open to a defendant to repel the legal effect of the account stated by pleading and proof of its procurement through fraud, duress, mistake, or other grounds cognizable in equity for the avoidance of an instrument, yet it is not open to a defendant to attempt to defeat the legal effect of such a contract by showing a lack of consideration in any other way.

"Thus, it is not open to a defendant in such a case merely to show that the account stated was based upon a disputed claim of the plaintiff's, which claim subsequently proved to be invalid. Nor would it be open to a defendant to show that the amount justly due was very

much less than the amount named in the account stated."

It is not necessary to make a detailed statement of the various items of the accounting, as made by the referee and by the court, in order to exhibit their resulting effect in determining the amount of the judgment. It is sufficient to say that the judgment is solely the result of an accounting which purports to cover all of the transactions of the partnership and to arrive at a balance due as shown by the books and papers of the partnership and by testimony concerning the same, without giving to appellants the benefit of the fact that their right of action is based upon the notes held by them, and without any findings directed to the particulars in which errors occurred in the settlements made between the partners and based upon which settlements the notes in suit were executed.

[3] It was contended by counsel for respondent and was held by the court at the trial that by reason of the stipulation for a reference and the order of reference based thereon, the court was authorized "to enter into an accounting of this entire matter." And when counsel for appellant in discussing the referee's report stated the rule that a settlement made in good faith is presumed to be a good and fair settlement and that the presumption is in favor of that settlement, the court replied: "I think your stipulation wiped out the presumptions." We are of the opinion that the stipulation, made as it was in view of the pleadings of respondent and the affirmative claims made by respondent, is not subject to the construction thus put upon it by the court. If it had been intended to wipe out the notes entirely and to wholly disregard the settlements made, it would have been useless to provide in the stipulation, as it was provided, that the accounting should be taken as to the "correctness of all purported statements." Likewise it would have been unnecessary to further stipulate for amendments to the pleadings, as further facts affecting the subject-matter should be developed by the report of the referee. By reason of the erroneous theory thus adopted, and according to which the case was tried, notes received for a valuable consideration, and not in any way tainted with fraud, have been, by the judgment, reduced to less than half of their face value, without any finding of the facts whereby such reduction may be justified.

The judgment is reversed, and it is hereby directed that a new trial be had of the issues presented with relation to credits claimed by respondent by reason of errors or omissions in the settlement of said partnership affairs, whereby respondent claims the amount of said notes should be reduced. Thereupon, findings having been made cover-

ing said issues, a new judgment may be entered.

I concur: CURTIS, J.

HOUSER, J. I dissent. To my mind, the stipulation to which reference is herein made constitutes a complete waiver as to any rights arising out of the "account stated" and fully authorizes an entire accounting de novo.

62 Cal. App. 367

KENNEDY v. SCALLY. (Civ. 2594.)

(District Court of Appeal, Third District, California. May 31, 1923.)

1. Appeal and error $\S$ 1073(1)—Decree quieting title in owner of equitable interest as against holder of legal title held not prejudicial to latter.

In an action to quiet title against the owner of the legal title, from whom plaintiff claimed the land as a gift, where plaintiff's pleadings set up the facts on which his claim was based and prayed for general relief, the court, complying with defendant's prayer that all adverse claims be determined, adjudged that the gift was valid and complete, and the objection that an action to quiet title was not the proper remedy for the owner of an equitable interest against the owner of the legal title was raised for the first time in defendant's reply brief on appeal, defendant was not prejudiced by further provisions of the decree quieting the title so adjudged, though a more appropriate judgment would have been one declaring that defendant held the legal title in trust for plaintiff and requiring her to convey it to him.

2. Gifts $\S$ 49(4)—Gift of land held established.

In an action to quiet title, evidence held sufficient to establish a gift of the land by defendant to plaintiff and his deceased wife.

3. Frauds, statute of $\S$ 158(4) — Evidence held to show possession and expenditure for improvements by donee of land, taking gift out of statute.

Evidence held to show possession and expenditures for improvements by donee of land in time and amount to take the transaction out of the statute of frauds.

4. Gifts $\S$ 49(4)—Evidence of parol gift of land should be clear and convincing.

The evidence to establish a parol gift of land should be clear and convincing.

5. Appeal and error $\S$ 1010(1)—Finding as to parol gift not disturbed.

Court's finding as to parol gift of land will not be disturbed, unless clearly unwarranted by the evidence.

6. Frauds, statute of $\S$ 129(9)—Parol gift of land in present relieved from operation of statute by donee's entry and making of improvements.

Where a parol gift of realty is made in present, donee has entered and made per-

manent and valuable improvements, and circumstances render it unjust to deprive him thereof because of imperfections in the gift, equity will treat donor's and donee's acts as such performance of the gift as will relieve the contract from the operation of the statute, and will lend its assistance to the perfection of donee's title.

7. Appeal and error ☞1050(1)—Overruling objection to question calling for conclusion not prejudicial error, where witness testified fully as to facts.

In an action to quiet title, where plaintiff testified fully as to the facts on which his claim of interest was based, the court's action in overruling objection to question asked plaintiff as to whether he ever acquired an interest in the premises did not prejudice defendant's rights, though the question called for a conclusion.

8. Appeal and error ☞1047(3)—Error in failing to strike out testimony held cured by witness' subsequent testimony.

In an action to quiet title to land given plaintiff by defendant, error in failing to strike out a witness' testimony that he could not make the improvements made by plaintiff for \$100 an acre was cured by the witness' later testimony that the reasonable cost of making the improvements was \$100 an acre.

9. Gifts ☞48—Testimony that donee would not have made improvements if he had not believed property belonged to him held admissible.

In an action to quiet title to land given plaintiff by defendant, testimony that he would not have made improvements thereon if he had not believed that the property belonged to him as a gift was admissible, as tending to show that the improvements were made in reliance on such gift.

10. Gifts ☞48—Evidence of value of donor's other property held admissible.

Evidence that defendant, at the time of the alleged gift of a ranch to her daughter and son-in-law, owned other property worth more than \$150,000 was properly admitted as tending to rebut any inference that the gift was unnatural, or deprived defendant of her means of support.

11. Gifts ☞48—Evidence that donor afterwards gave other property to other children held admissible.

In an action against plaintiff's deceased wife's mother to quiet title to land alleged to have been given by her to plaintiff and his wife, evidence that defendant afterwards gave valuable property to other children without giving any to plaintiff's wife held admissible as consistent with and tending to support plaintiff's claim of a prior gift to him and his wife.

12. Gifts ☞48—Who paid taxes and assessments held immaterial, in donor's action to quiet title.

Whether defendant, in an action to quiet title, paid part of the taxes and water assessments on the land after her alleged gift thereof to plaintiff and his wife, who took possession and made permanent improvements in re-

liance on such gift, held immaterial; plaintiff's cause of action not being dependent thereon, and defendant having made no claim for reimbursement.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by J. H. Kennedy, individually and as administrator of the estate of Margaret S. Kennedy, deceased, against Mary A. Scally. Judgment for plaintiff, and defendant appeals. Affirmed.

Power & McFadzean, of Visalia, and John G. Covert, of Hanford, for appellant.

Everts, Ewing & Wild and C. A. Tuttle, all of Fresno, and H. Scott Jacobs, of Hanford, for respondent.

FINCH, P. J. In addition to the usual allegations in a complaint to quiet title, the plaintiff alleged that defendant gave him and his wife, Margaret S. Kennedy, a daughter of defendant, the land in controversy, consisting of 160 acres, and that they took possession thereof under the gift and expended in making permanent improvements thereon the sum of \$4,000 during the year 1912, \$3,000 during 1913, and made valuable improvements in the years 1914 and 1915. The prayer is for a judgment decreeing "that plaintiff is the owner in fee simple absolute, possessed and entitled to the possession of the undivided three-fourths of the real property above described; that the gift of the said quarter section of land described in said complaint by the said defendant Mary A. Scally to plaintiff and to his wife, Margaret S. Kennedy, is good and valid and a complete, executed gift, and that the defendant (plaintiff?) is entitled to the decree of this court quieting his title to said undivided three-fourths of said quarter section of land"; that defendant has no estate, right, title, or interest therein; that she be enjoined from asserting any claim thereto; and "that plaintiff have such other and further relief as to the court shall seem meet and proper in the premises."

The defendant answered, denying the foregoing allegations of the complaint, and alleging that she permitted plaintiff's wife to occupy the land as the tenant of defendant, without charge or rental, and to "retain the rents, issues, profits, and products of said land"; that any improvements made by plaintiff and his wife upon the land were made solely for their own convenience in their occupation and use thereof; and that the reasonable rental value of the land was far in excess of the value of such improvements. The defendant also filed a cross-complaint against plaintiff in his individual capacity and as administrator of the estate of Margaret S. Kennedy, deceased, in the usual form of an action to quiet title. In her

cross-complaint the defendant prayed that "said plaintiff and said cross-defendants be required to set forth the nature of his or their claims and that all adverse claims of plaintiff or cross-defendants may be determined by a decree of this court" and that defendant's title be quieted and for general relief.

Evidence bearing upon the issues raised by the pleadings was presented by both parties without any objection as to the form or nature of the action. The court found that Margaret S. Kennedy died intestate on the 17th day of February, 1920, leaving surviving her the plaintiff and the defendant as her only heirs; that the defendant gave the land to plaintiff and his wife on or about August 15, 1912, and then and there placed them in possession of the same as the owners thereof; that during the year 1912 the plaintiff expended the sum of \$4,000 in making permanent improvements thereon; that the plaintiff and his wife expended additional sums in making improvements as follows: \$3,000 in 1913, \$500 in 1914, and \$50 in 1915; that ever since the gift was made they "held possession of said land, improved the same, harvested the crops raised thereon, leased the property, collected the rent, and managed and controlled the said land as owners thereof," and claimed and "asserted that they owned the same as a gift" from defendant; that such permanent improvements have enhanced the value of the land "far above its rental value"; that the value of such improvements is "largely in excess of the value of the use and occupation of said land at the time of the making of the gift; that the increased rental value of said land in the year 1915, and subsequent years, was due to the enhanced value by reason of the improvements placed thereon by plaintiff and his wife"; that they resided on the land from November 15, 1913, to January 1, 1916; that since January 1, 1916, the land has been occupied by tenants under leases executed by defendant, but that the plaintiff conducted all the negotiations for the leasing of the premises and arranged the terms thereof; that defendant signed such leases merely because she held the record title to the land; that the rental thereof was paid direct to plaintiff and his wife; that the defendant did not at any time give any directions to the tenants under such leases, or make any demands upon them, or in any manner treat them as her tenants.

By the judgment it is decreed that plaintiff "is the owner in fee simple absolute, possessed and entitled to the possession of the undivided three-fourths of the real property described in the complaint"; that "the gift of said quarter section of land * * * by the said defendant and cross-complainant Mary A. Scally to plaintiff and cross-defendant J. H. Kennedy and to his wife, Margaret S. Kennedy, is good and valid and a com-

plete executed gift; and it is decreed that the title of the plaintiff and cross-defendant J. H. Kennedy, so acquired, be and the same hereby is quieted and vested in such plaintiff and cross-defendant J. H. Kennedy, to said undivided three-fourths of said quarter section of land"; that defendant "has no estate, right, title, or interest whatever in or to said undivided three-fourths of said quarter section of land"; and that she be enjoined from asserting any claim thereto.

[1] The most serious question raised by appellant is whether the plaintiff, being the owner of the equitable title only, was entitled to a decree quieting his title against the defendant, who held the legal title. Appellant cites many decisions in this state to the effect that an action to quiet title is not the proper remedy for the owner of an equitable interest to invoke against the owner of the legal title, among them being that of *Chase v. Cameron*, 133 Cal. 231, 65 Pac. 460. In *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, 26, 159 Pac. 158, 160, it is said:

"The reason for the rule announced in *Chase v. Cameron* is that, if the owner of equities could sue to quiet title, he might obtain a judgment based upon his adversary's fraud, without setting up, in his pleadings, the facts constituting such fraud. This would be manifestly unfair."

In the instant case the complaint and the answer to the cross-complaint set up the facts upon which plaintiff's claim of title is based. The plaintiff and the cross-defendants prayed for general relief. Under the pleadings and on the findings they were entitled to a decree determining their interest in the land. It may be conceded that a more appropriate judgment would have been one declaring that the defendant held the legal title in trust for plaintiff and cross-defendants and requiring her to convey the same to them. The objection now made to the judgment was raised for the first time in appellant's reply brief. Had it been made at the trial, it is probable that the more appropriate judgment would have been rendered. Further, the defendant prayed that "all adverse claims of plaintiff or cross-defendants may be determined by a decree of this court." In compliance with such prayer the decree adjudges "that the gift of said quarter section of land * * * is good and valid and a complete executed gift." If the judgment had gone no further, it would have established plaintiff and cross-defendants' ownership of the land. Defendant's rights are not prejudiced by the further provisions of the decree quieting the title so adjudged.

[2] Appellant contends that the evidence is insufficient to establish the alleged gift. Plaintiff testified that about February, 1912, when himself and wife and defendant and her son were together, Mrs. Kennedy said to plaintiff, "Mama has come over and turned

over one of her ranches to us to farm;" that defendant's son asked if that was the proposition made, and the defendant said, "No, I gave them the ranch to do what they pleased with;" that—

"she told me she would like to have me come over right away; she would turn things over to me. * * * Two or three days later I went to Lemoore. * * * I think my wife went with me and Mrs. Scally to the ranch. * * * Mrs. Scally took me to the men; I think there were two; * * * and she told them from now on to look to me for their pay; that she had turned the ranch over to us, and she was through with it. * * * She says: 'I will give you the ranch, and if you want the horses you can buy them, or use them for a while and afterwards I will sell them.'"

J. K. Kennedy, plaintiff's father, testified that on two occasions defendant said she had given the place to plaintiff and his wife. C. K. Kennedy, plaintiff's brother, and Walter McNamara, testified that defendant had made similar statements. Defendant denied having given the land to plaintiff or his wife, or having made the statements related by plaintiff and his witnesses. There is ample evidence to have sustained a finding that no gift was made, but there is also sufficient evidence to support the finding of the court that the defendant gave the property to plaintiff and his wife, and appellant's argument in this connection is addressed to the weight of the evidence rather than its sufficiency.

[3] The evidence fully supports the findings of the court as to expenditures made by plaintiff and his wife for permanent improvements. It shows clearly that the alleged gift was made, if at all, not later than February, 1912, and that immediate possession was taken. The complaint alleges and the court finds that the gift was made and possession given about August 15, 1912. This discrepancy is important only as bearing upon the amount expended in reliance upon the gift. The court finds that \$4,000 was so expended in 1912, without specifying in what part of the year the expenditures were made. It may reasonably be inferred from the evidence that a considerable part of such expenditures were made prior to August 15th of that year. However, if the \$4,000 expended in 1912 be eliminated entirely, the findings as to expenditures in subsequent years sufficiently support the judgment. The sum of \$3,000 was expended in 1913. Testimony as to the rental value of the premises at the time the gift was made ranged from \$160 to \$800 a year. The expenditures made in 1913 alone, therefore, were nearly 4 times the highest estimate of the rental value and more than 18 times the lowest estimate. After January 1, 1916, the premises were leased for a cash rental of \$2,000 a year. This higher rental was due to the fact that plaintiff had leveled and checked the land and planted it to alfalfa.

Appellant attempts to show that the rental value of the premises exceeds the alleged expenditures for improvements by adding plaintiff's gross receipts, including the receipts from a dairy conducted by plaintiff, prior to January 1, 1916, to the rentals received thereafter. The total amount so received undoubtedly exceeds such expenditures. The argument, however, is manifestly unsound. It is perfectly clear that the expenditures made up to January 1, 1914, greatly exceed the rental value of the premises from February, 1912, to January, 1914. Plaintiff's possession and expenditures made up to that time relieved the parol gift from the operation of the statute of frauds, and the rights of the parties then became fixed. No subsequent receipts from the property or increased rental value thereof could affect those rights. *Howard v. Stephens*, 38 Cal. App. 296, 314, 176 Pac. 65. The increased rental value of the premises was due largely to the improvements made by plaintiff and his wife. "The fact that the permanent and valuable improvements spoken of have given to the property a rental value it did not theretofore have is a false quantity. Otherwise, the very thing equity requires to be done would defeat its object." *Howard v. Stephens*, supra, 38 Cal. App. 314, 176 Pac. 71.

[4, 5] The evidence to establish a parol gift of land should be clear and convincing. "Whether the evidence in a given case is clear and convincing is a question, in the first instance to be determined by the trial court, and its conclusion is not to be disturbed, unless the reviewing court can say, after an examination of the entire record and all the circumstances surrounding the transaction as there disclosed, that such conclusion is clearly unwarranted by the evidence." *Howard v. Stephens*, supra, 38 Cal. App. 311, 176 Pac. 70; *Couts v. Winston*, 153 Cal. 686, 688, 96 Pac. 357; *Beckman v. Waters*, 161 Cal. 581, 584, 119 Pac. 922.

[6] "The cases are numerous, and the rule may be considered well settled, that where a parol gift of real estate is made in praesenti, and the donee has entered under the gift, and has made permanent and valuable improvements upon the realty, and the circumstances are such that it would be unjust to the donee if he were thereafter to be deprived of the property by reason of imperfections in the gift, equity will treat the acts of the donor, together with the acts of the donee, as being such performance of the gift as will relieve the contract from the operation of the statute of frauds, and it will under such circumstances lend its assistance to the perfection of the donee's title." *Burris v. Landers*, 114 Cal. 310, 313, 46 Pac. 162, 163; *Husheon v. Kelley*, 162 Cal. 656, 124 Pac. 231; *Howard v. Stephens*, supra; *Kinsell v. Thomas*, 18 Cal. App. 683, 124 Pac. 220.

[7] Plaintiff was asked: "Did you ever acquire an interest in those premises?" Defendant objected on the ground, among others not urged on appeal, that the question called for the conclusion of the witness. The objection was overruled, and the witness answered in the affirmative. The witness testified fully as to the facts upon which his claim of interest was based, and hence the ruling could not have prejudiced defendant's rights.

[8] A witness was asked by counsel for plaintiff as to the cost of the improvements made by plaintiff. He answered: "I couldn't do it for \$100 an acre." Defendant's counsel moved to strike out the answer, but the court failed to rule on the motion. While the answer should have been stricken out, the witness later testified that the reasonable cost of making the improvements was \$100 an acre. This cured the error in failing to strike out the former answer.

[9] Plaintiff was permitted to testify that he would not have made such improvements if he had not believed that the property belonged to him as a gift from the defendant. The evidence was admissible as tending to show that the improvements were made in reliance upon the gift.

[10] Evidence was properly admitted to show that at the time of the alleged gift the defendant owned other property of the value of more than \$150,000. She purchased the property in suit for \$65 an acre in the year 1909. Evidence of the total value of her property tended to rebut any inference that the gift was unnatural or had the effect of depriving her of her means of support.

[11] Evidence was admitted over defendant's objection to the effect that in the year 1919 the defendant gave valuable properties to another daughter and to the son of defendant respectively. The fact that she gave property to two of her three children in that year, without then giving anything to the third, the plaintiff's wife, while perhaps of little weight, is consistent with and tends to support plaintiff's claim of a prior gift to him and his wife of the property in controversy.

[12] The court found that plaintiff's wife paid part of the taxes upon the land after the time of the gift and the defendant a part thereof. Appellant contends that the evidence is insufficient to support this finding. The question of payment of taxes is not a material issue in the case. Plaintiff's cause of action is not dependent thereon, and defendant made no claim for reimbursement for taxes paid. The same is true as to water assessments paid by defendant.

Other points relied on are similar to those discussed, and what has been said sufficiently disposes of them.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

62 Cal. App. 505

DUKE v. THORNBURY. (Civ. 4564.)

(District Court of Appeal, First District, Division 2, California June 14, 1923.)

1. Appeal and error ⇐1040(10)—Error in overruling demurrer not ground for reversal after trial on merits.

Error in overruling demurrer to complaint was not ground for reversal after a trial on the merits after the defendant by her answer had put in issue all matters going to the substantial rights of the parties.

2. Appeal and error ⇐1071(6)—Finding held sufficient on issue of whether plaintiff had received payments on note held as collateral.

In an action on a note, defended on the ground of payment, court's failure to find on issue of whether the plaintiff had received any payments upon the collateral held by him held not ground for reversal, in view of finding that no part of the note sued on had been paid except a specified amount.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Oscar Duke against Alpha E. Thornbury. Judgment for plaintiff and defendant appeals. Affirmed.

Wal J. Tuska, of San Francisco, for appellant.

W. E. Gearhart, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against her upon a promissory note executed and delivered by her to the plaintiff. The appeal is presented to us upon the judgment roll alone, and it is contended that the general and special demurrer of the defendant to the complaint should have been sustained, and that the judgment must be reversed because of the failure of the trial court to find upon certain issues presented by the pleadings. The plaintiff set out in full in the complaint the note sued upon, and also alleged that he had received from the defendant as collateral security for the payment of said note a certain promissory note of John L. Stickel, which note was also set out in full in the complaint.

[1] It must be conceded to the appellant that the allegations in the complaint as to the nonpayment of the note upon which recovery was sought were ambiguous and insufficient, and that the special demurrer attacking them upon these grounds should have been sustained. However, after the court had overruled the demurrer, defendant answered, admitting the execution of the note sued upon and denying that defendant had failed to pay the same. This, of course, would cure any defective allegations in the complaint upon these matters. The error or the trial court in overruling the demurrer would not warrant a reversal of this judg-

ment after a trial upon the merits and after the defendant had put in issue by her answer all matters going to the substantial rights of the parties. In the case of *Alexander v. Central L. & M. Co.*, 104 Cal. 532, 536, 38 Pac. 410, 411, it was said:

"Aside from these reasons, if we concede the complaint defective in this regard by reason of uncertainty, yet that uncertainty is not such as demands a retrial of a case which has gone to judgment upon the facts. It is not in all cases where error has been committed by trial courts in overruling demurrers to complaints upon the grounds of ambiguity or uncertainty that this court will order a reversal of a judgment based upon a trial of the issues made by the complaint and answer. The same rule applies to errors of this character as is invoked as to all other errors of the court. It must not be mere abstract error, but it must be prejudicial and injurious error in order to avail appellant, for otherwise he has no cause of complaint. It is apparent to the court from this record that no harm resulted to appellant by reason of the order of the court overruling the demurrer. The denials of the answer are full and complete. * * *

See, also, *Trask v. Garza*, 51 Cal. App. 739, 197 Pac. 807; *Ferry v. O'Brien* (Cal.) 206 Pac. 449; *Ransch v. Arp*, 39 Cal. App. 580, 179 Pac. 694; *Myers v. Canepa*, 37 Cal. App. 556, 174 Pac. 903, 906; *Sledge v. Stolz*, 41 Cal. App. 209, 182 Pac. 340; *Menefee v. Oxnam*, 42 Cal. App. 81, 183 Pac. 379. In the case of *National Bank v. Exchange Nat. Bank*, 186 Cal. 172, 180, 199 Pac. 1, 5, the court said:

"In view of the answer and the trial upon the merits it is unnecessary to consider the special demurrer. The rights of the parties were fully litigated under the pleadings. The evidence * * * of the nonpayment of the plaintiff's claim was fully presented to the court, so that a technical error, if any, in the statement of the causes of action in the complaint would not justify the reversal of the case."

[2] The next objection of appellant is that the trial court erred in failing to find whether or not the plaintiff had received any payments upon the note of Stickel held by plaintiff as collateral security. The findings recite that no evidence was offered by the defendant at the trial and it is found:

"That no part of said promissory note, principal or interest, has been paid, except \$492.50 on account of interest."

Defendant was given credit for this amount and judgment rendered against her for the balance due. The question of whether or not the plaintiff had received any payments upon the collateral held by him was an issue made by the pleadings, the answer alleging, upon information and belief, that plaintiff had received from Stickel certain payments upon his obligation, the exact amount of which

was alleged to be unknown to the defendant. This was an issue at the trial. The evidence is not before us, but, if it had shown that plaintiff had received any payments upon the note held as collateral, such payments would have been applicable upon the obligation of the defendant, and would have reduced the amount owing upon her note by the amount of the payments received upon the collateral. Therefore a finding that only \$492.50 has been paid upon the obligation of defendant, and that there is due and owing to plaintiff thereon the sum of \$2,623.08, principal and interest, is also an implied finding that no amount greater than \$492.50, applicable upon defendant's note, was ever received by the plaintiff from any source whatsoever. While it would have been desirable to have an express finding regarding the receipt of payments upon the collateral, a claim that its absence would constitute prejudicial error under the facts just recited need not be seriously discussed.

The judgment is affirmed.

We concur: **NOURSE, J.; STURTEVANT, J.**

(62 Cal. App. 457)

PINQUE v. J. B. HILL CO. (Civ. 4385.)

(District Court of Appeal, First District, Division 2, California. June 8, 1923.)

1. Appeal and error §994(3)—Trial court's conclusions as to weight of testimony not disturbed.

The weight to be accorded the testimony of a witness was a matter for the trial court, and its conclusions will not be disturbed on appeal.

2. Pleading §236(5)—Denial of defendant's motion for leave to amend answer to conform to evidence not abuse of discretion where matter was admissible without amendment.

The denial of defendant's motion to amend answer so as to make it conform to the evidence held not an abuse of discretion where the matter sought to be alleged, if material, could have been presented to the trial court without amendment.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Mary E. Pinque against the J. B. Hill Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

A. M. Drew and Harris & Hayhurst, all of Fresno, for appellant.

Everts, Ewing & Wild, J. R. Fitch, and D. F. Conway, all of Fresno, for respondent.

NOURSE, J. Plaintiff sued for the recovery of damages sustained by reason of

the taking of certain personal property under a writ of execution on a judgment which was subsequently reversed on appeal. Plaintiff herein, who was the defendant and judgment debtor in the former action, was a tenant of the defendant herein. The former action lay in two counts, one alleging a cause of action in ejectment in the ordinary form and the other alleging that the plaintiff therein had elected to terminate the lease upon the ground that the lessee had forfeited her rights under the terms of the lease. Judgment in that action went for the plaintiff but was reversed on appeal to the Supreme Court. *J. B. Hill Co. v. Pinque*, 179 Cal. 759, 178 Pac. 952, 3 A. L. R. 669. The judgment in the superior court had however, allowed the *J. B. Hill Co.* \$509 by way of damages for injury to the building and the further sum of \$300 as the value of the use and occupation of the premises. Execution was had upon that judgment pending the appeal, and the personal property, consisting of machinery, tools, and appliances used by the lessee for the purpose of conducting an automobile garage, was sold, and the defendant herein was placed in possession of the premises. Upon the return of the remittitur from the Supreme Court the *J. B. Hill Company* filed an amended complaint setting up three distinct causes of action, the first in ejectment, the second for damages for waste committed on the premises by the lessee, and the third for the cancellation of the lease upon the ground that the terms thereof had been changed contrary to section 1700 of the Civil Code. The trial judge sustained the demurrer to the first and third causes of action and the case went to trial upon the second. Judgment was thereafter rendered in favor of the lessee, from which and the order sustaining the demurrer to the first and third causes of action the *Hill Company* appealed. The judgment in so far as it related to the first and second causes of action was sustained, but was reversed upon the ground that the trial court was in error in sustaining the defendant's demurrer to the third cause of action. *Hill v. Pinque* (Cal. App.) 204 Pac. 241. The remittitur in said action was filed in the superior court on March 24, 1922. The lessee commenced this action by the filing of the complaint in the same court on October 24, 1919. Judgment was entered in favor of the lessee, the plaintiff herein, on June 5, 1922, for the sum of \$1,232.71. The appeal is from the judgment.

Two grounds are urged by the appellant: First, that the evidence is insufficient to support the judgment; and, second, that the

court erred in denying the appellant's motion to amend its answer to conform to the proof. On the first point it is said that all the testimony given for the purpose of establishing the value of the property taken came from the witness Weyant, who was the former business manager of the respondent and who acted throughout the proceedings and signed the complaint as her attorney in fact, she having abandoned the place and left for France some time prior to the commencement of this action. It is also said that the testimony of this witness is uncertain and unsatisfactory; that he demonstrated a lack of knowledge of the values of the property, which had been purchased secondhand, and which, in some instances at least, had been obtained by the respondent without payment of the purchase price therefor.

[1] We may agree with all that appellant says regarding the weakness of the testimony of this witness, but that was a matter which the trial court was required to judge, and its conclusions thereon cannot be disturbed upon this appeal.

[2] Upon the second point it is said that the appellant moved to amend its answer to conform to the evidence, and particularly to allege that the property was not the property of the respondent as she had not paid for it, but had merely acquired it as bankruptcy stock, and that, secondly, she was not damaged by the taking of the property by the judgment creditor. The motion to amend the answer does not appear in the record, and it is impossible for us to determine the grounds upon which it was made or the time when notice thereof was given. The respondent states in her brief that the motion was made after the findings of fact were made and after the judgment was rendered and filed. But, in any event, we are unable to see how the appellant suffered any prejudice by the order of the trial court refusing its application for leave to amend its answer. The evidence was all before the court, and if the failure to pay for the property in suit was material, it was a matter which the appellant could have presented to the trial court without amending its answer. We cannot, therefore, say that the trial court abused its discretion in denying the appellant's application for leave to amend. *Green v. Burr*, 131 Cal. 236, 239, 63 Pac. 360.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

62 Cal. App. 380

**CONTRACTORS' & BUILDERS' SUPPLY CO.
v. KLAY et al. (Civ. 2344.)**(District Court of Appeal, Third District,
California. June 2, 1923.)**Mechanics' liens — 290(5)—Judgment in mechanic's lien foreclosure based on obscure findings cannot stand.**

In a mechanic's lien foreclosure case, judgment for the materialman on obscure finding as to payment by him to one defendant of the sum for which judgment was given must be reversed in view of finding that plaintiff had been paid for the material furnished for the construction of the building.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Suit by the Contractors' & Builders' Supply Company against A. B. Klay and others. From a judgment for plaintiff against A. B. Klay, defendant Klay appeals. Reversed.

Griffin, Boone & Boone, of Modesto, for appellant.

J. B. Jennings, of Modesto, for respondent.

HART, J. This action is based on the Mechanics' Lien Law, and is for the foreclosure of a lien upon a quarter section of land belonging to the defendants above named other than the defendant Klay, and situated in Stanislaus county, said lien arising by reason of the furnishing by plaintiff of certain materials to be used and which were used in the construction of a dwelling house on said real property. The judgment denied to the plaintiff the claim of lien against said property, and acquitted the defendants, other than defendant Klay, of any liability upon the claim for which the lien was sought to be asserted, but awarded the plaintiff judgment against the defendant Klay in the sum of \$328. This appeal, supported by the judgment roll alone, is by the defendant Klay from so much of said judgment as awards, as against him in favor of the plaintiff, the said sum of \$328.

The defendant Klay, a contractor, entered into a contract with the owners of the said real property for the construction of a 1½-story dwelling house on said land. The complaint states that, under an agreement with Klay, it furnished materials, consisting of lumber and mill work, to be used and which were actually used in the construction of said building, of the total value of \$1,580.40, the same to be paid for in cash as they were delivered; that of said amount the sum of \$1,144.50 was paid, and that there remained due and unpaid of said amount at the time said dwelling house was completed, on the 1st day of March, 1920, the sum of \$433.90; that on March 17, 1920, the plaintiff filed and recorded, in due and legal form, a claim of

lien upon said dwelling house and land in said sum of \$433.90.

The answer specifically denies all the allegations of the complaint, and sets up a special defense to the effect that the defendants had fully discharged and satisfied the claim sued for, and, in fact, had paid the plaintiff more than was its due on the claim upon which it declares.

The court found that the materials were furnished by plaintiff as stated in the complaint; that all of said materials were actually used in the construction of the building likewise mentioned, and that they were of the value of \$1,578.40; that plaintiff duly and in proper form filed its claim of lien on the said building and the real property upon which it was erected in the sum of \$433.90, alleged to be the balance due for said materials at the time of the completion of said building, but found that the claim so filed involved an overcharge of \$105.90, and that the true balance claimed by plaintiff is and was the sum of \$328.

These findings were succeeded by the following: That on the 15th day of January, 1920, the defendant M. J. Kline paid to said Klay the sum of \$1,000 on the contract price for the construction of said building; that said plaintiff received as payment from the said defendant Klay the sum of \$750 of said \$1,000 paid as aforesaid; that on the 19th day of January, 1920, said Klay paid to the plaintiff the sum of \$750, with the express understanding and agreement between him and the plaintiff, and upon the express direction of Klay to that effect, that said sum of \$750 so paid to plaintiff should be applied to and become a payment on account of the materials furnished Klay by plaintiff as alleged in the complaint; that the plaintiff "failed and neglected to apply said \$750 on said indebtedness for said materials, but applied a portion thereof to an indebtedness owed by said defendant Klay on an entirely different job for others than the defendants, or any of them, and other than that set forth in plaintiff's complaint, and not connected in any way with the materials furnished for the work of the construction of the building set forth in plaintiff's complaint"; that the plaintiff had knowledge and notice at the time of the payment of said sum of \$750 by the said Klay that said sum was received by said Klay from the defendant M. J. Kline as a payment on the contract price of said building mentioned in plaintiff's complaint; that said sum of \$750 so paid by said Klay to plaintiff "more than satisfied the balance due to the plaintiff for materials furnished for the construction of the building, as set forth in plaintiff's complaint on file; that the claim or demand sued on in said complaint has been fully paid, discharged, and settled by the said defendants, and that the said defendants have paid to the said plain-

tiff more money than the said plaintiff had coming or was entitled to on said claim sued on in said complaint"; that only a portion of the said sum of \$750 paid by said Klay to the plaintiff was applied and credited on the account for materials used in the construction of the building mentioned in plaintiff's complaint.

The court then made the following finding:

"That the plaintiff has paid to and for the use of the defendant A. B. Klay, and credited on the general account of the said defendant A. B. Klay with the said plaintiff, the sum of \$328, and that the same, or any part of said \$328 so credited on the general account of the plaintiff, has not been paid on said general account, but the said sum of \$328 is a payment on materials furnished in the construction of the building set forth in plaintiff's complaint."

No brief has been filed herein for and on behalf of the respondent. This omission has been a source of regret to this court, because of the perplexity which it must be confessed has confronted us in attempting an interpretation of the findings and the meaning of the judgment from which the appeal is taken. The assistance of counsel who presumably prepared the findings might have been of much help to us in this particular. This remark is due to the fact, which must become obvious upon reading them, that the findings are not free from the imputation of ambiguity. Indeed, the finding last above quoted herein is unintelligible. So far as information upon the subject is to be obtained from the finding itself, we have been unable to determine whence the \$328 came, whither it went, to whom it belongs, or, in fact, what it has to do with this case. It will be observed that in the first part of said finding it is said that the plaintiff paid that sum for the use of defendant Klay, and credited rather than debited it on the general account of the said defendant. This is followed by the statement that said \$328, "so credited on the general account of the plaintiff" has not been paid on said general account. It then states that the said sum of \$328 "is a payment on materials furnished in the construction of the building set forth in plaintiff's complaint." Whether the payment of said sum on account of the materials furnished for the building mentioned in the complaint was by the plaintiff or the defendants, said finding is palpably obscure, and cannot be made clear as to that proposition, even when considering it in comparison with other portions thereof. This being the only \$328 referred to in the findings, we assume that it is that sum for which the court awarded judgment for the plaintiff and against said Klay. But, as has been pointed out, the finding is so confusing by reason of its palpable inconsistencies that it can afford no safe foundation for a judgment against anybody in this case,

even if it could in any event support a proper judgment herein. If the \$328 relates to another and entirely different account between the plaintiff and the defendant Klay, then the judgment cannot stand, since, clearly, it is not within the issues made by the pleadings. If, on the other hand, it was the intention to declare by said finding that there was still \$328 due the plaintiff for the materials furnished for the building in question, then the finding is inconsistent with the finding that the entire sum which was coming to the plaintiff for the materials furnished for use in the construction of said building had been fully paid, discharged, and satisfied. Again, if said finding, when viewed in connection with the finding that only a portion of the said sum of \$750 was credited on the account upon which this action was based, is to be interpreted to mean that the plaintiff paid a portion of the said \$750 on some other account between it and Klay, and that by reason thereof there remained an unpaid balance on the account sued on, then the plaintiff misappropriated so much of said sum as it credited on such "other account." Section 1479, subd. 1, Civ. Code. Under the terms of said section the plaintiff, having been directed by Klay at the time he paid the \$750 out of the \$1,000 obtained from the other defendants to apply said amount to the account upon which it has herein sued, was without authority to apply said \$750 or any portion thereof on any other account than that created by the furnishing by plaintiff to Klay of the materials which were to be used, and which were used, in the construction of the building mentioned in the complaint, unless the said sum of \$750 was in excess of the actual balance due on the account for the materials mentioned in the complaint, in which case, probably, the plaintiff would have been at liberty to apply the excess toward the satisfaction of any other account which it might have had against said Klay. If, though, such was really the situation, the court, as above stated, was without authority to enter a judgment for the plaintiff for the excess amount so applied.

But, whatever might have been in the mind of the court when making the finding above considered, it is clear that the court did find that the \$750 paid to the plaintiff out of the said sum of \$1,000 paid to Klay by the other defendants "more than satisfied the balance due to the plaintiff for materials furnished for the construction of the building as set forth in plaintiff's complaint," and that "the claim or demand sued on in said complaint has been fully paid, discharged, and settled by said defendants," etc. Upon this finding the court had left to it but one course to pursue, to wit, to render and cause to be entered a judgment in favor of all the defendants as against the plaintiff upon the claim sued for herein.

From every viewpoint from which the findings may be considered, the judgment must be reversed; and it is so ordered.

We concur: FINCH, P. J.; BURNETT, J.

62 Cal. App. 446

MESSERSMITH v. SMITH. (Civ. 4559.)

(District Court of Appeal, First District, Division 2, California. June 7, 1923. Rehearing Denied July 3, 1923. Hearing Denied by Supreme Court Aug. 6, 1923.)

1. Tenancy in common — 55(3)—Failure to make other tenants parties plaintiff held not to defeat right of action.

A right of action to quiet title was not defeated because it developed at the trial for the first time that plaintiff's interest in the premises was only that of a tenant in common with others who were not parties to the action, since a tenant in common was entitled to sue either jointly or severally for the protection of her interest, under Code Civ. Proc. § 384, and therefore it was not error to refuse to stop the proceeding in order to make the other tenants in common parties.

On Hearing in Supreme Court.

2. Witnesses — 205—Escrow instructions given to grantor's attorney are not privileged communications.

Where a grantor delivered a deed drawn for her by her attorney to the attorney in escrow, her oral escrow instructions to him were not privileged communications in the course of professional employment, within Code Civ. Proc. § 1881, subd. 2, so that he can be required to reveal such instructions to the grantee without the consent of the grantor.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

Action to quiet title by Rowena Messersmith, as administratrix of the estate of Elizabeth Hans, deceased, against Lucas F. Smith, Jr., executor of the last will and testament and of the estate of Elizabeth Schwan, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Lucas F. Smith and Stanford G. Smith, both of Santa Cruz, for appellant.

Rea, Cassin & Caldwell, of San Jose, for respondent.

NOURSE, J. This is an action to quiet title commenced by the plaintiff, as administratrix of the estate of Elizabeth Hans, deceased, against the defendant, as executor of the estate of Elizabeth Schwan, deceased. Judgment was rendered in favor of the plaintiff. Defendant appeals under the provisions of section 953a of the Code of Civil Procedure.

For a long time prior to and on November 10, 1911, Elizabeth Schwan was the owner of the tract of land described in the complaint. On that day she made a deed of this property conveying an undivided two-fifths thereof to Elizabeth Hans, an undivided two-fifths to Conrad Scholl, and the remaining one-fifth to Elias Trust. Deceased's deed was executed under the direction and advice of her attorney, who testified at the trial that the grantor delivered the deed to him in escrow with instructions that he deliver it to the grantees upon her death. Subsequent to its delivery the grantor procured the deed from her attorney on more than one occasion and exhibited it to some of her friends. On one of these occasions she returned to the office of her attorney and told him that the deed had been destroyed. It was never seen thereafter, but, over the objection of appellant, what purported to be a typewritten carbon copy of the original deed was produced by the attorney who drew it and was received in evidence. Some time after the destruction of the deed the grantor therein made and executed her will disposing of this same property. The defendant is the executor under this will.

The appeal is based upon the grounds: (1) That Scholl and Trust should have been made parties to the action; (2) that the testimony of the grantor's attorney was inadmissible; and (3) that the evidence was insufficient to support the findings of fact.

[1] 1. It appears that the interests of Scholl and Trust were not disclosed until the trial of the case. No allegations appear in the complaint relating to the fact that these parties asserted any claim against the interests of the parties who were named in the action. Thus no demurrer was filed raising the point of nonjoinder of parties. It seems to be conceded that under the deed Scholl and Trust were both tenants in common with the administrator of the estate of Elizabeth Hans, a fact which appeared for the first time when the deed was offered in evidence. Such being the case, it was not necessary to stop the proceedings in order to make either Scholl or Trust a party to the action. As tenant in common the administrator was entirely to sue either jointly or severally for the protection of her interest. Section 384, Code Civ. Proc.

2. Upon the question of the admissibility of the testimony of the grantor's attorney, appellant cites subdivision 2 of section 1881 of the Code of Civil Procedure, which provides:

"An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him."

Under the provisions of the Code section appellant's position is unanswerable. The Legislature prohibited the admission of tes-

timony based upon confidential information gained by an attorney from his client. The reason for the law is illustrated by this case. The deed which was executed by the deceased was never delivered to the grantees nor to any one to hold for them under written escrow instructions. Without the testimony of the attorney the destruction of the deed by the grantor before delivery was a complete and efficient revocation, as she undoubtedly intended it to be. By taking the testimony of the attorney, the want of escrow instructions was supplied by parol and a deposit in escrow was created. The value of the Code rule as well as the evil of its nonobservance is also illustrated by the circumstances of this case. All the acts of the grantor and statements made by her to her friends demonstrate that she did not know the effect of her deed or that she did not intend to create an escrow condition. If such had been her intention, the simplest precaution would have dictated the writing of instructions covering the escrow. If she had been living at the time of the trial, she could have denied the testimony of her attorney, and it would seem to be self-evident that his testimony was just the kind intended to be prohibited by the Code section. But the Supreme Court, in *Estate of Nelson*, 132 Cal. 182, 188, 64 Pac. 294, held that the confidential relation between attorney and client was waived when he was employed to draw his client's will; that "by requesting his attorney to draw his will the client impliedly asks him to do and say whatever may at any time and place be requisite for the purpose of establishing the integrity of the will." If this is true regarding the preparation of a will, it should also apply to conversations relating to the preparation and execution of a deed placed in escrow transferring possession of real property after the death of the grantor. Though we are unable to draw from the statute the exception stated in the *Nelson* Case, the decision of the court is controlling. Respondent also relies upon *Smith v. Smith*, 173 Cal. 725, 732, 161 Pac. 495. But this case is not in point, because the communications of the attorney Russell there under consideration were made in the presence of other parties, while the testimony of the attorney Taylor was not attacked on the ground that it was privileged.

3. The attack upon the findings is based upon the ground that the testimony of the grantor's attorney was inadmissible. It is granted that respondent's entire case depends upon the testimony of this witness, and that if this testimony was stricken out her case would fall. There cannot be any question that there is sufficient evidence in this testi-

mony to support the findings of the trial court.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [2] In denying the petition for transfer to this court after decision by the District Court of Appeal, we deem it proper to say that escrow instructions given by the grantor in a deed are not privileged communications, even though such instructions be given to a party who has theretofore, or at the time, occupied the position of attorney to the grantor. The assumption that the attorney while acting as the depository of the deed is occupying the position of attorney to the grantor, and acting as the agent of the grantor, assumes the very matter in issue where the question of delivery in escrow is involved, because, if the attorney is acting solely as the attorney for the grantor, then the deed in the possession of the attorney, as such, is, in legal effect, in the possession of the grantor, and there has been no delivery whatever. The very act of constituting the attorney depository of the deed in escrow makes him the agent of both the grantor and grantee (*McDonald v. Huff*, 77 Cal. 279, 282, 19 Pac. 499; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563; *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958), and renders the instructions given to him unprivileged.

Instructions to the holder of a deed delivered in escrow with reference to its delivery are not "in the course of the professional employment" of the attorney within the meaning of section 1881, subd. 2, C. C. P., although the delivery be made to the grantor's attorney, but are instructions which he is bound to reveal at the request of the grantee for whose benefit the instructions are given.

"Where the communication between the client and attorney is one authorizing the attorney to perform some act on behalf of the client, the communication giving such authority is not a confidential communication by the client, and the attorney may testify to the instructions given to him. *Burnside v. Terry*, 51 Ga. 186; *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393; *Bruce v. Osgood*, 113 Ind. 360, 14 N. E. 563." *Collette v. Sarrasin*, 184 Cal. 283, 284, 193 Pac. 571, 572.

See, also, *Henshall v. Coburn*, 177 Cal. 54, 169 Pac. 1014; *Ruiz v. Dow*, 113 Cal. 498, 45 Pac. 867.

The petition is denied.

62 Cal. App. 349

AGALIANOS v. AMERICAN CENT. INS. CO.
(Civ. 2580.)

(District Court of Appeal, Third District, California. May 29, 1923. Modified on Rehearing June 20, 1923.)

1. Pleading ⚡408—**Failure of complaint to state sufficient facts may be raised at any time.**

Under Code Civ. Proc. § 434, objection to complaint for want of facts is not waived by failure to raise it by demurrer, answer, or during the trial, but may be raised at any time.

2. Insurance ⚡632—**If building only insured while used for particular purposes, such use must be alleged.**

If, as claimed, fire policy only insured building and its contents while the building was occupied for mercantile and restaurant purposes, it was indispensably necessary, in stating a cause of action, to allege that the building was, at time of fire, used for such purposes.

3. Insurance ⚡632—**Complaint held to allege sufficiently, in absence of demurrer or objection, that building was occupied at time of fire for purposes specified.**

Complaint alleging that on certain date, and from that date to and including the date of its destruction by fire, insured was the owner of described building occupied for mercantile and restaurant purposes, *held* to allege sufficiently that the building was used for such purposes at time of fire, in absence of any demurrer or other objection, especially where insurer, by stipulation, limited the trial to the question of cancellation.

4. Insurance ⚡310(2) — **Notice that policy would stand canceled unless premium was paid construed as conditional notice of cancellation.**

Notice by insurer that unless premium was paid within five days it would stand canceled for nonpayment of premium was a conditional notice of cancellation, and, if premium was not paid, operated as cancellation without further notice or other action, but, if the premium was paid, was of no further force or effect.

5. Insurance ⚡665(3)—**Evidence held to support findings of payment of premium and non-cancellation of policy.**

Positive testimony of insured that he paid premium in full to insurance company's local agent *held* to support findings that the premium was paid and that policy was not canceled by notice that it would stand canceled unless premium was paid within five days.

6. Insurance ⚡229(2) — **Notice that policy would stand canceled unless premium paid not a cancellation, though cancellation without any reason was authorized.**

Though fire policy provided that either party might, without giving any reason, cause policy to be canceled, notice by insurer that policy would stand canceled unless premium was paid within five days did not cancel and in-

validate the policy; the premium having been paid.

7. Insurance ⚡229(2)—**When premium had been paid policy remained in force, notwithstanding notice that it would stand canceled unless premium was paid.**

Notice by fire insurer that policy would stand canceled unless premium was paid within five days did not cancel policy, where the premium had already been paid before service of such notice.

8. Insurance ⚡654½—**Question whether insured and agent were on friendly terms immaterial on question of payment of premium.**

Where fire insurer claimed its agent, without authority, permitted payment of premium in part by cancellation of his personal indebtedness, questions asked insured as to whether he and the agent were on friendly terms were immaterial.

9. Witnesses ⚡236(4)—**Question asked insured as to business in which he was engaged at time of fire properly excluded as indefinite.**

Though, under policy insuring building and contents only while occupied for certain purposes, question as to business in which insured was engaged at time of fire was perhaps proper as preliminary to direct question as to purpose for which building was being used, it was so indefinite as to justify sustaining of objection thereto.

10. Witnesses ⚡42—**Exclusion of questions as to matter which witness had admitted he did not remember by reason of intoxication held not error.**

Where insurance company's agent admitted that he was so under the influence of liquor at times involved that he could not remember how premium was paid, it was error to exclude questions as to whether he did not buy liquor from insured and become indebted therefor, and whether such indebtedness was not deducted from the premium, or whether he had paid the indebtedness.

11. Witnesses ⚡42, 271(3)—**Affidavit of witness held incompetent, and when admitted without objection not proper subject of cross-examination.**

Where insurance agent disclaimed ability to recall facts as to payment of premium by reason of intoxication, his affidavit to effect that premium was fully paid was incompetent, and, having been admitted without objection, did not authorize cross-examination as to whether he was intoxicated when he signed it.

12. Witnesses ⚡380(5) — **Party could not cross-examine his own witness when he gave no testimony adverse to such party.**

Where insurance agent could give no rational account of facts concerning payment of premium, and gave no testimony adverse to the insurer, who called him, but merely failed to give testimony as favorable to it as desired, it could not cross-examine him, under Code Civ. Proc. § 2049, as to his statements prior to trial.

13. Witnesses ⚡323—Party may cross-examine witness and impeach him when surprised, but surprise must be substantial.

Under Code Civ. Proc. § 2049, one may cross-examine his own witness and impeach him, if taken by surprise by his testimony, but the surprise must be substantial and be founded on testimony at variance with what the party producing him had reason to believe it would be, and prejudicial or detrimental to such party.

14. Insurance ⚡670—Finding held sufficient finding of occupancy for particular purposes at time of fire.

Finding in language of allegation that on certain date, and thereafter and to and including the day of its destruction by fire, insured was the owner of a described building occupied for mercantile and restaurant purposes, held a sufficient finding that it was so occupied at time of fire.

15. Appeal and error ⚡694(1)—Sufficiency of evidence to support finding not reviewable when bill of exceptions does not specify insufficiency.

Under Code Civ. Proc. § 648, sufficiency of evidence to support finding is not subject to review, when bill of exceptions contains no specification of insufficiency of evidence to support it.

16. Stipulations ⚡14(7)—Proof of occupancy of insured building for purposes specified held rendered unnecessary.

In action on fire policy, stipulation that policy was issued, that fire occurred and proof of loss was made, and that, if premium had been paid and policy had not been canceled, the amount of \$1,800 was unpaid and was the amount of the loss, held to admit all essential and material facts except payment of premium and noncancellation of policy, and to render unnecessary proof that premises were occupied for purposes specified in the policy.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Theodore Agalianos against the Amerian Central Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Coogan & O'Connor, of San Francisco, and Arthur L. Levinsky, of Stockton, for appellant.

Stanley M. Arndt and N. A. Brown, both of Stockton (George F. McNoble, of Stockton, of counsel), for respondent.

HART, J. The plaintiff sued to recover on a policy of insurance issued by the defendant to the plaintiff, and covering a certain building and the contents thereof situated in Lodi, San Joaquin county. The action was tried by the court, the parties thereto having expressly waived a trial by jury. The plaintiff was awarded judgment in the sum of \$1,800, which is the amount of the risk provided in the policy. A motion for a new trial was made by the defendant and denied by

the court. The defendant prosecutes this appeal from the judgment upon a bill of exceptions.

The important allegations of the complaint are as follows:

"II. That on the 15th day of April, 1921, at Lodi, county of San Joaquin, state of California, in consideration of the payment by the plaintiff to the defendant of the premium of \$81, the defendant, by its agents duly authorized thereto, made its policy of fire insurance in writing to the amount of \$1,800, a copy of which is annexed hereto marked Exhibit A, and is hereby referred to and made a part hereof as if herein set forth in full.

"III. That on said 15th day of April, 1921, and for a long time prior thereto, and from that date on up to and including the 2d day of July, 1921, the plaintiff was the owner of the property situated at No. 10 South Main street, city of Lodi, San Joaquin county, state of California, including the one-story frame building thereon occupied for mercantile and restaurant purposes and the merchandise therein contained and the store, office, and workshop, furniture, fixtures and equipment, implements, signs, and tools and supplies incidental to the business being carried on in said premises.

"IV. That plaintiff now is, and at all times herein mentioned has been, the owner of the property situated at No. 10 South Main street, city of Lodi, San Joaquin county, state of California.

"V. That on the 2d day of July, 1921, said one-story frame building, together with all its contents, including said merchandise and said store, office, and workshop, furniture, fixtures, and equipment, and said implements, signs and tools and said supplies, were all and each of them totally destroyed by fire."

The answer of the defendant consists of a denial of the allegations contained in paragraphs 3, 4, 5, and 6 of the complaint and a special defense based upon the alleged cancellation of the policy by the defendant upon the 21st day of June, 1921, and prior to the day on which the property was destroyed by fire, to wit, the 2d day of July, 1921.

Among other provisions, the contract of insurance between the plaintiff and the defendant contains the following:

"(1) \$1,000.00. On the one-story roof frame building and its additions (if any) of like construction communicating and in contact therewith, including foundations, sidewalks, plumbing, electrical wiring, and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations, and frescoes, stationary scales, and elevators, belonging to and constituting a part of said building, only while occupied for mercantile and restaurant purposes and situate as above."

[1] The point first urged for a reversal, and which is raised for the first time on this appeal, is that the complaint does not state a cause of action on the policy because it fails to show that the building covered there-

by was, from the time of the issuance of the policy until and including the time at which the building was destroyed by fire, used only for mercantile and restaurant purposes, an allegation which is essential to the statement of a cause of action under the above provision of the policy. There was no objection by demurrer to the sufficiency of the complaint to state a cause of action, nor was there any such objection made in the answer or during the progress of the trial by way of opposition to evidence offered by the plaintiff in support of the complaint; but failure to object to a complaint for want of facts is not waived and may be raised any time. Code Civ. Proc. § 434; *Arnold v. American Ins. Co.*, 148 Cal. 660, 663, 84 Pac. 182, 25 L. R. A. (N. S.) 6.

[2] It has been held that, where, as here, the action is to recover on an insurance policy, a cause of action is not stated unless it be shown by the complaint that the loss alleged was within the terms of the policy. In this case therefore, under the construction placed by the defendant upon the above provision of the contract between the insurer and the insured, it was, to state a cause of action against the defendant, indispensably necessary to allege that the building destroyed was, at the time of the fire, used by the insured for mercantile and restaurant purposes. *Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138; *Arnold v. American Ins. Co.*, 148 Cal. 660, 84 Pac. 182, 25 L. R. A. (N. S.) 6. See, also, *Benicia Agricultural Works v. Germania Ins. Co.*, 97 Cal. 468, 32 Pac. 512; *Mawhinny v. Southern Ins. Co.*, 98 Cal. 184, 32 Pac. 945, 20 L. R. A. 87; *Slinkard v. Manchester Fire Assurance Co.*, 122 Cal. 595, 55 Pac. 417.

[3] As to the meaning of the provision of the policy above quoted herein, the contention of the appellant is that the words "only while occupied for mercantile and restaurant purposes" refer to the building itself, while, on the other hand, the plaintiff insists that, interpreting the provision according to its grammatical construction, as in this case (so it is contended) it should be construed, the said words mean this: That all permanent fixtures, awnings, wall and ceiling decorations, and frescoes, etc., belonging to or constituting a part of said building, shall remain covered by the policy only for such time, during the term of the policy, as the building shall be "occupied for mercantile and restaurant purposes." In other words, the plaintiff takes the position that said provision comprises two different and independent paragraphs or parts, each dealing with a different subject-matter; that the intention to disconnect the two paragraphs so that each should be read without reference to the other is clearly shown by the fact that the second paragraph is not only separated from the first by a semicolon, but commences

with the word "also"; that, as thus considered, the natural and rational meaning of the entire article or provision is that the "appellant insured the building, the merchandise and the store, office, and workshop, furniture, fixtures, and equipment, regardless of the nature of occupancy, but that appellant only insured the permanent fixtures, awnings, wall and ceiling decorations, and frescoes as long as the building was occupied for restaurant and mercantile purposes." Resp. Brief, p. 9.

There is much force in the view that counsel for the plaintiff thus take of the provision of the policy in question; but it is not necessary to determine this particular controversy herein since, assuming that the defendant's construction of the provision is sound, and conceding, as must be done, that it was necessary, to state a case for the plaintiff, to allege that the building at the time of the fire was occupied and used for mercantile and restaurant purposes, we are persuaded to the belief that the complaint in paragraph 3 thereof, in the absence of a demurrer thereto, is sufficient in that particular. It will be observed that in said paragraph it is, in effect, alleged that from the date of the issuance of the policy down to and including the 2d day of July, 1921, on which day it was destroyed by fire, the building was occupied for mercantile and restaurant purposes. The complaint in this regard may be amenable to the criticisms of a demurrer on special grounds, but, even so, it is sufficiently clear to show that the building was, at the time of the fire, used for mercantile and restaurant purposes. At least the facts stated in paragraph 3 clearly imply the existence of the fact that the building was at the time of the fire occupied and used for said purposes, and this is sufficient, in the absence of a demurrer or other appropriate and timely objection to the pleading. The courts are disinclined to view with favor objections to pleadings specifically made for the first time after judgment, where it is clear that upon suggestion before trial, the defect or defects could have been easily remedied or overcome. Speaking of such a situation in a case which, as we have seen, involved precisely the same point as the one we are now considering, it is said in *Arnold v. American Insurance Co.*, supra:

"A somewhat liberal rule, therefore, has frequently been applied in construing a complaint where the objection is made for the first time after judgment. Facts essential to a cause of action appearing by reasonable implication only, and allegations made in the form of a legal conclusion, which merely implied the necessary material facts, have been held sufficient as against such an objection. An example of this is the case of *Penrose v. Winter*, 135 Cal. 289, 67 Pac. 772, where there was no other allegation of the essential fact of non-payment except the allegation that 'there is now

due and owing,' etc. This was held sufficient after judgment, the ground of the ruling being that the objection was rather to the manner of pleading an essential fact than to the total failure to allege such fact, and that such faults, in the absence of demurrer, are cured by the judgment."

While, obviously, the mere admission, either expressly or impliedly, of counsel for the defendant that the complaint is sufficient in the statement of a cause of action cannot have the effect of making a complaint wanting in sufficient facts a good pleading, yet it is undoubtedly true in this case that counsel for the defendant assumed that the complaint herein is sufficient in all respects, for they not only failed to challenge its sufficiency by demurrer or other legal mode of testing the sufficiency of a pleading, but, on the opening of the trial, voluntarily and expressly limited by stipulation the trial to the issue of the alleged cancellation of the policy prior to the date of the destruction of the building and its contents by fire. The stipulation is as follows:

"Mr. Levinsky: We will admit on behalf of the defendant that the policy was issued by the agent, Mr. De Force, at Lodi, and that a fire occurred, and proof of loss was made within time, and if the premium has been paid, and the policy has not been canceled by reason of nonpayment or otherwise, that the amount of \$1,800 has been unpaid and is the loss."

This stipulation, it is clear, involves an admission of all the facts essential to the statement of a cause of action for a recovery upon the policy.

[4] We are now to consider the next point insisted upon for a reversal, to wit, whether the policy was actually canceled prior to the day on which the building and its contents were destroyed, as alleged in the complaint. It was admitted by the plaintiff at the trial that the defendant addressed to and served upon the plaintiff a notice in writing, dated June 15, 1921, to the effect that the premium of \$81 due the defendant under the policy in question had not been paid, and further likewise notified plaintiff that—

"Unless said premium be paid on or before five days from the date of service of this notice, said policy and the whole thereof, including mortgage agreement, if any, will stand canceled for nonpayment of premium without further notice, and thereafter be null and void, and no liability will exist thereunder."

It will be perceived that the above notice was a conditional notice of cancellation. It notified the defendant that unless he complied with the condition therein stated within the time specified in the notice the policy would stand canceled. If in such case the insured defaults in the payment of the premium within the time specified, then, upon the expiration of said time, the notice operates,

ipso facto et eo instanti, to cancel the policy. In other words, in such case, the insured having failed to pay the premium within the prescribed time, the notice then operates to cancel the policy, and no other or further notice or other action by the insurer is necessary to effect a cancellation of the policy. If, on the other hand, the premium be paid by the insured within the time specified in the notice, then the notice is of no further force and effect and the policy will remain a valid contract between the insurer and the insured.¹

[5] The plaintiff positively testified that he, in three different installments, paid in cash the premium of \$81 to one Byron A. De Force, the local agent of the defendant at Lodi through whom the policy of insurance involved herein was issued by the defendant, long prior to the receipt of the above notice.

De Force was made a witness by the defendant and questioned closely as to the matter of the claimed payments by the plaintiff, but stated that, owing to the fact that he was suffering from alcoholism about the time the policy was issued and for some time thereafter, he was unable to say how much money was paid on the premium or in what manner it was paid. In fact, his testimony was so unsatisfactory and, indeed, so unintelligible upon the subject-matter thereof, that the trial judge was impelled to remark: "The witness has not specifically, certainly testified to anything in any fashion that the court can consider it." He did not deny receiving the payment of the premium in full nor did he affirm that he had received such payment. As we shall later see, counsel for the defendant undertook to make him say that part of the payment for the premium was in the application of a personal debt he owed the plaintiff to the satisfaction of the amount due on the premium, but he seemed unable to remember whether such was the fact or not and refused to testify that it was the fact.

It was specifically found by the court that the policy of insurance issued to the plaintiff was not canceled by the defendant in the manner stated in the notice and at the time alleged in the answer, and from this finding the finding is implied that the defendant had paid the premium at the times mentioned by him in his testimony. The testimony of the plaintiff, if believed by the court, as evidently it was, was sufficient to justify the specific finding that the policy was not can-

¹ This paragraph was changed on rehearing to read as above indicated. In the original opinion it read as follows: "It will be readily perceived that the above notice is not a notice of cancellation. It was merely a notice of intention to cancel the policy unless within a designated time the premium is paid. It did not operate *ipso facto* to cancel the policy, but merely notified the defendant that unless he complied with the condition therein stated within the time specified in the notice the policy would be canceled."

celed and the finding of payment of the premium necessarily implied therefrom. At any rate, said testimony is sufficient to support the findings of noncancellation of said policy and the payment of the premium thereon. Indeed, there is in the record no testimony worthy of being so characterized which is contradictory to the testimony of the plaintiff that he paid the premium in full to defendant's agent, De Force, before the receipt by plaintiff of the notice from defendant of its purpose to cancel the policy if the premium were not paid as required by said notice.

[6, 7] Counsel for the defendant contend, however, that, since it is within the rights of the defendant, under the policy issued to the plaintiff, arbitrarily or without stating any reason therefor, to cancel the insurance policy before the end of the term for which it was issued, the effect of the above notice operated, ipso facto, to cancel and so invalidate the force of the policy. It is true that the policy issued by the defendant provides that either the insured or the insurer may at any time, without giving any specific or any reason therefor, cause the policy to be canceled. But the case here is not one in which the insurer, following the provision of the policy authorizing it to cancel the policy merely upon giving the insured five days' notice, has elected to cancel the policy arbitrarily or for unexplained reasons. And it is for this reason that the case of *Wing Chung Long v. Prussian National Insurance Co.*, 33 Cal. App. 715, 166 Pac. 358, cited by the defendant as supporting its position with regard to the effect of the notice herein involved, is not in point. In that case it appears from the opinion that two different written notices were served upon the insured at different times. The first, which was served in January, 1913, was precisely the same as the one here. The second was dated March 25, 1913, and was an unconditional notice of the cancellation of the policy. It was properly held in that case that the defendant, under the terms of the policy, had the right to elect arbitrarily to cancel the policy, notwithstanding that a notice had been previously served upon the insured declaring it to be the intention of the insurer to cancel the policy unless the insurer paid the premium, as to which he was then in default, within five days from the date of such notice. In other words, it was held that the insurer could cancel the policy even though the premium had been paid, and that there was no necessity under the terms of the policy for the insurer to state in the notice of cancellation the grounds upon which or the reasons for which the policy was canceled, and that the prior notice stating that it would be canceled in case the premium was not paid within a specified time was not to be considered as having any connection with

the subsequent notice or as qualifying or limiting its effect. There is, obviously, a marked distinction between that case and the one at bar.² If, therefore the plaintiff within five days from the date of the notice paid the premium to the defendant, the life of the policy would, of course, be perpetuated or retain its legal integrity to the end of its term, unless in the meantime it was canceled by either the insurer or the insured under the provision of the policy investing them with the mutual right of cancellation, exercisable arbitrarily, but, it having been shown that the premium had been paid before the receipt by the plaintiff of said notice, it follows that the contingency (failure of plaintiff to pay premium) upon the happening of which the force of the policy was, by virtue of the terms of said notice, to terminate, did not happen, and the policy therefore remained in full force and effect.

The next assignments of error involve rulings of the court disallowing answers to certain questions propounded to certain witnesses by counsel for the defendant. These assignments are numerous, but are of the same general nature, and may therefore be grouped and thus considered.

The theory upon which it was sought to bring the proposed but excluded testimony into the record was that the defendant's Lodi agent, De Force, transcended the scope of his authority as such agent by accepting, as in payment of the premium, or at least as in part payment thereof, the cancellation by plaintiff of a debt which he (De Force) owed the former for goods and merchandise. See *Tomsecek v. Travelers' Ins. Co.*, 113 Wis. 114, 88 N. W. 1013, 57 L. R. A. 455, 90 Am. St. Rep. 846; *Briggs v. Collins*, 113 Ark. 190, 167 S. W. 1114, L. R. A. 1915A, 686; *Sullivan v. Germania Life Ins. Co.*, 15 Mont. 522, 39 Pac. 742; *Folb v. Firemen's Ins. Co.*, 133 N. C. 179, 45 S. E. 547; *Texas Life Ins. Co. v. Davidge*, 51 Tex. 244; *Hoffman v. Hancock Mutual Life Ins. Co.*, 92 U. S. 161, 23 L. Ed. 539; *Wiley B. Allen Co. v. Wood*, 32 Cal. App. 76, 82, 162 Pac. 121; *Stetson v. Briggs*, 114 Cal. 511, 514, 46 Pac. 603.

After the stipulation of counsel for the defendant as to the truth of certain facts was made, and the plaintiff had introduced in evidence, without objection, the policy and proof of loss, the latter admitted to be properly made, the defendant, under section 2155 of the Code of Civil Procedure, called the plaintiff as a witness. As stated above, the plaintiff repeatedly, and with apparent emphasis, declared in the course of his examina-

² In the original opinion this sentence read: "Thus it is readily to be perceived that there is a marked distinction between that case and the one at bar. Here the notice did not operate, *ex propria vigore*, to cancel the policy, but, as above stated, amounted only to one of intention to cancel it." It was changed on rehearing to read as now indicated.

tion by defendant's counsel that he paid the whole of the premium, a part thereof in cash and a part by means of a check. He was then asked by the defendant's attorney the direct question as to whether the premium was not paid partly in cash and partly by deducting a personal debt that De Force owed him, and the plaintiff answered that De Force had never at any time owed him any money or was indebted to him for any purpose. To contradict this testimony by the plaintiff the defendant called De Force to the witness stand and, as above stated, undertook to show by him that the premium was paid partly by the plaintiff deducting therefrom the amount of a personal indebtedness of said De Force. De Force, as shown, did not seem to remember how or in what manner the premium was paid. Counsel then asked the witness a number of questions, for the purpose, it was stated at the time, of showing by what particular means the premium was paid and the business for which the building was used at the time the policy was issued and the fire occurred.

As illustrative of the character of the questions asked for the purposes stated are the following: Plaintiff was asked by counsel for the defendant whether De Force was in the habit of buying liquor at his (plaintiff's) place, and also if it was not true that he and De Force were on friendly terms at the time of the issuance of the policy and down to the time of the destruction of the premises by fire. Objections to these questions were sustained by the court. Also the following questions propounded to De Force: Whether he had not purchased liquors from the plaintiff for which he did not pay and the amount of which was deducted by the plaintiff from the total amount due for the premium; whether or not De Force was indebted to the plaintiff in the year 1921; whether the witness had paid plaintiff an indebtedness which he (De Force) admitted he owed him in April, 1921; as to the nature of the business in which the plaintiff was engaged in the year 1921. To all these questions objections were made upon the general grounds, and the objections sustained by the court. Counsel for the defendant also asked the witness some questions in the nature of impeachment, to which the court sustained objections on the ground that it was an attempt by defendant to impeach his own witness. These rulings are also assigned as erroneous.

[8, 9] The questions by the defendant which the court refused to allow the plaintiff to answer called for testimony which could have reflected no substantial light upon the issue which was being tried. It was certainly immaterial whether the plaintiff and De Force were upon friendly terms, and the question propounded to the plaintiff as to the business he was engaged in at the time of the fire, while perhaps proper as a prelimi-

nary one, or one leading finally to a direct or categorical question as to the particular purpose for which the building was then being used, was so indefinite as to have justified the court in sustaining an objection thereto. The court suggested that counsel should go directly to the question of occupancy and not ask questions which appeared to be upon their face wholly immaterial. It is quite manifest that the plaintiff might have been engaged in a business other than the mercantile and restaurant business and still the building upon which the insurance was placed used for the purposes stated in the policy.

[10] There was no error in sustaining the objections to the questions put to De Force by counsel for the defendant which are above adverted to. It requires but slight scrutiny of the testimony given by said witness, if, indeed, it can properly be called testimony, to make it clear that he could not give a rational explanation of any of the details of the transaction upon which this action is founded. It was admitted by him, it will be recalled, that at the time of the issuance of the policy and at the times payments on the premium were made by the plaintiff he was under the influence of liquor to an extent that rendered it impossible for him to state definitely how or in what manner or by what means the payments were made. He did say on one occasion, however, that he remembered receiving a check from plaintiff as in part payment of the premium, but that he had no recollection of receiving any cash payment, although he did not affirmatively say that he did not also receive cash as in part satisfaction of the premium. It is therefore quite plain that, even if the court had allowed the question propounded to him by counsel for the defendant as to the means by which the premium was paid, he would not have been able to give any more satisfactory answer thereto than he had given to the questions calling for the same testimony previously propounded to him. Hence it cannot be held that the court's rulings upon those questions were erroneous. Indeed, the court could properly have excluded the answers to said questions that we are now considering on the ground that similar questions had previously been asked the witness, with the result as first above explained.

The disallowance by the court of the impeaching questions to De Force and other questions likewise propounded to the same witness in the nature of cross-examination did not involve error.

[11] One of the questions asked of De Force by the attorney for the defendant, which was in the nature of cross-examination, and evidently for the purpose of laying the foundation for introducing proof in impeachment of his testimony in a certain particular, in case his answer should require impeach-

ing proof, was whether he was intoxicated at the time he signed a certain affidavit to the effect that the premium was, on the 15th day of April, 1921, paid to him in full as agent of the defendant by the plaintiff. The said affidavit was, without objection by the defendant, introduced in evidence by plaintiff's attorney during his cross-examination of De Force, who had stated, just previous to the introduction of the document, that he executed the same. In sustaining the objection to the question as to whether De Force was in an intoxicated state when he signed said affidavit, the trial court properly held that the document involved incompetent testimony, at the same time stating that the affidavit would not have been allowed to go into the record if counsel for the defendant had objected to it, and further correctly declaring the rule to be that, as to incompetent testimony to the admission of which no objection is made, cross-examination is not allowable.

[12, 13] Another question asked of De Force by defendant's counsel, and similar in character to the above, was whether the witness did not say, prior to his being called to the witness stand, in the presence of one of the attorneys for the defendant and certain other named persons, that a portion of the premium was paid by the application thereto of a personal debt in a certain amount which the witness owed the plaintiff. As already pointed out, the witness was not able, prior to the asking of said question, to give a rational account of the manner in which or the means by which the premium was paid. Indeed, nowhere in his testimony did he positively or affirmatively make any statement militating against the case of defendant, either as to the payment of the premium or the occupancy of the building. As must readily be inferred from what has been said above as to the general character of his testimony, it is manifest that all that can be said of such testimony, in so far as its effect upon the case of the defendant is concerned, is that it did not measure up to the expectations of the latter. In other words, De Force's testimony as to the payment of the premium was merely disappointing to the defendant in that he did not testify as favorably to it as it had wished or desired. Such disappointments, however, do not justify the cross-examination or the impeachment of one's own witness. One may cross-examine his own witness for the purpose of laying the foundation for his impeachment and so impeach him, if he can, if he is taken by surprise by the testimony given by such witness. Section 2049, Code Civ. Proc. But the surprise which will open the way to such a course must be substantial. It must be founded on the fact that the witness has given testimony not only at variance with

what the party producing him as a witness had good reason to believe, before calling him to the witness stand and examining him, that it would be, but that such testimony is prejudicial or detrimental to the case of such party. The rule as thus stated is not only sound in principle but accords with the spirit as well as the letter of section 2049 of the Code of Civil Procedure, and is sustained by the cases treating that subject. It has repeatedly been held that the mere failure of a witness to give favorable testimony for the party producing him does not entitle such party to prove that he has made contrary statements elsewhere, and when the testimony of such witness is of that character, the party producing him is bound to accept the same as it is so given. See *People v. Creeks*, 141 Cal. 532, 75 Pac. 101; *People v. Cook*, 148 Cal. 334, 345, 83 Pac. 43; *Zipperlen v. Southern Pacific Co.*, 7 Cal. App. 206, 214-217, 93 Pac. 1049; *People v. Spencer* (Cal. App.) 208 Pac. 380.

There are other rulings than the above to which counsel object, but they involve the disposition of questions similar to those above considered and they need therefore not be given special notice herein.

[14-16] It is lastly contended that there is no evidence supporting the finding that the building was occupied for mercantile and restaurant purposes at the time of the fire. The finding as to occupancy is in the language of the third paragraph of the complaint and sufficiently shows, as we hold is true of the complaint, that the building was occupied for the purposes stated in the policy at all times from the date of the issuance of the policy to and including the time that the building and contents were destroyed by fire on July 2, 1921. As to the contention, however, that there is no evidence to support this finding, it is first to be remarked that that point is not subject to review upon the record before us, because the bill of exceptions contains no specification of the insufficiency of the evidence to support it. Section 648, Code Civ. Proc.; *Millar v. Millar*, 175 Cal. 797, 799, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184, and cases therein cited; *Smith v. Meade*, 36 Cal. App. 173, 171 Pac. 815; In the matter of *Baker*, 153 Cal. 537, 542, 96 Pac. 12. But a conclusive reply to the point is that the stipulation whereby counsel for the defendant admitted the existence of certain material facts involved, as we have above pointed out, the admission of all the essential and material facts in this case, except the issue as to the payment of the premium or cancellation of the policy, and therefore, if it be true that the finding as to occupancy is in any respect insufficient or not supported by positive testimony, said stipulation supplies such deficiency. Indeed, in view of the stipulation referred to, there

was no necessity for a finding upon the question of occupancy, since it is well settled that no finding of essential facts, the truth of which is admitted, is necessary or required.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

Modification of Opinion on Rehearing.

HART, J. It should be explained that the above modification (shown by footnotes, ante), is made because of a suggestion to the writer of the opinion, after its publication in the California Appellate Decisions, that the language stricken from the opinion seemed to imply that, in the event that the insured failed to pay the premium within the time specified in the notice, the said notice would not then operate, ipso facto, to cancel the policy. We did not intend, by the use of the language hereby expunged from the opinion, so to declare. We never for a moment supposed that the notice upon default by the insured in the payment of the premium within the time designated therein, would not stand as an absolute cancellation of the policy. Counsel for the appellant in their briefs seemed to hold to the view that, even though the premium were paid within the prescribed time, the insured could, nevertheless, treat the notice as one of unconditional cancellation, to take effect upon the expiration of the five days within which the premium was required to be paid, or as amounting, in effect, to the cancellation which either the insurer or insured was at liberty to effect under the provision of the policy giving the parties to the contract of insurance the mutual right to cancel or surrender the policy arbitrarily or without stating any reason therefor. This contention we had in mind when we used the language stricken out. We merely attempted to say that a notice specifically stating a condition upon which alone the policy would be canceled would not have that effect unless the condition were not complied with by the insured within the time fixed by the notice for its performance. But we can see the force of the criticism that the language hereby stricken from the opinion might justify the implication that, if the premium was not paid within the prescribed time, a cancellation of the policy would not then be effected, but that there would be required further notice to that effect. Clearly, the said language so construed would not correctly state the rule as to that matter; and, to make our position clearer upon the proposition, we are glad of the opportunity to make the above modification.

We concur: FINCH, P. J.; BURNETT, J.

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FRASIER v. WITT et al. (Civ. 4124.)

(District Court of Appeal, Second District, Division 2, California. May 28, 1923. Hearing Denied by Supreme Court July 26, 1923.)

1. Landlord and tenant §76(2)—Contract for services held violation of covenant not to sublet.

A covenant in a lease not to sublet the house or furnishings held violated by a subsequent contract for services between lessee and third party, transferring exclusive possession and management of the premises at a fixed rental reserved, and containing a re-entry clause on condition broken; such contract being a thinly veiled lease.

2. Landlord and tenant §76(3) — Covenant against subletting not waived by permission to employ a servant manager of premises.

Under a lease with covenant not to sublet, lessor granting permission to employ a servant to manage the premises did not waive the right to claim a forfeiture for transferring exclusive possession as an entirety under a "contract for services."

3. Landlord and tenant §290(5) — Damages from independent covenants not proper offset.

In a forcible entry and detainer suit, where the lease contains a covenant by lessor to repair and a covenant by lessee not to sublet, the covenants being independent, damages from failure to repair cannot constitute a set-off or counterclaim in an action on the covenant not to sublet, since Code Civ. Proc. § 741, applies only to cases of adverse possession.

4. Landlord and tenant §290(5) — Counterclaim or offset for money paid for future rent must be so pleaded.

In an action of forcible entry and detainer, in the absence of any pleading that an offset or counterclaim was money advanced for rent, accruing in the future, testimony to that effect is not availing.

5. Landlord and tenant §198—Retention of rents paid in advance, but accruing before forfeiture, held proper.

Rents paid in advance, but accruing before forfeiture of the lease and notice to quit, were properly retained by lessor, and do not constitute a counterclaim in action for unlawful detainer.

6. Appeal and error §758(3) — Errors not specifically designated held not reviewable.

Errors suggested by appellant's general discourse, but not specifically pointed out, are not reviewable.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Loulu V. Frasier against Maye Witt and others. Judgment for plaintiff, and defendant Witt appeals. Affirmed.

Floyd S. Sisk, of Venice, for appellant.

Wm. T. Blakely, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action of unlawful detainer to recover possession of a lot of land, with the apartment house thereon known as the Seaward Apartments, situated in the city of Venice, together with damages for unlawful withholding. The case was tried before a jury, a verdict was returned awarding possession to plaintiff and assessing her damages at \$345, and from the judgment entered thereon the defendant Maye Witt appeals.

Appellant, as plaintiff's lessee, entered into possession of the premises under a written lease executed by herself and plaintiff on November 1, 1919, whereby the latter, as the lessor, leased the premises to appellant for the term of five years at a rental of \$100 per month, payable monthly in advance on the 1st day of each and every month of the five-year term. The lease contained the following covenant on the part of appellant:

"That she will not sublet, or transfer the use or possession of, said house, No. 15 Mildred Ave., Venice, California, furniture, goods and chattels, or any part of the same to any person or persons whatever; that she will carefully and economically occupy and use said house, furniture, goods and chattels, and forthwith repair all injury, and pay all damages * * * that may happen or accrue to the same or any part thereof during the term of this lease."

On December 10, 1921, appellant, as the party of the first part, and the defendants H. K. Weadon and wife, as parties of the second part, executed a written instrument bearing the caption, "Contract for Services," and which contains the following provisions:

"That the first party hereby engages and employs the second parties, and said second parties hereby accept said engagement and employment, upon the following terms and conditions, to wit: That the said second parties hereby agree to manage and conduct that certain apartment house known as the Seaward Apartments, situate at No. 15 Mildred avenue, in the city of Venice, Cal., for the term of one year from and after the 10th day of December, 1921, and ending on the 9th day of December, 1922. That during the said term said second parties will carefully and economically manage and conduct said apartment house, and carefully and economically use and occupy said house, furniture, goods and chattels now therein situated, and shall at their own expense forthwith repair all injury, and pay all damages that may happen or accrue to the same or any part thereof during the term of this agreement. * * * At the termination of this agreement, or other sooner determination thereof, said second parties will peaceably and quietly surrender, yield, and deliver up the entire possession of said house, furniture, goods, and chattels, and premises above described, unto said first party, in as good condition as the same are now in, reasonable use and wear thereof excepted. * * * The second parties, for their services to be rendered and performed hereunder, are to and shall receive and retain any and all sums of moneys derived as

rentals in and about said premises, in excess of the sum of two hundred seventy-five (\$275.00) dollars per month; said second parties hereby agreeing to pay to said first party the said sum of \$275.00 per month, in lawful money of the United States of America, upon the 10th day of January, 1922, and thereafter upon the 10th day of each and every month during the remainder of this term, a similar amount as above specified; said parties of the second part hereby and upon this date paying to the first party the sum of \$700.00, to apply as follows: For the first month of said term, and for the last month thereof—and \$150.00 to apply upon the October-November, 1922, payment; and if all of the terms of this agreement are carried out upon the part of said second parties, then they shall not be called upon by first party to account for any sums of money for the months above mentioned, but if said second parties make default in any of the covenants herein contained, and first party again takes possession or is entitled to take possession of said premises, she shall also be entitled to retain all of said above-named sum of \$700.00 as liquidated damages for the use and occupation of said premises by the second parties under this contract. * * * And it is agreed that time is of the essence of this contract, and that, if the second parties do not make the payments hereinbefore provided for, at the time and in the manner therein specified, or default in any of the covenants above agreed upon, then and in that event this contract may, at the option of the first party, thereupon and without notice to second parties, be terminated and thereafter become null and void, and that thereafter the first party or her agents may re-enter and take possession of said premises in entirety, and remove said second parties therefrom, or any and all other persons unlawfully holding the same, or any part thereof, using all force that may be reasonably necessary, said second parties hereby waiving any and all damages that may accrue from such removal."

Upon discovering that her lessee, the appellant here, had entered into this agreement with the Weadons, plaintiff, deeming that the former had thereby violated her covenant not to sublet or transfer the use or possession of the premises, brought this action on January 21, 1922, alleging that, without plaintiff's consent, appellant had sublet the leased property to the Weadons, and had transferred to them the use and possession thereof. Before bringing the action plaintiff served upon each defendant the statutory three days' notice to quit and deliver up possession. At that time appellant was in possession of the property, she having previously effected a re-entry.

Appellant's answer, besides containing a denial that she had sublet the premises or had transferred the use or possession thereof, pleaded as affirmative defenses: (1) That plaintiff had waived the covenant against subletting and transferring the use and possession by previously giving to appellant permission to place a "manager" in charge of the apartment house; (2) that on January 1, 1920, at plaintiff's request, appellant had

orally agreed to pay an additional sum of \$20 per month on her lease—that is, a monthly rental of \$120 instead of the \$100 per month provided for in the written lease; that pursuant to such oral agreement she paid to plaintiff such additional sum of \$20 for 21 months, making a total of \$420; that said total of \$420 was “additional rental at the rate of \$20 per month upon said premises for 21 months from January 1, 1920, to and including September 1, 1921,” and that, in consideration of such increased rental, plaintiff had agreed that defendant might install a “manager”; and (3) that, since taking possession, appellant had expended for repairs and new furnishings more than \$3,000.

Appellant has not stated her points with any definiteness or crystalline lucidity. Her principal points, as nearly as we can discern them, are: (1) Her contract with the Weadons was not a sublease or a transfer of the use or possession of the premises; (2) by previously permitting appellant to install a manager, a Mrs. O'Brien, who was in charge of the apartment house for appellant from February, 1921, to June of that year at a salary of \$35 per month, respondent waived appellant's covenant not to sublet or transfer the use or possession; (3) the expenditures made by appellant for repairs should have been allowed as an offset to respondent's claim of damages for the unlawful withholding; (4) the 21 payments of \$20 each likewise should have been allowed as an offset; and (5) the trial judge erred in his refusal to give certain instructions and in his rulings upon certain objections to the admission of evidence.

[1] The instrument executed by appellant and the Weadons, though it is styled a “Contract for Services,” is but a thinly veiled attempt to conceal appellant's deliberate evasion of her covenant not to sublet the premises or transfer the use or possession thereof. Looking beyond the form of the transaction to discover its true import, we can readily see that the arrangement made with the Weadons amounted to an underletting of the premises, notwithstanding the parties designated their agreement a contract for services. Under the provisions of the instrument the Weadons were not to go into occupation simply as servants of appellant. They were new tenants, and not merely new occupants. A part of the lessee's estate was transferred to them. That is, they were given the right of exclusive possession for a definite term, one year, for which a fixed rent was reserved. The document provides that the Weadons are to manage and conduct the apartment house “for the term of one year,” and that during that “term” they shall pay appellant “the sum of \$275 per month * * * upon the 10th day of January, 1922, and thereafter upon the 10th day of each and every month during the remainder of this term.” This part of the document is so worded that the Weadons, in effect, obligated themselves to pay appellant this fixed sum of

\$275 per month irrespective of whether they received that amount from the rentals of the several apartments or not. It is further provided that, if the Weadons shall “default” in any of their covenants, then appellant, at her option, may “re-enter and take possession of said premises in entirety, and remove said second parties therefrom.” It is clear that it was within the contemplation of the parties that the Weadons should have the right to receive and retain the whole income to be derived from the apartments. True, the instrument declares that the Weadons shall have the right to retain only the income in excess of \$275 per month; but, as that sum was to be paid by them to appellant in any event, the effect is the same as if the document had expressly declared that the Weadons should retain all the income from the apartments, rendering to appellant a rental of \$275 per month during the term. Such a provision is wholly inconsistent with the idea that the Weadons were but servants of appellant. Moreover, if the relation were not that of landlord and tenant, but that of master and servant, as appellant would have us believe, then why did appellant expressly reserve to herself the right of “re-entry” for condition broken? Such a reservation would not have been necessary had the possession of the Weadons been that of servants and not that of tenants. Clearly the transaction possessed all the elements necessary to constitute it an underletting of the leased premises, let the parties to it call it what they may.

[2] Respondent's previously granted permission to install a “manager,” i. e., a mere agent or servant, did not authorize appellant to sublet to a tenant the entire premises and transfer the right of exclusive possession. Therefore any permission which respondent may have given to employ a servant to manage the apartment house was not a waiver of appellant's covenant not to sublet or to transfer to a tenant the use or possession of the premises as an entirety, as was done when appellant put the Weadons in possession under the so-called “Contract for Services.”

[3] Appellant was not entitled to set off the cost of the improvements made by her. We do not understand her to claim that respondent violated any covenant to make repairs. And, even if the latter had violated such a covenant, still it would have been the violation of a covenant wholly independent of appellant's covenant not to sublet or transfer possession, and therefore would not be a defense to this action (*McSloy v. Ryan*, 27 Mich. 110); nor would it be a proper subject for set-off or counterclaim (*Arnold v. Krigbaum*, 169 Cal. 143, 146 Pac. 423, Ann. Cas. 1916D, 370; *Phillips v. Port Townsend Lodge*, 8 Wash. 529, 36 Pac. 476). Appellant seems to think that section 741 of the Code of Civil Procedure gives her the right to set off the cost of the improvements. That sec-

tion has no application here. Aside from the consideration that set-off or counterclaim is usually not permissible in an action for unlawful detainer, section 741 is applicable only when the improvements are made by a defendant who, at the time when they were made, was holding adversely to the plaintiff. *Hannan v. McNickle*, 82 Cal. 122, 23 Pac. 27. Here the defendant, when she made the improvements, was holding not adversely to but under plaintiff, as the latter's tenant.

[4, 5] The \$420, the aggregate of the 21 additional payments of \$20 each, is not available as an offset or recoupment. Assuming, for the purposes of this decision only, that these additional amounts could have been successfully pleaded as a recoupment or an offset if, as appellant testified, they were paid as advances on rent to accrue in the future at a time subsequent to the forfeiture of appellant's lease, still the fact remains that such a defense was not pleaded. Appellant's answer alleges that the \$420 was an "additional rental * * * upon said premises for 21 months from January 1, 1920, to and including September 1, 1921." This period antedated the transaction whereby appellant sublet the premises to the Weadons contrary to her covenant. That underletting did not occur until December 10, 1921. There can be no question as to respondent's right to receive and retain all rents which accrued prior to the forfeiture of the lease. Such prior rents could not possibly be set off against the damage which was caused by appellant's unlawful detainer after she was served with notice to quit.

[6] What we thus far have said will suffice to dispose of most of the other points raised by appellant. The few remaining assignments are not pointed out with sufficient definiteness to call our attention to the particular action of the court which is deemed to be erroneous. We cannot be expected to hunt through the record to find errors which appellant's general discourse might lead us to suspect may exist. She should at least specifically point out the errors upon which she relies.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

(62 Cal. App. 501)

PEOPLE v. LORDEN. (Cr. 1112.)

(District Court of Appeal, First District, Division 2, California. June 14, 1923. Rehearing Denied July 14, 1923. Hearing Denied by Supreme Court Aug. 13, 1923.)

1. Criminal law §1036(1)—Fact proved by incompetent testimony without objection beyond attack on appeal.

In the absence of an objection, a fact proved by incompetent testimony is beyond attack on appeal.

2. Criminal law §661—Rules of evidence in civil actions applicable in criminal cases.

Rules of evidence in civil actions are applicable in criminal cases.

3. Embezzlement §11(1)—Broker held guilty on selling collateral and converting proceeds.

A partner in a broker concern was guilty of embezzlement, where without authority he took into his possession stock deposited with the firm as collateral and made an unauthorized sale thereof and kept the proceeds.

4. Criminal law §371(2)—Evidence of similar embezzlements admissible to show intent.

In the prosecution of a member of a broker firm for embezzlement in selling collateral and keeping the proceeds, evidence of similar transactions by him about the same time, committed both with stock deposited by prosecutrix and by others, was admissible to show intent.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

E. L. Lorden was convicted of embezzlement, and appeals. Affirmed.

Bion S. Gregory, Chas. W. Haswell, and Haswell & Pierce, all of San Francisco (O. A. Borden, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant has appealed from a judgment of conviction, and an order of the trial court denying him a new trial.

He was charged, in an information filed by the district attorney with having committed the crime of embezzlement, on the 6th day of March, 1922. Before we take up that particular transaction it should be recited that the complaining witness, Bella Gilmore, in the month of February of that year called at the office of Harrison J. De Vere, manager of the office at San Jose of Aftergood & Co., for the purpose of purchasing corporate securities. On that occasion she purchased through Mr. De Vere ten shares of Studebaker at \$95 a share; ten shares of American Tobacco at \$131; ten shares of Telephone at \$118; ten shares of Allis Chalmers at \$45; and ten shares of Texas Oil at something like \$30. As stated, she bought the stocks on margin, and at the time of the purchase she was told by Mr. De Vere that it was necessary for her to furnish collateral. As she did not understand the meaning of the expression collateral, she inquired of Mr. De Vere, and he informed her that she could put up other stock which Aftergood & Co. would deposit in the bank, borrow money on it, and with the money so borrowed would purchase the other stock. In accordance with that statement, in Feb-

ruary the prosecuting witness delivered as collateral to Mr. De Vere a certificate representing Pacific Gas & Electric stock.

On the 6th day of March, 1922, Miss Gilmore again called on Mr. De Vere to purchase other stocks. After having made the purchase at that time she delivered to him certificate No. 447, of which she was the owner, representing four shares of the capital stock of Reid Bros., a corporation. Mr. De Vere said he would forward the certificate No. 447 to Aftergood & Co., who would hold the certificate as collateral, and thereupon he gave Miss Gilmore a written receipt for the certificate. After that date Aftergood & Co. did not call on Miss Gilmore for any further security, neither did she ever receive back her certificate representing the Reid Bros. stock, nor the certificate representing the Pacific Gas & Electric stock. She testified that she had never received any stock from Aftergood & Co., or anything at all. In her conversations with Mr. De Vere he told her that Aftergood & Co. would transact the business, and that, when Miss Gilmore came to close out the deal, if there was anything left out of the Reid Bros. stock she would receive the amount. He also stated to the witness that if the stock purchased on margin went down that the witness stood in danger of losing her collateral. From the time she purchased until the date of the trial the witness stated that the stock which she had so purchased on margin did not fall in price, but increased in price. As she delivered her certificates to Mr. De Vere she signed the certificate of transfer on the back of the certificate. She so signed certificate No. 447. Mr. De Vere was called as a witness by the prosecution and confirmed the several statements made by Miss Gilmore. Furthermore, he testified that when he received the certificates from Miss Gilmore he mailed them to Aftergood & Co.

Charles J. Blumenthal was then called by the prosecution and testified that he was a stock broker and that on the 10th day of March, 1922, he bought from the defendant, E. L. Lorden, four shares of Reid Bros. stock at a price in the neighborhood of \$85 per share, that the stock so purchased was evidenced by certificate No. 447, and that he paid the defendant by check.

On December 4, 1922, when Mr. De Vere was on the stand as a witness, the district attorney asked him the following questions, and he made the following answers:

"Q. Calling your attention to the months of February and March of the present year, what was your occupation at that time? A. I was managing a brokerage office of Aftergood & Company in San Jose.

"Q. Do you know the defendant in this action? A. I do.

"Q. And what connection, if any, did the de-

fendant have with Aftergood & Co., if you know? A. He was a partner in the concern."

[1, 2] The appellant, now contends that there is no evidence in the record showing that he was a partner in the firm called Aftergood & Co. The record, as we have quoted it, refutes the contention. The statement made by Mr. De Vere was not adverted to on cross-examination, and was allowed to stand in the record for its full value. If the appellant considered that the witness was giving incompetent testimony, or that he was stating his conclusion, an objection should have been made in the trial court, or a motion to strike out should have been made. In the absence of an objection, a fact proved by incompetent testimony is beyond attack on appeal. *Walberg v. Underwood*, 39 Cal. App. 748, 180 Pac. 55, 57; *Sanders v. Austin*, 180 Cal. 664, 182 Pac. 449. The rules of evidence in civil actions are applicable also in criminal actions, except as otherwise provided in the Penal Code.

[3, 4] Miss Gilmore turned her stock over to Mr. De Vere to be by him turned over to Aftergood & Co. to be held by that company for certain purposes only. Mr. De Vere testified that he forwarded the stock to the San Francisco office. As a partner in the firm of Aftergood & Co. the defendant was entitled to the possession of Miss Gilmore's stock to the same extent and no less than any other partner. When, without any authority to do so, he took the stock into his possession and make an unauthorized sale thereof, and kept the proceeds from the rightful owner of the stock, it may not be said that the verdict was against the evidence, or contrary to the law. Over the objection and exception of the defendant, the trial court received in evidence testimony of and concerning similar acts and transactions of the appellant committed at about the same time. The court did not commit any error in receiving such testimony. *People v. Sindici*, 54 Cal. App. 193, 201 Pac. 975. One of the similar acts was the sale by the defendant to Pinckard, Shaughnessy & Anderson on February 20, 1922, of the shares of stock in the Pacific Gas & Electric Company, which Miss Gilmore transmitted through Mr. De Vere a few days previously. Another was a sale of stock owned by Minnie Moeslein, and another one was a sale of stock owned by Harriet S. Cochran. The testimony was admissible, notwithstanding that some of the stock so embezzled was not owned by Miss Gilmore. The appellant argues that before such evidence is admissible for the purpose of proving intent it must first be made to appear that the offense for which the defendant is on trial has been proved. The answer is that in the instant case such showing had been made.

The trial court gave to the jury certain

instructions regarding the law of partnerships. The appellant does not contend that they did not correctly state the law, but does contend that they were not relevant to any evidence that had been introduced. For the purpose of this decision, it may be conceded that the instructions were not pertinent to the evidence introduced, but it is patent that there was nothing in any one of the instructions that was prejudicial to the defendant.

When the prosecution rested its case the defendant also rested its case without introducing any testimony. Thereafter the case was argued, and the court instructed the jury. The defendant requested the court to give two instructions which were refused, and the refusal is now assigned as error. The purport of each instruction was to advise the jury to acquit the defendant. The trial court did not err in refusing each of the instructions.

The last point made by the appellant is that the trial court erred in denying the appellant a new trial because "the verdict is contrary to law or evidence." The verdict was not contrary to law, nor was it contrary to the evidence. The motion was properly denied.

The judgment and order are affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

62 Cal. App. 610

RALPHS et al. v. OBERFELD. (Civ. 4417.)

(District Court of Appeal, First District, Division 2, California. June 20, 1923. Hearing Denied by Supreme Court Aug. 16, 1923.)

1. Appeal and error ⚡938(2)—**Bill of exceptions presumed to have been engrossed and settled within required time.**

Where bill of exceptions was not settled within the 10 days provided therefor by Code Civ. Proc. § 650, nor within the time extended by stipulations of the parties or by order of the court referred to in the certificate, but the certificate did not negative the fact that an additional extension of time was obtained, it will be presumed that the bill was settled and engrossed within time extended by stipulation of parties or order of the court obtained in due time, in view of section 1963, creating the presumption that an act of a court was regularly performed within the lawful exercise of its jurisdiction.

2. Guaranty ⚡25(3)—**Evidence held not to prove renewal of contract between principal and creditor.**

In an action on written guaranty of the performance by sales agents of their contract, evidence held insufficient to prove renewal of the guaranty contract.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Isaac Ralphs, William J. Pugh, W. W. Woodd, and Irvin Holmes, copartners doing business under the firm name and style of the Ralphs-Pugh Company, against Bertha Oberfeld. Judgment for plaintiffs, and defendant appeals. Reversed.

Jesse H. Mills, of San Francisco, for appellant.

Frank A. Duryea, of Marysville, for respondents.

STURTEVANT, J. In this action the plaintiffs sought to recover judgment against the defendant on a written guaranty. The defendant answered, and thereafter a trial was had before the court sitting without a jury. The trial court made findings in favor of the plaintiffs, and awarded the plaintiffs a judgment, and the defendant has appealed, bringing up a bill of exceptions.

[1] The respondents have interposed a preliminary objection, which must be disposed of at this time. The respondents objected to the use of the bill of exceptions by the appellant and to the consideration of the bill by this court. The objection is based on the contention that, after the bill had been settled, it was not engrossed and presented for settlement within the time allowed by law. To support their objection the respondents presented for our consideration the certificate settling the bill. That certificate is as follows:

"The foregoing engrossed bill of exceptions is hereby settled and allowed this 28th day of July, 1922, subject to the objection of counsel for plaintiffs that the same was not engrossed and presented for certification within the time allowed by law after settlement of proposed bill; said proposed bill having been settled on December 17, 1921, 10 days' extension of time to engross and present having been given by stipulation of counsel on December 27, 1921, 10 days' further extension having been given by order of court on January 6, 1922; the bill not having been engrossed and presented within said last extension; and the court having made and filed its order on January 17, 1922, without notice to or consent of counsel for plaintiff, allowing defendant to January 27, 1922, to engross and present said bill, and said engrossed bill having been delivered to the attorney for plaintiffs for his stipulation as to the correctness of the engrossment on January 27, 1922."

It will be noted that the certificate recites that the bill was settled December 17, 1921. It will be borne in mind that the statute (Code Civ. Proc. § 650) gave the appellant 10 days in which to engross and present the bill for signature. That would carry the time to December 27th. Later counsel by stipulation extended the time 10 days. That would carry until January 6, 1922. The certificate does not negative the fact that counsel for respondents did not give an additional extension.

sion, nor does it negative the fact that the court did not make an additional order extending the time from January 6 to January 17, 1922. Continuing, the certificate affirmatively shows that on January 17th the court made an order extending the time to January 27, 1922, and on the date last mentioned the said engrossed bill was delivered to the attorney for the plaintiffs for his certificate as to the correctness of the engrossment. The trial judge certified the bill on July 28, 1922. It is presumed as a matter of law that his act in doing so was regularly performed and was within the lawful exercise of his jurisdiction. Code Civ. Proc. § 1963. In support of the certificate of the trial judge we must presume, in the absence of any other showing, that a further stipulation was obtained in due time, or an additional order was obtained in due time, regularly extending the period for engrossment from January 6th to January 17, 1922. No other objection being made thereto, the bill of exceptions may properly be considered as a part of the record in this case.

The appellant's son, Albert O. Oberfeld, and Joseph Duarte were about to engage in the business of handling automobile accessories, and were negotiating with the plaintiffs to act as sales agents of the plaintiffs. The contract between the principals and agents having been arranged before the delivery thereof, the appellant was induced to execute a guarantee in writing as follows:

"Whereas, an agreement bearing date of March 16, 1915, has been made and entered into between Isaac Ralphs, William J. Pugh, W. W. Woodd, and Grayce Holmes, doing business under the name of Ralphs-Pugh Company, as the party of the first part, and Albert O. Oberfeld and Joseph Duarte, the parties of the second part, wherein the said parties of the second part are to act as sales agents for certain tires and tubing:

"Now, therefore, I, Bertha Oberfeld, hereby guarantee the payment for all such tires and tubings sold by the said first party to the second parties under said agreement up to the amount of one thousand dollars (\$1,000.00).

"Dated San Francisco, California, March 20th, 1915. Bertha Oberfeld."

[2] The paper having been executed, the principals and agents commenced to transact business. The second paragraph of the contract between the principals and agents stated its term to be "for a period of one year commencing March 20, 1915, and ending March 20, 1916. * * *" But the respondents alleged, and the court found, that the contract between the principals and the agents contained a covenant as follows:

"Renewal: In the event party of the second part shows sufficient volume to warrant extension of this contract for one year from date of expiration of present contract, party of the first part agrees to extend contract on above terms and conditions,"

The trial court also found:

"And at the expiration of said one year mentioned in said contract, on or about the 20th day of March, 1916, plaintiffs extended said contract another year from and after said March 20, 1916, upon the same terms and conditions, pursuant to the provisions in said contract relating to such extension. * * *"

The unpaid bills for which the plaintiffs sought to recover in this action were deliveries made subsequent to March 20, 1916. The matter of the extension, or nonextension, of the one-year term was therefore most material to a correct determination of the rights of the parties. The appellant claims that there is no evidence sustaining the finding quoted above to the effect that the term of the principal contract was extended. We think this claim is well founded. The bill of exceptions contains no writing of any kind or nature extending the contract between the principals and agents. The only evidence on the subject of extension was as follows:

Mr. Ralphs, one of the plaintiffs, testified:

"All the goods sold by us to Oberfeld & Duarte from March 20, 1915, to March 20, 1916, were paid for in full. After March 20, 1916, I do not remember ever having any conversation whatsoever with Mr. Oberfeld, or Oberfeld & Duarte, in regard to the continuance of this agreement, and after the expiration of the year, to wit, March 20, 1916, we continued selling goods to Oberfeld & Duarte. * * * After the 20th day of March, 1916, and after the contract had been in existence for one year, we took no steps to renew this contract, because we believed the terms of the contract covered the continuance for the next year."

On the trial of the case a stipulation was read which contained the following paragraph IV:

"That plaintiffs did not at the time of the expiration of the period provided for in said Exhibit A (contract between principals and agents), or at any other time or at all give to defendant any notice either written or verbal, that they had extended plaintiffs' Exhibit A for the second year, or for any other time, and that defendant did not know and was never informed of any extension of plaintiff's Exhibit A, and that she did not give her consent thereto."

Counsel for appellant and counsel for respondents have presented to the court very learned arguments as to when, in what manner, and with what effect the debtor and creditor may extend the principal contract without affecting the rights of the guarantor. In view of the facts contained in the present record, we do not find ourselves called upon to go into those matters. It is sufficient to say that the contract between the principals and agents in the instant case was never extended. It manifestly appears that after March 20, 1916, the respondents sold and delivered goods to their former agents,

but such sales were not made under the contract March 20, 1915, to March 20, 1916.

The finding to the effect that said contract was extended is not supported by the evidence.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

(62 Cal. App. 450)

PEOPLE v. SINGH. (Cr. 692.)

(District Court of Appeal, Third District, California. June 7, 1923. Hearing Denied by Supreme Court Aug. 6, 1923.)

1. Sodomy ☞1—Instruction that sexual penetration, however slight, was sufficient to complete crime, not error.

In prosecution for the infamous crime against nature an instruction that any sexual penetration, however slight, is sufficient to complete the crime, and that evidence of emission is not necessary, was not error, under Pen. Code, § 287.

2. Sodomy ☞5—Proof of commission on or about time alleged in information held sufficient.

Under information charging the infamous crime against nature as of date December 6, 1922, it was not error to instruct that it was not necessary to prove the offense as of the date alleged, but proof thereof at any time on or about that date and within three years of the filing of the information was sufficient.

3. Criminal law ☞822(12).—Instruction that victim of infamous crime against nature, in absence of proof of knowledge of wrongfulness, could not be deemed accomplice, not invasive of jury's province.

In prosecution for the infamous crime against nature, the victim being a 9 year old boy, where there was an instruction that it was for the jury to determine whether the boy was an accomplice, a further instruction that, in absence of clear proof that at the time of committing the act constituting the crime he knew its wrongfulness, a child under the age of 14 years is presumed incapable of committing a crime, and cannot therefore be deemed an accomplice, when considered with instruction given, was not invasive of the jury's province.

4. Criminal law ☞814(12).—Question of good character, in prosecution for infamous crime against nature, held not applicable.

In prosecution for the infamous crime against nature, where there was no proof of defendant's good character, the rule as to good character had no application, and refusal of instruction thereon was not error.

5. Witnesses ☞370(1).—Refusing evidence of ill feeling of complaining witness, not called as witness, nor complaint introduced in evidence, held not error.

In prosecution for the infamous crime against nature, where the father of the 9 year

old boy victim swore to the complaint, but was not called as a witness, nor the complaint introduced in evidence, there was no error in refusing to permit defendant to show the ill feeling of the father toward him, citing Code Civ. Proc. §§ 2049, 2052.

6. Criminal law ☞1169(1).—Admission of details of complaint of boy subject of sodomy held harmless, if error.

In prosecution for the infamous crime against nature, committed upon a boy, it was harmless, if error, to permit mother of boy to testify to details of child's complaint concerning defendant's crime.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Carter Singh was convicted of the infamous crime against nature, and he appeals. Affirmed.

J. E. Ebert, of Marysville (W. E. Davies, of Marysville, of counsel), for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Appellant was convicted of the infamous crime against nature, and he appeals from the judgment and the order denying his motion for a new trial. The victim of the assault was a boy of the age of 9 years, and his story as recited on the witness stand discloses every fact material to a conviction. We cannot say that his testimony is inherently improbable, or that the jury was not justified in according it full credit. It would do no good to set out the testimony, or to comment further upon it, and while it is true that there was a sharp conflict in the evidence, the case was properly one for the jury to determine, and we have no right to substitute our judgment for theirs as to the facts.

[1] There was no error in giving the following instruction:

"Any sexual penetration, however slight, is sufficient to complete the crime against nature. Evidence of emission is not necessary."

The criticism of appellant is directed particularly to the last sentence in said instruction. The first sentence is in the exact language of section 287 of the Penal Code and is a part of the definition of the crime. It must be read in connection with the preceding section, and as thus construed it reveals all the elements sufficient to constitute the crime, and necessarily removes by implication from the prosecution the burden of proving the circumstance mentioned in the concluding portion of the instruction. In *People v. Hodgkin*, 94 Mich. 27, 53 N. W. 794, 34 Am. St. Rep. 321, cited by appellant, the Supreme Court of Michigan based the decision upon the ground that the statute dispensing with the necessity for such proof had been repealed, and that therefore the common law

was in effect, which required such showing.

[2] The court did not err in instructing the jury that:

"It is not necessary for the prosecution to prove the commission of the offense on that date (December 6, 1922), but proof of its commission at any time on or about that date and within 3 years of the filing of the Information is sufficient."

There was no evidence or claim of more than one offense and hence the authorities cited by appellant are not in point. In *People v. Williams*, 133 Cal. 165, 65 Pac. 323, many acts were committed, and it was held that the main charge could not be dispensed with by giving such an instruction, but that it should have been selected and notified to the defendant at the commencement of the trial, as the offense upon which the prosecution intended to rely.

People v. Elgar, 36 Cal. App. 114, 171 Pac. 697, involved a similar situation. Herein no such confusion or injustice could result from the instruction. It was given for the reason that the boy was not certain of the exact date of the commission of the offense, but it is apparent, from his and other testimony, that it was on the date mentioned, or within a very few days of it.

Appellant complains of instruction No. 7 as to reasonable doubt. He says that a similar instruction was criticized by this court in *People v. Del Cerro*, 9 Cal. App. 764, 100 Pac. 887, and *People v. Tomasovich* (Cal. App.) 206 Pac. 119. Such is the case, and we think there is merit in the criticism; but in each instance it was held that the fault was not such as to demand a reversal of the judgment, and we adhere to that view.

[3] The court instructed the jury that it was for them to determine whether the complaining witness was an accomplice, but appellant contends that the court virtually withdrew the question from the jury by giving this instruction:

"In the absence of clear proof that at the time of committing the act constituting the crime he knew its wrongfulness, a child under the age of 14 years is presumed incapable of committing a crime, and cannot therefore be deemed an accomplice."

The only comment upon the instruction by appellant is as follows:

"While this instruction follows section 26 of the Penal Code, the addition of the words 'and cannot therefore be deemed an accomplice' had the effect of taking from the jury the very question which the court in instruction No. 10 advised them they had to pass upon."

We think appellant has misconstrued said instruction. If the court had unqualifiedly instructed them that the prosecuting witness could not be deemed an accomplice, the criticism would be just, as there would have been a clear invasion of the province of the jury.

But the instruction must be considered as a whole, and, while not very happily expressed, the reasonable construction is that, unless clearly shown, that the prosecuting witness understood the wrongfulness of the act, where he is under the age of 14 years, the presumption is that he is incapable of committing a crime and therefore cannot be an accomplice in its commission. Manifestly, if incapable of committing it, he cannot be an accomplice. To say, therefore, that in the absence of such proof he is presumed to be incapable of committing crime is tantamount to saying that he is presumed not to be an accomplice. It still left it for the jury to determine whether this presumption was overcome by the evidence. We do not understand appellant as questioning the competency of the Legislature to prescribe such rule of evidence as is presented in said section 26 of the Penal Code. For further discussion of the principle we may refer to *People v. Dong Pok Yip*, 164 Cal. 143, 127 Pac. 1031, *People v. Camp*, 26 Cal. App. 385, 147 Pac. 95, and *People v. Kanngiesser*, 44 Cal. App. 345, 186 Pac. 388.

[4] Appellant next complains of the refusal of the court to give his proposed instruction:

"I instruct you that evidence of good character is evidence relevant to the question of guilty or not guilty, and is to be considered by you in connection with the other facts and circumstances in the case. * * * The good character of the defendant, when proven, is itself a fact in the case; it is a circumstance tending, in a greater or less degree, to establish his innocence; and it is not to be put aside by the jury in order to ascertain if the other facts and circumstances considered in themselves do not establish his guilt beyond a reasonable doubt."

The rule itself is well established (*People v. Ashe*, 44 Cal. 288), but it had no application to the case, since there was no such proof. Appellant, indeed, asked a certain witness this question, "Do you know what his reputation for truth, honesty and integrity is?" but the court held that the evidence must be confined to the traits involved in the accusation, stating to the defendant that he would be permitted to show his general reputation "for the elements involved in the charge," but appellant declined to follow the suggestion of the court, and in fact withdrew the question. The ruling was clearly right, since the reputation of the defendant for "truth, honesty, and integrity" had not been assailed by the prosecution.

[5] It is claimed that "the court erred in refusing to permit the defendant to show the interest and ill feeling of the father of the boy toward the defendant. It appears that the complaint was sworn to by the boy's father, and it was proper for the defendant to show that the complaining witness was bi-

ased and prejudiced against defendant. *People v. Bird*, 124 Cal. 32, 56 Pac. 639; Code Civ. Proc. §§ 2049, 2052." But the father was not called as a witness for the people, nor was said complaint introduced in evidence. We do not understand that a defendant may call a person as a witness simply for the purpose of discrediting him. The purpose of such showing is to weaken the effect of the testimony which the witness has given in favor of the adverse party. If he has not testified, there is, of course, no ground or reason for any impeachment. In the *Bird* Case the prosecuting witness, Griffith, had testified against the defendant, and it was sought to show his bias and hostility; but the lower court would not permit it. Said sections of the Code also refer to the impeachment of a witness who has given adverse testimony at the trial.

[6] Another objection of appellant is that "the court erred in permitting the mother of the boy to state the details of the boy's complaint." She was asked, "What did Lloyd say to you at the time?" and she answered, "He complained all the time of running off at the bowels, he couldn't hold passages, and I asked him what was the matter, 'Did you get hurt?' and he said, 'Yes,' one of the children at school kicked him. And on Friday evening he came home from school and looked awful pale, and crying, and went to the toilet, and I went out and asked him what was the matter and said, 'I will have to take you to the doctor to-night,' and he cried and told me Carter Singh did this, that Carter Singh 'corn-holed him.' There was no motion to strike out any portion of the answer, although a general objection was made to the question.

In *People v. Barney*, 114 Cal. 554, 47 Pac. 41, it is said:

"There was no error in overruling defendant's objection to the question propounded to Mrs. Boone, the child's mother, as to whether, shortly after the date of the alleged offense, the child made any complaint to her about any injuries she had received from defendant. * * * In cases of this kind the prosecution is always permitted to prove that the injured party made complaint of the injury while it was recent."

In *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202, it was held proper to ask the mother concerning the child the following question:

"Now, when you got here to the house, did she make any complaint about what had happened?"

The Supreme Court, however, took occasion to say:

"Of course, any narrative of the child as to what the defendant did would not be admissible."

This latter statement is, no doubt, in accordance with the generally recognized rule,

and ordinarily the form of the question should be as suggested without calling for the conversation. But herein the boy had previously testified on direct examination in response to a proper question that he had made complaint to his mother. In the cross-examination, in an effort to discredit his testimony, appellant required him to state just what he had said to his mother. He did so in the language which we have already quoted from his mother's testimony. Under such circumstances, it was probably permissible, according to the authorities, to allow the mother to confirm what he had said. At any rate, in view of the boy's testimony, it is reasonable to hold that the error, if any, was without prejudice. It is almost inconceivable, indeed, that, if the mother had simply stated that he complained of his treatment by the defendant, that the verdict would have been different. The effect upon the jury would have been the same.

We have given careful attention to the earnest contention of appellant that he has been grievously wronged by the action of the jury and the trial judge, but we cannot assume the responsibility that belongs to them. Finding substantial evidence to support the verdict and judgment, and believing that no prejudicial error was committed, we must leave the conclusion undisturbed.

The judgment and order are affirmed.

We concur: FINCH, P. J.; HART, J.

62 Cal. App. 512

IN RE SOWASH'S ESTATE. (Civ. 4539.)

(District Court of Appeal, First District, Division 1, California. June 15, 1923. Hearing Denied by Supreme Court Aug. 13, 1923.)

1. Wills $\S$ 502—"Relation" under statutes preventing lapse of estates devised to children or relation dying before testator defined.

The word "relation" is very general and comprehensive and may include, in its generic sense, every relation arising in social life, including relationship by affinity as well as blood; but in determining whether a wife is a "relative" under statutes, such as Civ. Code, § 1310, preventing lapse of estates devised to children "or other relation" dying before testator, the term includes only relationship by blood.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Relation—Relative.]

2. Wills $\S$ 552(3)—Devise to wife fails on her death before testator, though she leaves lineal descendants by former marriage, in absence of substitutionary intent.

Under Civ. Code, § 1343, a testamentary disposition to testator's wife fails on her death before testator, where no intention appears to

substitute another in her place, though she leaves lineal descendants by a former marriage; relationship by marriage not being contemplated by section 1310, providing that descendants of a child or "other relation," to whom an estate is devised, shall take it on devisee's death before that of testator, while section 1334, vesting it in deceased's heirs at law according to the law of succession, when words of donation and not of limitation are used, does not apply, so as to include any one who would succeed to testator's estate had he died intestate within the term "relation."

3. Wills ⚡440—Testator's intent must be ascertained from will as written notwithstanding subsequent changes in conditions.

The rule that testator's intent must be carried out, if possible, does not authorize courts to make a new will conforming to what they think was his intent, which must be ascertained from the will as it stands notwithstanding changes in conditions after its execution.

4. Wills ⚡555(1)—Testamentary disposition to wife with request to devise to her and testator's children by former marriages held to have failed on wife's death before testator.

Under a will devising all of testator's property to his wife with a request that she make a will dividing it between her and his children by former marriages, the devise to her failed on her death before testator; the will showing no intent to substitute others for her in such event.

5. Wills ⚡675—Devise to wife with request to devise to her and testator's children by former marriages held not impressed with precatory trust.

A devise of all of testator's property to his wife with a request that she make a will dividing it between her and testator's children by former marriages held not impressed with a precatory trust not terminated by the wife's death before that of testator.

6. Wills ⚡675—Precatory words in will do not create trust unless testator intended imperative obligation.

Precatory words in a will do not create a trust unless testator intended to impose an imperative obligation and exclude the exercise of discretion by the person to whom they are addressed.

7. Wills ⚡675—Whether trust is created by precatory words depends on court's impression as to maker's intention.

Whether a trust is created by precatory words depends on the court's impression as to the maker's intention, considering the will itself with the circumstances surrounding its execution.

8. Wills ⚡601(8)—Expression of testator's desire to legatee or devisee not limitation on estate expressly vested in absolute terms.

An expression of testator's desire for the disposition of his estate is considered imperative when addressed to his executor, but expression of wish addressed to a legatee or

devisee is not construed as a limitation on an estate or interest expressly vested in him in absolute terms; a clear and distinct devise or bequest not being affected by other words not equally clear and distinct or by inference from other parts of the will.

9. Husband and wife ⚡276(1)—On death of wife community estate vested in husband without administration.

Where a testamentary disposition of community property to testator's wife failed by reason of her death before his, the estate vested in him without administration, and his heirs, on his death, were entitled to distribution in conformity with Civ. Code, § 1336, subsec. 1.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

In the matter of the estate of Jacob M. Sowash, deceased. From a decree construing decedent's will, two children of deceased's wife by a former marriage appeal. Affirmed.

J. H. G. Weaver and Puter & Quinn, all of Eureka, for appellants.

Pierce H. Ryan and A. G. Bradford, both of Eureka, for respondents.

TYLER, P. J. This appeal involves the construction to be given to the will of one Jacob M. Sowash, deceased. The instrument is dated February 8, 1916, and at the time of his death which occurred December 6, 1919, Sowash was a resident of the county of Humboldt. He was possessed of certain real and personal property. He had been twice married. His second wife, Augusta M. Sowash, predeceased him, she having died March 26, 1919. Sowash was her second husband. The property here involved constitutes community property acquired by deceased and his wife Augusta. The will mentions three groups of children, namely, the children of deceased by his first wife, the children of Augusta M. Sowash by her former husband, and the children of deceased by his wife Augusta. The proper construction to be given to the second paragraph of the instrument is the subject of this appeal. It reads as follows:

"Second. I give, devise and bequeath all the property, whether in expectancy or possession, whereof I shall die possessed, or to which I may be entitled to my dear and beloved wife, with this my dying request to her: that she make a will before, or, at least, immediately upon my death, devising and bequeathing all the property she shall receive from me or my estate upon the final settlement of my estate by final decree of distribution or otherwise (not necessarily in kind but in amount or value) other than so much thereof as shall have been expended by her and for her during her life time for her comfort, maintenance and support, to the following persons, to wit, the one half thereof to my wife's children, to wit, Hazel Sowash, Ethel Maud Sowash, Hattie Long, Benjamin Doffner, and Lottie Stebbins, share

and share alike; and the other half to be given to my children, to wit: Hazel Sowash, Ethel Maud Riley, George Sowash, Frank Sowash, Ida Devault, Alice May, Jacob Sowash, share and share alike. I make this request because all the property we have has been accumulated by us jointly as husband and wife, and is as much hers as mine; and it is just and right that upon our deaths the one half of it should go to her children and the other half to my children, and we have mutually agreed that it shall be so divided; and the terms of this will and my request herein expressed have also been mutually agreed upon by myself and wife."

Under the construction adopted by the trial court the entire property of the estate was distributed to the children of the deceased by his first and second marriages to the exclusion of the children of his wife Augusta by her former marriage, the court concluding that as Augusta had predeceased the testator the testamentary disposition as to her had lapsed, and that, therefore, the entire estate went to the heirs at law of deceased. This is an appeal from the decree and is prosecuted by two of the children of Augusta by her former marriage.

It is their contention that it was the intention of the testator, as clearly expressed by his will, that upon the death of both himself and his wife the estate was to be divided equally between his children and his wife's children in the proportion of one half to his children by his first and second marriages, the other half to the children of his wife Augusta by her first marriage and to her children by her second marriage with deceased, and that this manifest intention must be carried out, and courts have no power to change it.

It is further contended that the devise in the will to Augusta A. Sowash was impressed with a precatory trust, by reason of which, had she survived the testator, she would have taken all the property devised to her, less that expended in her lifetime for her comfort and support, in trust for the persons to whom the will requests her to devise it, and that the trust was not terminated by her death.

Respondents' answer to the first contention is that the wife, having predeceased the testator, the disposition to her failed, and the entire estate was properly distributed to the heirs of Sowash.

The Code sections upon the subject in force at the time of the testator's death provide as follows: If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other person in his place, except as limited by section 1310 of the Civil Code. Section 1343, Civ. Code. Section 1310 declares that whenever any estate is devised or bequeathed to any child, or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descend-

ants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator.

There is no express intention in the will to substitute others in place of the wife in the event that she predeceased her husband, a subject hereinafter discussed; and unless it can be said that the wife is a relation of the husband within the meaning of section 1310 of the Civil Code the disposition as to her failed, and the estate was properly distributed to the heirs of the husband, the testator having survived the wife.

[1] Appellants' first contention involves the meaning of the term "relation" as applied to the construction of wills.

The word is a very general and comprehensive term, and may include in its generic sense every relation that arises in social life. *Esty v. Clark*, 101 Mass. 36, 3 Am. Rep. 320. Lexicographers have defined it as signifying a relation in general so as to include relationship by blood or affinity. In its widest sense, therefore, the word no doubt has this meaning. But in the construction of wills, when courts have been called upon to determine whether a wife is a "relative" under statutes preventing lapse, they have by a uniform course of decisions held that the term includes only relationship by blood, and that a husband, therefore, is not a relative of his wife, nor a wife a relative of her husband. *Renton's Estate*, 10 Wash. 533, 39 Pac. 145; *Supreme Council v. Bennett*, 47 N. J. Eq. 39, 19 Atl. 785; *Esty v. Clark*, 101 Mass. 36, 3 Am. Rep. 320. The reason for the rule is stated in *Renton's Estate*, supra, to be that upon a devise to a child or other relative by consanguinity it would be naturally supposed that a testator would intend that his property, upon the death of the devisee before his own, should inure to the benefit of the lineal descendants of his devisee, because such descendants would in fact be his relatives for whose welfare he might be supposed to have a concern, only differing in degree from that which he would feel towards the devisee himself. But in the case of a wife, although a husband might acquire a great affection for her children by a former husband, yet this solicitude would not stop with such children, and the husband's whole estate devised by will to his wife might upon his death descend to utter strangers to him, to the exclusion of those who might be the natural objects of his bounty. See *Estate of Pfulb*, 48 Cal. 643.

[2] The claim that the devise has not lapsed by reason of the saving clause in section 1310 cannot, therefore, in our opinion be maintained as such statute applies against a lapse only where the beneficiary is a relation of the testator, and relationship by marriage is not contemplated within the meaning of the section.

Nor is this situation altered or in any way

affected by section 1334 of the same Code. Appellant presents the argument in this connection that the term "relation" as used in section 1310 is broad enough to include the meaning given to it under section 1334, which, he contends, includes any person who would succeed to the estate of a testator had he died intestate.

The latter section does not apply to the situation under consideration. As pointed out by respondent, the section is but a general rule dealing with the subject of the interpretation of wills, providing, as it does, that testamentary dispositions to the class of persons enumerated therein, when the words used are words of donation and not of limitation, vests the property in the heirs at law of a deceased according to the provisions of the Code relating to succession. The manifest object of this section is to give a definite meaning to the different words employed in the statute, which have received various constructions in the different jurisdictions when unaided by statute. As suggested by counsel for respondents, if the testator had made a devise to "my relations" instead of to "my wife," then resort might be had to the section to determine the meaning of the term. The use of the term in the will here under construction did not therefore create a substituted devise. *Farnsworth v. Whitney*, 102 Me. 296, 66 Atl. 831; *Curley v. Lynch*, 206 Mass. 289, 92 N. E. 429.

[3, 4] Nor does the will, as claimed, show any intent on the part of the testator to make a substitution to others in the event that his wife predeceased him. Of course, if such an intent appeared it would control, and, if legal, be given full effect. *Estate of Goetz*, 13 Cal. App. 292, 109 Pac. 492; *Estate of Murphy*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110; *Smith v. Secor*, 157 N. Y. 402, 52 N. E. 179. Here there is absolutely nothing in the will that can possibly justify the claim that such intention does appear. The instrument is silent upon the possibility of the wife predeceasing the testator. If he had contemplated a substitutional gift over he should have made such intention clearly appear. *Estate of Sutro*, 139 Cal. 87, 72 Pac. 827.

It must therefore be held that the will was made in view of existing conditions at the time of its execution. Here Sowash gave his estate to his wife, and the fact that he made no provision in the event that she predeceased him shows that he did not anticipate this contingency. What his intent may or may not have been after this condition was changed by the death of his wife we have no means of knowing, except from the fact that he allowed the will to stand as originally executed. We are limited in our powers to an interpretation of the will as we find it. The rule of construction that the intent of the testator must be carried out if possible does not authorize courts to make

a new will to conform to what they may think the testator intended. The intent of the testator must be ascertained from the will as it stands. *Estate of Hittel*, 141 Cal. 436, 75 Pac. 53.

Upon this question, therefore, we conclude that there was no substitution, and that the wife, having predeceased the husband, and she not being a relation of his within the meaning of section 1310 of the Civil Code, the testamentary disposition as to her lapsed and failed.

[5] Nor do we think that the devise to the wife was in any manner impressed with a precatory trust.

In this connection it is contended by appellants that by reason of the requests contained in the will a trust was created, under which the wife, had she survived the testator, would have taken all of the property devised to her (less what might be expended for her comfort and support during her lifetime) in trust for the persons to whom the will requests her to devise it, and that such trust was not terminated by her death prior to that of the testator.

Respondents advance two arguments against this contention. They claim:

First, that the chief essential of a precatory trust does not exist, as the words employed in the will are recommendatory in nature and import no trust or charge, and cannot therefore be construed as imperative.

Second, it is further argued that the subject or res of the supposed trust being merely the property devised "other than so much as shall have been expended for herself during her lifetime for her comfort, maintenance and support," is too uncertain and indefinite to be made the basis of an enforceable trust.

[6-8] Upon the question as to what words are sufficient to create precatory trusts the decisions of our own state are controlling. As is said in the *Estate of Browne*, 175 Cal. 361, 165 Pac. 960, whatever may be the rule elsewhere, it is here settled that precatory words are not to be regarded as creating a trust unless it appear that the testator intended to impose an imperative obligation and to exclude the exercise of discretion on the part of the person to whom the recommendatory words are addressed, citing *Estate of Purcell*, 167 Cal. 176, 138 Pac. 704; *Estate of Mitchell*, 160 Cal. 618, 117 Pac. 774; *Estate of Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; *Kauffman v. Gries*, 141 Cal. 295, 74 Pac. 846. In the determination of this question our Supreme Court, in *Estate of Hamilton*, 181 Cal. 758, 186 Pac. 587, has declared that the construction to be placed upon one instrument is of little value as a precedent in aid of the construction of another. And this is particularly true of cases involving the existence or nonexistence of a precatory trust, for previous decisions only serve to illustrate the application of general rules of construction of wills, which,

after all, is a matter of impression as to the maker's intention made upon the mind of a court considering the will itself with the circumstances surrounding its execution. Each case must of necessity, therefore, depend more or less upon its own peculiar facts. While in the case last cited the court deemed certain words used in connection with the will under consideration as being sufficient to create a precatory trust, there is nothing contained in the decision which conflicts in any manner with the doctrine expressed in the Marti Case, *supra*, which establishes the rules of interpretation to be observed in the construction of language used in this connection, and these rules have not been departed from in subsequent cases. It is there pointed out that precatory words may or may not create a trust according to the circumstances of the particular case. They are not to be regarded as creating a trust unless it appears that the testator intended to impose an imperative obligation, and to exclude the exercise of discretion or option in reference to the act in question. The expression of the desire of the testator for the disposition of his estate is one to be considered as imperative when addressed to his executor, but a mere independent expression of desire addressed to the legatee or devisee is not to be construed as a limitation upon an estate or interest expressly vested in the legatee in absolute terms. A clear and distinct devise or bequest cannot be affected by any other words not equally clear and distinct or by inference from other parts of the will. Accordingly, the ordinary use of the word "desire" does not import a trust or charge as addressed to a legatee or devisee. An expression of "desire" that the one to whom a present bequest is made shall make a testamentary disposition falls short of a command or direction, and is in the nature of a mere expression of the testator's feeling, and a suggestion or recommendation or reason to be considered by the legatee or devisee in making a testamentary disposition. See, also, *Estate of Mitchell*, 160 Cal. 618, 117 Pac. 774; *Estate of Purcell*, 167 Cal. 176, 138 Pac. 704.

Unless, therefore, the case compels a different construction, a mere recommendation or request is not sufficient to create a precatory trust.

Nor can it be here said that the reason given for the devise to the wife in any manner changes the situation, for, as above stated, a clear and distinct devise is not affected by recommendations or by any other words not equally clear and distinct. *Estate of Granniss*, 142 Cal. 1, 75 Pac. 324; Civ. Code, § 1322.

[9] The property being community property in its character and the testamentary disposition to the wife having lapsed and failed by reason of the fact that she prede-

ceased her husband, the estate vested in him without administration, and upon his death his heirs were entitled to have distribution made to them in conformity with subsection 1 of section 1386 of the Civil Code. The trial court rightfully so concluded.

As above suggested, whatever the testator's intention may have been as to the disposition of his estate in the event that his wife predeceased him we have no means of knowing. He had an opportunity of meeting the changed condition by making a new will. This he did not see fit to do, and we cannot make one for him. *Estate of Hittell*, 141 Cal. 436, 75 Pac. 53; *Estate of Fair*, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; *Estate of Walkerley*, 108 Cal. 656, 41 Pac. 772, 49 Am. St. Rep. 97.

This conclusion renders a discussion of the question of the uncertainty and indefiniteness of the trust unnecessary.

For the reasons given the judgment is affirmed.

We concur: ST. SURE, J.; RICHARDS, J.

62 Cal. App. 493

In re THOMPSON'S ESTATE. (Civ. 4519.)

(District Court of Appeal, First District, Division 1, California, June 14, 1923. Hearing Denied by Supreme Court Aug. 13, 1923.)

1. Wills —470—Construed as whole and testator's intention given effect.

A will is to be construed according to testator's intention, and in case of any uncertainty arising on its face his intention is to be ascertained from the words thereof, and to that end all of its parts will be construed in relation to each other, so as, if possible, to form one consistent whole, in view of Civ. Code, § 1318 et seq.

2. Wills —538—Alternative gift to another in case of death refers to death during testatrix's lifetime.

A will, which gave a two-thirds interest in an estate to testator's daughter, but provided that, in the event of the daughter's death, testator's brother was to get a two-thirds interest, *held* to refer to death during testatrix's lifetime.

3. Wills —601(1)—Absolute gift limited by subsequent disposition of remainder.

One provision of a will provided that, if testatrix's daughter survived her, a two-thirds interest should go to her, and another provided that, if the daughter died without issue, the remaining estate should be distributed among named remaindermen. The daughter died without issue shortly after testatrix. *Held*, in view of the will as a whole, that the daughter secured only a life estate; hence on her death the remaindermen were entitled to the two-thirds interest.

4. Wills ⚡601(1)—General devise limited by clear subsequent disposition of gift over.

A general devise may be limited by a subsequent clear disposition of a gift over of the remainder.

5. Wills ⚡812—Specific lapsed legacy not required to contribute until general funds exhausted.

Where no objection was raised to the payment of a specific legacy, which had lapsed, it should not be required to contribute to a deficiency until after the general funds have been exhausted.

Appeal from Superior Court, Santa Cruz County; Benj. K. Knight, Judge.

In the matter of the estate of Caroline H. Thompson, deceased. From an order approving and settling an executor's account, and from an order of partial distribution, an appeal was taken. Affirmed, as modified.

Charles B. Younger, of Santa Cruz, for appellants.

Alfred W. Hare and Netherton & Johnston, all of Santa Cruz, for respondents.

TYLER, P. J. Appeal from an order approving and settling an executor's account and from an order of partial distribution. The main question involved is the proper construction to be given to the last will and testament of the deceased. The instrument in question is olographic, and it is dated January 4, 1919. The death of the testatrix occurred September 15, 1919, and the will was admitted to probate October 21, 1919. Certain real estate described therein as the Morris Vineyard tract, and which was sold during the course of administration for the sum of \$20,250, forms the major portion of the estate and is the subject-matter of the present controversy. It is the claim of appellant that the trial court adopted a wrong construction of the will, and that respondents were distributed a greater sum than that to which they were entitled. Such portions of the will as are necessary for a proper discussion of the case are as follows:

"1st. I give and devise and bequeath to my brother Harry H. Penfield should he survive me an undivided one-third interest in lot 21, block C of the Morris Vine Yard Tract in the city of Los Angeles. * * *

"2d. I give and devise and bequeath to my daughter Della Thompson Euans should she survive me the remaining two-thirds interest in the above described real property. In the event of my death Carolyn H. Thompson and of Della Thompson Euans I desire that my brother Harry H. Penfield shall have the two-thirds interest hereinabove given to my daughter Della Thompson Euans. And that the remaining one-third interest shall be divided equally between my life-long friends Annie Adella Dunsmoor Charles F. Dunsmoor and Grace Dunsmoor Hare."

"4th. The rest and residue of my estate

* * * I give and devise and bequeath to my daughter Della Thompson Euans in the event that she survives me. In case of her death before mine own, all property not otherwise bequeathed is to be divided equally between Annie Adella Dunsmoor Charles F. Dunsmoor and Grace D. Hare.

"5th. In the event of the death of my daughter Della Thompson Euans and Harry H. Penfield prior to my own demise I bequeath to my friends Annie Adella Dunsmoor Charles F. Dunsmoor and Grace D. Hare whatever I may die possessed of share and share alike.

"6th. I nominate and appoint Alfred W. Hare and Cassius M. Jay of Los Angeles Cal. executors and trustees of my will without bond for carrying out the terms of this will and I desire that Alfred W. Hare and Cassius M. Jay shall become trustees for such estate as shall by this instrument come to said Della Thompson Euans and they shall make such sales investments as shall in their judgment provide income for the support of said Della Thompson Euans principal and interest to be spent if necessary for such maintenance and support.

"7th. I am desirous that Kenneth Logan Euans husband of Della Thompson Euans, shall not receive one cent of my estate and I require and direct that in the event of my daughter Della Thompson Euans dying without issue such estate as shall remain shall be distributed to Annie Adella Dunsmoor Charles F. Dunsmoor and Grace D. Hare share & share alike if Annie Adella Dunsmoor be still alive. If not to Charles F. Dunsmoor and Grace Dunsmoor Hare, of their heirs.

"8th. In case of my death and that of Della Thompson Euans I devise that the heirs herein mentioned Annie Adella Dunsmoor Charles F. Dunsmoor and Grace Dunsmoor Hare shall out of their undivided one-third interest in lot 21, block C, of Morris Vine Yard Tract of the city of Los Angeles pay to Cassius M. Jay \$500 for his faithful friendship and care of my interests."

[1] In construing a will the predominant idea in the testator's mind, if apparent, is heeded as against all doubtful and conflicting provisions which might defeat it. A will is to be construed according to the intention of the testator, and in case of any uncertainty arising upon the face of the will as to the application of any of its provisions, the testator's intention is to be ascertained from the words thereof, and to that end all the parts are to be construed in relation to each other so as, if possible, to form one consistent whole. Where, therefore, the meaning of any part of a will is ambiguous or doubtful it may be explained by reference to other parts of the will. Civ. Code, § 1318 et seq. In other words, a will is construed from its four corners.

[2] It is perfectly apparent from a reading of the entire will that it was the intention of the testatrix to make her daughter and her brother the chief objects of her bounty. It is therein provided in the first instance that the daughter is to have a two-thirds interest in the property and the brother a one-third

interest, dependent only upon the condition that they survive the testatrix. As she predeceased both of these beneficiaries the condition upon which they were to take occurred and, in the absence of any further qualifications, their estates became absolute. So far as the brother's share is concerned, there was none, so that the interest given to him directly under the will has become vested and it is not involved in this controversy. The daughter Della Thompson Euans died intestate without issue shortly after the death of the testatrix, her death having occurred July 19, 1920.

In construing the will of the mother the trial court concluded that under the seventh clause thereof the daughter had only a qualified interest in the share set apart to her amounting to no more than a life estate and that the testatrix had effectually disposed of the estate in remainder by devising the same to her friends the respondents. Appellant contends that such construction does not conform to the intention of the testatrix as stated in her will; and he further contends that any such attempted distribution of the property is inconsistent with and contrary to the absolute disposition which testatrix made of the same in paragraphs 1 and 2 of the will and is therefore void on the ground of repugnancy. Upon the first proposition it is argued that as the daughter survived the mother she succeeded to two-thirds of the vineyard lot and that this absolute devise was in no manner qualified by the seventh paragraph of the will under which the testatrix provided that in the event of the death of the daughter without issue her interest should go to her friends.

We see no merit in this contention. As pointed out by the respondents, two primary devises are made in the alternative, depending upon the condition as to whether the mother or daughter died first. If the daughter and brother both survive, one-third goes to the brother and two-thirds to the daughter. As this condition happened, both estates became absolute, unless qualified by some secondary provision. The final sentence of the second paragraph makes an alternative complete primary disposition, to become effective in the event that the mother survives the daughter, in which case two-thirds would go to the brother and one-third to the three friends. This event did not happen, and this provision therefore did not become effective, for the reason that it provides for the primary disposition of the property in the event that the daughter predecease the mother.

It is true, as contended by appellant, that this paragraph of the will does not expressly provide for the death of the daughter prior to that of the mother, but it certainly can have no other meaning as hereinafter pointed out. Assuming this to be true, this clause, as above stated, must be eliminated, and the primary devise of one-third to the brother

and two-thirds to the daughter is up to this point still effective. By paragraph 6 a secondary provision affecting the situation is found. Trustees are there provided for the property of the estate devised to the daughter, and then in paragraph 7 occurs a final secondary disposition in favor of the respondents of whatever may remain of such property at the death of the daughter if she should die without issue. The language of the alternative disposition contained in the second paragraph of the will in referring to the devise over to take effect in the event of the death of the testatrix and of her daughter, though unlimited as to time, cannot be held to mean death generally whenever it may happen, but rather to death in the lifetime of the testatrix. Civ. Code, § 1336; Estate of Rounds, 180 Cal. 386, 181 Pac. 638.

The instrument in question as a whole is in complete accord and harmony with this rule of construction, and an analysis of its provisions compels the construction given to it by the learned trial court. It will be noticed that the clause in question immediately follows in the same paragraph a disposition to take effect in the event of survival, and it being a disposition to take effect upon death, shows that it was a mere alternative provision, the first relating to survivorship, the second to nonsurvivorship. The language in question, therefore, as above stated, creates an alternative primary disposition of the property, to become effective only in the event that the mother survive the daughter. As this contingency did not happen, the provision becomes inoperative.

This construction finds support in other provisions of the will and carries out the intention of the testatrix. By paragraph 4 the testatrix disposed of the remainder of her estate, the daughter being named the residuary legatee, remainder over to her friends, of all the property of her estate not otherwise bequeathed, to take effect in the event of her daughter predeceasing her. In this event the brother would still have received his two-thirds share of the vineyard lot. Paragraph 5, although inoperative for the reason that the death of both brother and daughter before that of the testatrix is the condition precedent to its effectiveness, throws light upon the intention of the testatrix, for it provides that upon the happening of this contingency the whole estate should go to her friends. It is apparent that the testatrix had in mind under this paragraph the possibility of her daughter and brother both predeceasing her; and unless paragraph 2 is construed as referring to the death of the daughter during the lifetime of the testatrix, this situation is unprovided for. The contingency of the brother's death is taken care of under the residuary clause.

Paragraph 7, under which the remainder of the daughter's inheritance is devised over to respondents in the event of her death with

out issue, shows the condition of mind of the testatrix toward her son-in-law, as it is declared therein that he shall not receive one cent of her estate. This paragraph of the will became operative only by reason of the fact that the daughter died without issue after having survived the testatrix, and the amount of the estate in remainder which respondents might receive thereunder would, of course, depend entirely upon the amount expended on behalf of the daughter in her lifetime—an uncertain quantity. This provision further shows that the testatrix had in mind the possibility that the daughter might die leaving a portion of the property devised to her unexpended and that the husband might benefit thereby, a result she wished to thwart. There is no question that she desired to make some provision for respondents, and the remainder, whatever it might amount to, is all they could possibly succeed to in the event that the daughter survived the mother, and it might or might not have been of value, depending upon the extent of the expenditures made on behalf of the daughter, which in turn depended upon the duration of her life.

Paragraph 8 is not operative as the provisions thereof contemplate the possible antecedent death of the daughter, in which event respondents were to receive one-third of the lot in question.

Counsel for the appellant direct our attention to this last provision as supporting his contention that the testatrix was referring in the second paragraph to the death of her daughter at any time, and not in the sense that it was to occur prior to that of the testatrix, and he argues that if his construction is not the correct one then it must follow that the testatrix intended to require her friends to pay \$500 out of their devise to her other friend Cassius M. Jay, if they acquired a one-third interest in the property by reason of the fact that the daughter predeceased the mother, but that upon failure of that event they should not be required to pay anything if they succeeded to a two-thirds interest.

As above suggested, if the condition upon which they were to pay this sum of \$500 had happened they could have well afforded to do so; but in the event that the daughter survived the mother their remainder would be of uncertain, if any, value—a fact quite apparent to the testatrix. This argument therefore has little force. We are of the opinion, therefore, that the learned trial court properly construed the instrument in question.

[3, 4] This brings us to the second contention of the appellant. In this connection it is claimed that testatrix having made a complete disposition of the property in question by the first two paragraphs of the will, the limitation over is repugnant to this absolute

devise, and is therefore inoperative and void. We see no merit in this contention. Here the provisions of the will show a clear intent on the part of the testatrix to bequeath to her daughter a limited estate, for the words creating the same are dispositive, and not precatory, and they require that the remainder provided for shall be distributed to respondents. The law is well established in this case that a general devise may be limited by a subsequent clear disposition of a gift over of the remainder. *Estate of Briggs*, 186 Cal. 351, 199 Pac. 322; *Estate of Tooley*, 170 Cal. 164, 149 Pac. 574, Ann. Cas. 1917B, 516; *Adams v. Prather*, 176 Cal. 33, 167 Pac. 534.

[5] And, finally, appellant objects to that part of the account charging him with a proportion of the expenses of administration. It appears from the record that a considerable sum was received by the executors from the residuum of the estate of testatrix, and also that the account includes the specific legacy to Jay which had lapsed for reasons indicated. No objection seems to be raised by respondents to the payment of this legacy, they no doubt believing that there is a moral if not a legal obligation to pay the same, especially since they have received a greater sum by reason of the early demise of the daughter than they would have received under their specific legacy. However this may be, the specific legacy of appellant should not be required to contribute to any deficiency until after the general funds have been applied to the payment of administration expenses.

The judgment, therefore, should be modified to conform with these views. So modified, it stands affirmed.

We concur: ST. SURE, J.; RICHARDS, J.

SHANKLIN v. SCRIBNER et al.
(Civ. 2501.)

62 Cal. App. 487

(District Court of Appeal, Third District, California. June 12, 1923. Hearing Denied by Supreme Court Aug. 9, 1923.)

1. Appeal and error *§*1036(2)—**Overruling of demurrer on ground of misjoinder of parties defendant harmless as to defendant indebted to plaintiff for whole amount due.**

The overruling of a demurrer, on the ground that there was misjoinder of parties defendant, was harmless as to a defendant who was under legal obligation to pay the whole amount due plaintiff, since the fact that other persons were made defendants could not affect such obligation.

2. Corporations *§*244(6)—**Stockholder's liability applies only to debts contracted while a stockholder.**

Under Civ. Code, *§* 322, making a stockholder liable for a proportionate share of cor-

poration's debts, the fact that person acquires a part or all of the capital stock of a corporation does not make him liable as a stockholder for its past debts, but liability therefor rests upon the person who owned the stock at the time the debts were contracted.

3. Limitation of actions ⚡53(2)—**Action held to constitute one on "open book account."**

Corporation's account with employee, in which the corporation was charged with employee's salary from month to month, and credited with payments thereon made from time to time, was an open book account, and employee's action thereon was an action on an open book account, notwithstanding that the account was that of the corporation and not of the employee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Open Account.]

4. Limitation of actions ⚡53(2)—**Action one on open book account, though books were kept in name of ditches owned by corporation and not name of corporation itself.**

An action against a corporation operating certain water ditches was an action on a book account within the statute of limitations, though the accounts were kept in the name of the ditches and not the name of the corporation.

5. Limitation of actions ⚡53(1)—**Payment entered upon open book account tolls the statute.**

An action on an open book account was not barred by limitation, where the last payment on the account was made within four months of the time of the commencement of the action, since the payment made and entered upon the account tolled the statute.

6. Pleading ⚡237(6)—**Action of court in permitting plaintiff to amend to conform to proofs held not error.**

Where account book was produced during the trial and the items of the account read therefrom in evidence and clearly showed the amount due the plaintiff, the court did not err in permitting plaintiff to amend his complaint to conform to the proofs, by alleging that the sum sued for was the balance due on an open book account.

Appeal from Superior Court, El Dorado County; Charles O. Busick, Judge.

Action by J. W. Shanklin against O. Scribner, C. B. Bills, T. G. Patton, and the Diamond Ridge Water Company. Judgment for plaintiff against first-named and last-named defendants, and such defendants appeal. Reversed as to first-named defendant, and affirmed as to last-named defendant.

J. W. Dorsey and W. E. Cashman, both of San Francisco, for appellants.

E. Fitzgerald, of Placerville, and T. A. Farrell, of Sacramento, for respondent.

FINCH, P. J. Plaintiff was given judgment against defendants Scribner and Dia-

mond Ridge Water Company, and such defendants have appealed.

The third amended complaint, on which the action was tried, alleges that in August, 1911, defendants Scribner, Bills, and Patton "owned and were copartners in the Cosumners water rights and Diamond Ridge water ditches in El Dorado county, Cal., which said water rights and ditches furnished water for irrigation and mining purposes;" that the Diamond Ridge Water Company was incorporated March 5, 1916, and in that month acquired the property described, and has thereafter operated and controlled the same; that in August, 1911, Scribner, Bills, and Patton employed plaintiff as an office employee, and that plaintiff performed services as such from September 1, 1911, to the time when the corporation defendant took over the properties, and that at that time the corporation assumed and promised to pay plaintiff the balance due for his services under such employment by the individual defendants, and has since paid him all, or nearly all, thereof; that at that time the corporation employed plaintiff in the same capacity, and that plaintiff continued in such employment from March 6, 1916, to January 1, 1920; that plaintiff's agreed salary was \$150 a month up to January 1, 1912, \$50 a month thereafter until January 1, 1918, and \$25 a month after that date; and that there remained a balance of \$1,738.50 due plaintiff January 1, 1920. The original complaint was filed January 7, 1920, and the third amended complaint was filed June 30, 1920.

Scribner and the corporation demurred to the complaint on the grounds, among others, of misjoinder of parties defendant, misjoinder of causes of action, and that any sum in excess of \$600 was barred by section 339 of the Code of Civil Procedure. Their demurrer was overruled, and they thereupon filed separate answers, each denying the existence at any time of the alleged copartnership, the employment of plaintiff, the performance by him of the alleged services, or that defendants were indebted to him, and alleging that he had been fully paid, and pleading the statute of limitations. The corporation filed a counterclaim of \$1,125, alleged to be due defendant corporation from plaintiff for office rent.

After the evidence was closed, the court permitted plaintiff to file amendments to his complaint to conform to the evidence, alleging that Scribner "is the sole owner of all of the stock of the defendant corporation"; setting up a second cause of action for \$1,738.50 for services performed for defendants at their request; and a third cause of action alleging "that upon the 1st day of January, 1920, the defendants were and now are indebted to the plaintiff upon an open book account for labor and services as an office

employee, rendered to defendants by plaintiff, at defendants' request, upon which there is due a balance to plaintiff from the defendants of the sum of \$1,738.50."

The court found all the allegations of the complaint and the amendments thereto to be true, except that Bills and Patton had no interest in the corporation, and that all the allegations of defendants' answers and counterclaim were untrue.

Plaintiff testified that he was employed and his compensation agreed upon as alleged in the complaint. Patton's testimony tends strongly to corroborate that of plaintiff. Scribner testified that the corporation assumed the indebtedness of the individual defendants to plaintiff for the alleged services performed prior to the organization of the corporation, amounting to \$1,591, and included the same in the statement of indebtedness filed with the Railroad Commission at the time of the organization of the corporation. The evidence relative to plaintiff's employment and the balance remaining unpaid on account of his services is without substantial conflict. It is true that Scribner, who was president of the corporation, testified that he instructed Patton, the resident manager thereof, to dispense with plaintiff's services after the corporation was formed, but plaintiff was not informed of such instruction, and he continued in the discharge of his duties as such employee, a fact which Scribner must be presumed to have known and which the evidence fairly shows he did know. The services were performed under the immediate supervision of Patton, who had full charge as resident manager and full authority to employ and discharge men. Scribner testified that he had "never gone over Mr. Patton's head yet to deal directly with the employees."

[1] If it be conceded that there was a misjoinder of parties defendant, the substantial rights of the corporation were not prejudiced by the overruling of the demurrer, because it was under legal obligation to pay the whole amount due plaintiff. The fact that other persons were made defendants could not affect that obligation in any manner.

[2] The judgment against Scribner is erroneous. He was not sued on his liability as a stockholder, and, if he had been, such liability did not extend to the whole indebtedness. The evidence shows without conflict that he owned 51 per cent. of the capital stock for about the first two years of the life of the corporation, and all thereof thereafter. A stockholder "is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him at the time the debt or liability was incurred bears to the whole of the subscribed capital stock or shares of the corporation." Civ. Code, § 322.

The fact that a person acquires a part, or all, of the capital stock of a corporation does not make him liable as a stockholder for its past debts, but liability therefor rests upon the person who owned the stock at the time the debts were contracted. If Scribner was individually liable at all under the pleadings, it was for the small sum remaining unpaid, at the time the action was brought, on the indebtedness of the individual defendants, and which the corporation had agreed to pay.

[3] Appellants contend that the account sued on, as set forth in the amendment to conform to the evidence, and as shown by the evidence, is not an open book account. The book which contained the corporation accounts was produced at the trial. In the account therein with plaintiff, the corporation was charged with plaintiff's salary from month to month and credited with payments thereon as made from time to time; there being several such credits during every year up to January 1, 1920, the last being of date September 12, 1919. That such an account is an open book account is well settled. 1 C. J. 597; 1 R. C. L. 207; *Furlow P. B. Co. v. Balboa L. & W. Co.*, 186 Cal. 754, 200 Pac. 625; *Wright v. Loaiza*, 177 Cal. 605, 171 Pac. 311; *George Rice & Sons v. Cowan*, 46 Cal. App. 225, 189 Pac. 132; *Mercantile Trust Co. v. Doe*, 26 Cal. App. 246, 146 Pac. 692. It is immaterial that the book account sued on was that of defendant corporation rather than of the plaintiff. *Millet v. Bradbury*, 109 Cal. 170, 173, 41 Pac. 865.

[4] The business was conducted under the name Diamond Ridge Ditches up to the time the corporation was formed. Thereafter the accounts were continued under the name Diamond Ridge Ditches as before. Appellant contends that, even if the account was an open book account with Diamond Ridge Ditches, it was not such an account with defendant corporation, relying upon the case of *Wright v. Loaiza*, supra. That case and this are not analogous. In that case the plaintiff sued upon an account kept by him with a person other than the defendant. A case more nearly in point is that of *Furlow P. B. Co. v. Balboa L. & W. Co.*, supra, where it was held that an open book account in the name of one partner for partnership purposes was such an account as to his copartners within the meaning of the statute of limitations. It would be a startling rule which would permit a corporation to shorten the period of the statute of limitations in its own favor by keeping its books under a name other than its own.

[5] No part of the cause of action was barred. The last payment on the account was made September 12, 1919, within four months of the time the action was commenced. "Payment made and entered upon the open book account tolls the statute."

Furlow P. B. Co. v. Balboa L. & W. Co., supra.

[6] It is argued that the court erred in permitting plaintiff to amend to conform to the proofs by alleging that the sum sued for was a balance due upon an open book account. The indebtedness so alleged was the same indebtedness which was specifically set forth in the original and the third amended complaints. The account book was produced at the trial, and the items of the account read therefrom in evidence. It does not appear how any dispute relative thereto could arise, or in what manner the corporation's rights were prejudiced by the fact that the averment of an open book account was made after the trial rather than before. The evidence clearly shows that the plaintiff performed all the services required of him under an express contract, at an agreed compensation, and the judgment awards him the balance of such compensation remaining unpaid, and is a just judgment against the corporation.

The judgment against the defendant corporation is affirmed, and that against the defendant Scribner is reversed.

We concur: HART, J.; BURNETT, J.

62 Cal. App. 527

**LICKLEY v. BOARD OF EDUCATION OF
LOS ANGELES COUNTY et al.**
(Civ. 4334.)

(District Court of Appeal, Second District, Division 1. California. June 15, 1923.)

1. Appeal and error —458(2)—Supersedeas ineffective to prevent improper hearing of charges against teacher by county board of education after appeal from judgment.

On application by a teacher to the superior court for a writ of prohibition restraining the county board of education from hearing charges against him, claiming that three board members were scheming to revoke his teaching certificate from motives of passion and prejudice, judgment was rendered for defendants, and plaintiff appeals. *Held*, on application for a writ of supersedeas to prevent the hearing, that, the judgment not requiring or prohibiting the doing of any act, there is nothing on which the writ can operate in the relief or aid of appellate jurisdiction, and it is therefore denied.

2. Courts —207(5)—Original jurisdiction to issue in appellate court.

The appellate court has original jurisdiction to issue writs of prohibition.

3. Courts —207(5)—Original jurisdiction of appellate court to issue writs of prohibition not applicable to cases brought on appeal.

The original jurisdiction of the appellate court to issue writs of prohibition does not apply to cases originating in the superior court, and brought up on appeal only.

4. Appeal and error —458(1)—Confined to relief from proceedings based on judgment; "writ of supersedeas."

The only function of the writ of supersedeas is to restrain proceedings upon the judgment from which the appeal has been taken.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Supersedeas.]

Application by Ernest J. Lickley for a writ of supersedeas directed against the County Board of Education of the County of Los Angeles, State of California, and George T. Bush, Arthur C. Brown, Mark Keppel, J. N. Lacy, and J. T. Baker, as members of the County Board of Education of Los Angeles county, restraining them from proceeding with the hearing of certain charges against petitioner pending appeal from judgment sustaining demurrer to petition. Writ denied.

Joseph Scott and A. G. Ritter, both of Los Angeles, for appellant.

A. J. Hill, Co. Counsel, Edward T. Bishop, Asst. Co. Counsel, and Haas & Dunnigan, all of Los Angeles, for respondents.

CONREY, P. J. The plaintiff applied to the superior court for a writ of prohibition to restrain and prohibit the defendants from hearing or taking any further proceedings in connection with the hearing of certain charges filed with the county board of education of the county of Los Angeles against the plaintiff. In the petition for prohibition it was alleged that three certain members of the board were disqualified from hearing said charges by reason of bias, prejudice, and hatred toward the petitioner, and that said members prior to the hearing have determined out of such personal bias, hatred, and prejudice to revoke the certificates of the petitioner as a teacher, regardless of the sufficiency or insufficiency of the charges made against him or of any testimony in support thereof.

In their return to the writ respondents denied that said members have any prejudice against the petitioner, and denied that they have for said reasons, or at all, determined what action will follow the hearing of said charges.

Treating the return as constituting a demurrer as well as an answer, the court entered an order that the demurrer be sustained. Thereupon the court entered judgment wherein it was recited that it appeared to the court that the petition does not state facts sufficient to warrant the relief demanded, and ordered that the petition be denied. From this judgment the plaintiff appealed, and the transcript on appeal is now on file in this court.

[1] Appellant has now made application to this court for a writ of supersedeas. It

is alleged that respondents are threatening to, and, unless restrained from so doing, will, proceed with the hearing upon said charges, and "that, unless said proceedings before said board are stayed pending the disposition of this appeal, the relief sought by petitioner on this appeal will be of no avail." The single question presented at the hearing of this application relates to the power of this court by writ of supersedeas to prevent respondents from proceeding with the hearing of said charges against appellant during the time of pendency of the appeal.

An alternative writ of prohibition was issued in the court below. Respondents contend that, upon the entry of judgment in the action, the alternative writ ceased to be effective, and that the judgment itself is not a judgment which either requires or prohibits the doing of any act. Therefore, they say that there is nothing upon which a writ of supersedeas could operate. This contention appears to be sustained by the decisions in this state. Thus in *Southern Pacific Co. v. Smith*, 171 Cal. 8, 151 Pac. 426, the Supreme Court said:

"The situation is simply that the superior court by final judgment has denied the injunctive relief sought, refusing to make any provision in such judgment by way of injunctive relief pending appeal. Any temporary injunction previously granted ipso facto terminated with the giving of judgment on the merits denying an injunction, unless in some way maintained by express provision in such judgment. It is thoroughly settled by our rulings that to grant any such relief as is here sought would not be relief in aid of our appellate jurisdiction, and that under our constitutional and statutory provisions we have no original jurisdiction in injunction matters."

[2, 3] We do have original jurisdiction to issue writs of prohibition, but in cases which originated in the superior court, and which are here only on appeal, we have no such original jurisdiction.

In the Matter of *M. O. Graves* (Cal. App.) 216 Pac. 386, recently decided by Division 2 of this district, appellant applied for supersedeas to stay, pending appeal, a superior court judgment of suspension from practice of law. The court held that—

A writ of supersedeas "will only be issued to restrain proceedings upon the judgment from which the appeal has been taken. * * * The general rule, therefore, is that supersedeas will not issue where the judgment does not command or permit any act to be done, or where it is not of a nature to be actively and affirmatively enforced by execution or otherwise."

In *Wood v. Board of Fire Commissioners*, 50 Cal. App. 594, 195 Pac. 739, appellant applied for a supersedeas during the pendency of his appeal from a judgment of the su-

perior court denying a writ of prohibition against the Board of Fire Commissioners of the city of Los Angeles. In denying this application the court, pointed out that the action sought to be enjoined by means of the supersedeas was not in execution of the judgment, but was entirely distinct and separate therefrom.

"The superior court adjudged merely that the plaintiff was not entitled to any relief, and no process of the court is necessary to carry its judgment into effect. There is, therefore, nothing to supersede, and the writ would be ineffectual for any purpose. *Tyler v. Presley*, 72 Cal. 290."

The granting of the writ applied for in the case at bar, even though it were called a writ of supersedeas, would in legal effect be the granting of an alternative writ of prohibition, as if this court could now exercise original jurisdiction, although the case is here solely for the purposes of appeal. This we think this court is without authority to do.

Counsel for appellant have brought to our attention a decision of the Supreme Court of the state of Washington which appears to sustain their contention. *State v. Board of Education of the City of Seattle*, 19 Wash. 8, 52 Pac. 317, 40 L. R. A. 317, 67 Am. St. Rep. 706. In that action appellant sought to obtain from the superior court a writ of prohibition to halt a trial of charges against him as superintendent of public schools, it being alleged that one of the board of directors of the school district was disqualified by prejudice, etc., against appellant. An alternative writ issued, and thereafter the court sustained a demurrer to the petition and entered judgment in favor of the defendants. The plaintiff appealed and applied for a writ of supersedeas. The Supreme Court held that, in the exercise of its discretion, by virtue of its inherent power as an appellate tribunal, it had authority to issue an order of supersedeas "to preserve the status quo of the parties, pending the determination of the appeal upon its merits." The court discussed the matter at length, quoting from decisions rendered in Nebraska, Wisconsin, California, and elsewhere; but the California decisions there mentioned do not touch the question here at issue.

[4] We cannot fail to be impressed by the decision of the Supreme Court of Washington, in so far as it emphasizes the situation in which an appealing plaintiff finds himself in a case of this kind, where his application for the writ has been denied in the court below, and where the county board of education, regardless of the challenge to its jurisdiction, chooses to proceed with the trial of the charges. Nevertheless we are constrained to deny the application for a writ of supersedeas, because the decisions in this state have clearly and consistently held that the only function of that writ is to restrain,

proceedings upon the judgment from which the appeal has been taken.

The application for a writ of supersedeas is denied.

We concur: HOUSER, J.; CURTIS, J.

62 Cal. App. 413

In re RAMEY'S ESTATE.

McLAUGHLIN et al. v. WELSH.

(Civ. 2607.)

(District Court of Appeal, Third District, California. June 6, July 5, 1923. Hearing Denied by Supreme Court Aug. 2, 1923.)

1. Wills ⚡55(1)—Evidence held not to warrant finding of testatrix's incompetency.

In a will contest, evidence *held* insufficient to warrant finding that testatrix was incompetent.

2. Wills ⚡52(1)—In will contest burden of proving testator's incapacity on contestant.

In a will contest, the burden is on the contestant to prove testator's mental incapacity.

3. Wills ⚡386—On conflicting evidence verdict in will contest not disturbed on appeal.

The rule that all questions of the weight of evidence and the credibility of the witnesses are for the jury and the trial court, and that if there be any substantial evidence to support the finding or verdict it cannot be set aside, is applicable to will contests.

4. Wills ⚡50—Elements necessary to prove testator's mental incapacity stated.

In a will contest it is not sufficient for contestants to prove that testator was feeble in mind, suffering from disease and aged and infirm, but they must show that he was incapable of understanding the nature and substance of his property and of disposing thereof intelligently, and was not free from delusions affecting his actions.

5. Wills ⚡158—Proof of undue influence must show overpowering pressure exercised when will executed.

In a will contest on the ground of undue influence, the proof of undue influence must be such as to show that there was pressure exercised which overpowered the mind and bore down the volition of the testator at the very time the will was made.

6. Wills ⚡166(1)—Evidence held to warrant finding of undue influence.

In a will contest, evidence *held* sufficient to warrant finding of undue influence.

7. Wills ⚡166(12)—Circumstantial evidence sufficient to show undue influence.

In building up a cause on circumstantial evidence in a will contest, it is not necessary that any single fact proved, standing alone, shall establish the issue of undue influence; but it is sufficient if all the facts and circumstances given in evidence considered together lead to a

rational inference that the ultimate fact is as alleged.

8. Wills ⚡384—Omissions from written contest not ground for reversal.

Though under Code Civ. Proc. § 1312, a written contest of a will is subject to demurrer, where the facts omitted from the contest were alleged in the petition for probate, the proponent was not injured by the omission, especially since written contest of other contestants alleged such facts, and the final judgment should therefore not be disturbed when overruling the demurrer.

9. Trial ⚡256(6)—In absence of request for more specific instruction, charge correctly stating issues held properly given.

Where, in a will contest, the court correctly stated to the jury the issues to be determined, it in effect told them to disregard the other issues, and, in the absence of a request for a more specific instruction, contestants' contention that the jury should have been instructed to wholly disregard the other issues cannot be sustained.

10. Trial ⚡241—In will contest held not improper for court to read statute defining undue influence.

In a will contest on the ground of undue influence, it was proper in instructing the jury to read Civ. Code, § 1575, defining "undue influence," and the fact that in reading the statute the court substituted the word "her" for "him" was harmless.

11. Wills ⚡384—Instruction permitting jury to consider proponent's actions to determine issue of undue influence held not prejudicial.

In a will contest on the ground of undue influence, though the fact that proponent visited testatrix while she was in the hospital, at her request, could not be considered sufficient to show undue influence, an instruction that it is proper for the jury to take into consideration all the actions of proponent as shown by the evidence at and immediately prior to the execution of the will was not prejudicial.

12. Trial ⚡194(9)—Instruction that inequalities in will could be considered on issue of undue influence and mental capacity did not violate Constitution.

In a will contest, an instruction that "inequality in the distribution of property among those who would inherit if no will had been made is not of itself evidence of undue influence or unsoundness of mind, yet it may be considered as a circumstance by the jury, together with all the other facts and circumstances shown by the evidence, as tending to establish undue influence or unsoundness of mind," did not violate Const. art. 6, § 19, prohibiting judges from instructing in regard to matters of fact.

13. Trial ⚡251(1)—Not error to refuse instruction which, though correct in principal, was inapplicable to case.

It is not error to refuse an instruction which, though correctly stating the law, is not applicable under any theory of the case.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Application by Charles E. Welsh for the probate of the will of Ellen E. Ramey, deceased, contested by May McLaughlin and others. From a decree denying probate, proponent appeals. Affirmed.

Crofton & Wetmore, of Marysville, for appellant.

A. H. Hewitt, of Yuba City, and Richard Belcher and W. H. Carlin, both of Marysville, for respondents.

BURNETT, J. The appeal is from a judgment denying probate of the purported will of Ellen E. Ramey, deceased, entered April 1, 1922. The judgment was based upon the verdict of a jury in favor of contestants, finding: First, that the testatrix on March 1, 1921, the date of the execution of the will, was of unsound mind; and, second that she was then acting under the undue influence of proponent and appellant, Charles E. Welsh. The testatrix was a maiden lady of the age of 73 years at the time of her death in November, 1921. She left surviving her one brother and several children and grandchildren of deceased brothers and sisters as her sole heirs at law. She was the owner of personal property of the value of \$14,000, consisting of bonds and money. For several years she had been subject to epileptic fits, but she was generally able to take care of herself, occupying for a long time prior to February 1, 1921, an apartment in the home of one Mrs. J. McFadden in Yuba City. At this latter date she became ill and needed and obtained the services of a physician, who advised her to go to a hospital. Acting upon his advice, she went to the Rideout Hospital in Marysville, remaining there for two or three week and then going to the Sutter county hospital as a pay patient, where she remained until March 7, 1921, when she went to the "King's Daughters Home" in Oakland, where she died in November following. When she became ill at Mrs. McFadden's she sent for her nephew, Charles E. Welsh, the appellant herein, who resided on his farm near Sutter City, and he went to see her, and from that time until she arrived at the "King's Daughters Home," he attended to all her business. When she was at the Rideout hospital she told appellant—according to his testimony—that she was getting too old to attend to business matters; that she wanted him to take care of her property interests and that she desired to get into some old people's home where she could spend the rest of her days and not be bothered any more about business matters. Thereupon she executed and delivered to him a power of attorney, on February 23, and at the same time gave to him a check for \$4,029, the amount of her deposit in the First National Bank of Yuba City, which he cashed and deposited the amount in the same

bank in his own name, and proceeded to draw checks against it for his and her expenses. In her will she made appellant the sole beneficiary and designated him her executor. To his application for admission of the will to probate and his appointment as executor a contest was filed, purporting to be that of May McLaughlin and Owen D. Welsh, a niece and nephew respectively of the decedent, alleging incompetency of the testatrix at the time of the execution of the will, but the contest as to Owen D. Welsh was unauthorized by him and at his request at the beginning of the trial it was dismissed. Minnie C. Clements, Clarence Clements, and Marion Clements, as "grandniece and grand-nephews, respectively, of said Ellen E. Ramey, deceased, being children of a deceased niece," jointly filed another contest, alleging: First, the incompetency of the deceased and unfitness of Charles E. Welsh to act as executor; second, the non-execution of the will; and, third, undue influence on the part of Charles E. Welsh. Demurrers to the contests were interposed but overruled, and answers were thereupon filed. At the close of contestants' case a motion for nonsuit was made by proponent and denied by the court. The findings of the jury were upon two special interrogatories submitted at the request of the contestants.

[1] According to the usual course of such trials proponent first offered proof of the due execution of the will. Waldo S. Johnson, a prominent attorney of Marysville, testified that on the morning of March 1 he was requested by M. T. Brittan, an attorney of Marysville, to act as a witness to the will in question; that he did not know Ellen E. Ramey, but was informed that she was an elderly lady and in the hospital; that he went there in a machine with Mr. Brittan and Charles E. Welsh, and he and Mr. Brittan were shown into her room; after some informal talk he stated that having understood she was a lady of advanced years he would like to satisfy himself as to her mental condition at the time. He was then left alone with her and the door was closed. He had the will with him, which he had received from Mr. Brittan. He took it up and discussed it in detail and asked her if she understood exactly what she was doing, how she was disposing of her property, and she said she did, that is the way she wanted it to go. He talked with her upon several subjects and formed his opinion as to her mental condition. He then called Mr. Brittan and told him to proceed. The will was thereupon executed according to the requirement of the statute and she retained it in her possession. The door was then thrown open and one of the nurses came in, and a little later the proponent, and they all sat there for 10 or 15 minutes more talking informally, and finally the testatrix handed the will to her

nephew and told him to take care of it, that it was her last will and testament. She was of sound and disposing mind at the time; that she was up and dressed when she signed the will and had no fit while he was there; that he never heard of her having fits and that Mr. Welsh was not in the room when the will was executed.

Charles E. Welsh testified that he had known Ellen E. Ramey ever since he was old enough to remember, that he had seen her a great many times since 1919, and talked with her on those occasions. He used to go with her to transact her own business. She was of sound and disposing mind on March 1, when she executed the will. His reasons for so believing were based upon the manner in which she talked, the way she transacted her business, the care she took of her property, her knowledge of what property she had, and her demeanor and conversation generally. After testatrix became ill in the latter part of January, 1921, and while she was at the hospital, she told the witness that she wanted to go below and stay in the home and that she wanted him to handle her property; that she did not tell him she was going to make a will in his favor and that he never talked to her in any way about making a will; that she told him to bring or send out an attorney and he took Mr. Brittan to see her. After he talked with her, Mr. Brittan drew up the power of attorney, making the witness her attorney in fact; that she never told him she wanted an attorney to draw a will; that he had taken Mr. Brittan out on February 27 or 28, and he did not hear any of the conversation between them. He did not know what Mr. Brittan went there for until March 1; that after the execution of the will he was in the room with his aunt and Mr. Johnson and Mr. Brittan probably 15 minutes. The testatrix handed him the document and said, "Take care of that." In reply to a question on cross-examination to state all that his aunt said, he replied:

"I don't know as she said very much. She wanted to know how everybody was, handed me this paper, told me to take care of it, wanted to know if I had heard anything from the Home down there, when she could go; she was getting anxious to go; she was tired of that place. I told her I would find out as quickly as I could and let her know as quickly as I could find out."

M. T. Brittan, the other subscribing witness, testified substantially as the two foregoing in reference to the execution of the will; that Ellen E. Ramey appeared to him to be of sound and disposing mind at the time; that he had seen her concerning this document before he prepared it; that Mr. Welsh came to his office and told him that she wanted to see an attorney, but said nothing about her purpose.

Contestants thereupon called to the stand
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Mrs. Elsie Horton Wilcoxson, one of their most important witnesses, who was the head nurse or matron at the Sutter county hospital. She testified that Ellen E. Ramey was an inmate of the hospital from February 19 to March 7, 1921; that during all that time her physical condition was very bad; that she had at least five or six epileptic fits while she was there. She knew her before she went to the hospital and observed her mental condition while she was a patient there. She was not in her opinion of sound and disposing mind. Her reasons for the opinion were that, after one of these convulsions, Miss Ramey would lie for several days without talking to any one, apparently in a semiconscious condition; sometimes she would know any one and sometimes not; she was in bed most of the time; her mental condition was about the same all the time she was there; she saw her frequently and Miss Ramey was under her charge; she talked with her every day; she observed her condition and general appearance and actions; from this she concluded that she was not of sound mind and that condition existed on March 1; testatrix talked with her only once about her business affairs; that was in the evening after the execution of the will; at that time testatrix stated to her that Mr. Welsh (Charles E. Welsh, proponent) intended to take care of her for the rest of her life and was preparing to take her to Oakland to a home; she stated she was sorry she had signed her name to any papers, but did not state what the papers were; she appeared to be nervous and looked very despondent; the attacks of epilepsy would last for several hours before she would become conscious, then she would lie in a semiconscious condition for several days after that, sometimes two or three days; witness could not remember how long prior to March 1 testatrix had one of these attacks. They did not recur at regular intervals, but she thought the patient had one between March 1 and 7. Between these dates inclusive the physical condition of testatrix was very weak; from February 19 to March 1 decedent was not able to take care of herself physically at any time; she would with help get up and sit in a chair a while; she would get up and fall down; by helping her, aiding her she could walk some, but she could not get up and walk around without some one helping her. She became weaker as the days went on, and as her physical condition sank so did her mind; she knew Mr. Johnson and Mr. Brittan were in the room with Miss Ramey on March 1; that she saw them enter and as far as she could remember Charles E. Welsh went in with them; she did not hear them talking in there as she did not stop to listen to their talking; they were there possibly half an hour and she saw them come out and go away together. She had seen Miss Ramey prior to the entrance of these

gentlemen into the room, possibly an hour or so; she was then sitting in a rocking chair; she had been helped to be dressed and helped to a chair; she saw her a few minutes after the gentlemen left when she was helped to a bed, being then weak and apparently exhausted.

Mrs. Wilcoxson was followed by Dr. Allen E. Gray, the regular county physician, as well as the special physician for testatrix while she was in the county hospital. He testified that the physical condition of testatrix while she was there was not very good; she was weak and had a number of epileptic attacks; that she was able at times to walk about the grounds unassisted. As to her competency the record of his testimony is as follows:

"Q. What was her mental condition as to soundness of mind? A. Well, I didn't see there was any mental symptoms, that is any insanity or anything like that. Q. What was your answer? A. I didn't consider her insane. Q. You didn't consider her insane? A. No. Q. Did you consider her incompetent to transact business? A. At what time? Q. The time she was at the hospital. A. I did when she first entered the hospital, but afterwards I considered she was incompetent. Q. Was her condition getting worse or better while she was there—from the time she entered the hospital? A. I had her at the Rideout Hospital first. Q. I am speaking of along about March 1. A. There wasn't so much difference from the time that she entered until she left. Q. What was the condition of her mind during the last of February and March, 1921? The Court: As to being competent or incompetent. A. Well, the same question was brought out when the guardian was appointed. It was an act she did that made me think she was incompetent and that was around the latter part of February, that was the only act she did that made me believe she was incompetent."

The witness afterwards explained that the act to which he referred was the transfer of all her property to Mr. Welsh without any security. It may be added that the appointment of a guardian to which he alluded took place in September—more than six months after the execution of the will. He testified that the patient had several epileptic fits while at the hospital but he could not say just when. He would not state that she had one on March 1 or February 27 or 28, as he did not remember the date. He admitted that just before the power of attorney was executed to Mr. Welsh he advised him and his brother, Foster Welsh, that Miss Ramey was in his opinion perfectly competent to do business. These two were the only witnesses for the contestants who testified as to the physical or mental condition of testatrix while she was at the county hospital.

Henry Chism, an acquaintance of testatrix, expressed the opinion that she was of unsound mind. He had known her for some years, but his acquaintance with her was

quite limited and he saw her infrequently. He could not say when was the last time he talked with her, but thought it was within the last five years. He admitted that he did not like her; that he never visited at her house socially, in a business way, or otherwise within four or five years prior to her death.

Mrs. Chism, the wife of Henry Chism, testified also that in her opinion Miss Ramey was of unsound mind within "the last two years of her life or one year for that matter." She saw testatrix frequently during the last two years of her life, as the witness resided just across the street from the McFadden home. Her reason for believing her incompetent was that she thought Miss Ramey did not speak intelligently at times; that "I found her mind was weakened all the time and in talking to her I could see that her mind was very poor."

C. A. Duncan testified that he knew testatrix a little more than 50 years. She lived most of the time at Miss McFadden's, near his place. He saw her occasionally. He did not particularly have conversation with her, but he used to carry groceries from his store to her when she would ask him to do so. During the last years of her life there was a change in her "physical or mental condition." He was asked the question, "Would you consider her as being of sound and disposing mind during the last part of her life, prior to March 1, 1921?" His reply was:

"Well, at times Miss Ramey seemed to be of sound mind; at other times she did not. She was subject to spells and after those spells she didn't seem to be just at herself."

Within the last two years of testatrix's life while he lived next door to her, he would see her quite often in the yard and he talked to her occasionally. He could not say that it was oftener than once a month that he talked to her; he never visited her home during that period, but she came to his house occasionally and visited with his wife. In ordering groceries she did not appear to be of unsound mind and in her conversation generally she would talk just like any other acquaintance, but sometimes she would talk in a rambling fashion, although not when she was ordering groceries.

Dr. A. J. Duncan, a practicing physician, testified that he knew Miss Ramey perhaps 20 years; that he would see her frequently; that at the request of Mr. Welsh he visited her while she was at the hospital, some time between February 22 and March 1; she was in bed and he stayed only a few minutes. When he went into the room she recognized him, called him by name, and he asked her how old she was and she told him. He knew at the time that she was subject to epileptic fits. After he found out who it was he declined to make any further exam-

ination, but from the examination he made and his knowledge of her case generally he did not consider her competent, and his reason for the opinion was: "I believe that a person that is subject to chronic epilepsy at her age deteriorates mentally." He admitted that at the time of his visit to her he did not consider himself competent as a physician and surgeon to pass upon the mental capacity of Miss Ramey and that apparently at that time she was perfectly rational.

The foregoing we consider a fair synopsis of the evidence before the court when the motion for nonsuit was made and denied.

Thereupon proponent called Mrs. J. McFadden, in whose house Miss Ramey had occupied apartments at different periods from March, 1910, to the latter part of January or first of February, 1921, when she went to the Rideout Hospital, two weeks before the execution of the will. The witness saw testatrix frequently during this period and had opportunity of observing her manner and actions and had conversations with her. She observed her as she would any one else under the same circumstances and was no more interested in her than in any one else. The witness declared that during the entire period Miss Ramey seemed to be of sound and disposing mind; that she did not see anything to the contrary; that Miss Ramey managed her own affairs, attended to her own business, and when she wanted to pay her rent she went down to the bank and got her money to pay it with. The witness saw testatrix three times after she went to the Rideout Hospital, where witness visited her. She went there because she thought Miss Ramey might be lonesome and she had conversations with her on these visits; she did not remember what the conversation was, but conversed with her as she would with any one else; that the only circumstance she remembered was that the hospital bills had been presented to Miss Ramey and the latter said she had no way of paying bills until Mr. Welsh came in and she would have him bring checks for her, and testatrix was worried that bills were presented to her when she expected him to attend to that matter. The witness remembered that previous to that, it might have been six months previous, when testatrix was somewhat indisposed, witness had at the request of testatrix written to Mr. Charles E. Welsh to come in when it was convenient to see Miss Ramey. As to the epilepsy, witness testified that testatrix would lapse into unconsciousness without any premonition at all that it was going to occur; testatrix told her that she did not know for a half minute beforehand that the spells were coming on; witness never saw her when she passed into unconsciousness, but was informed imme-

diately or heard her and took occasion to have her placed upon the bed. Sometimes she would be six months free from them, then again she might have two very close together; testatrix never required a physician, but Dr. Gray had told her that she had better go to the Rideout Hospital, as she had no attendant in her room and she would improve faster in the hospital. While testatrix was ill at her home, witness visited her several times a day and she had no spasms or convulsions, and her physical condition when she visited her at the Rideout Hospital was about the same as when she left the home of witness.

As stated by appellant, Mrs. McFadden was apparently the closest and most intimate acquaintance of Miss Ramey during the period in which she knew her, and her testimony was clear and emphatic that testatrix was of sound and disposing mind at that time.

C. A. Emory, whose wife is a grandniece of Miss Ramey, knew the testatrix for about seven years; he was a grocery clerk in Yuba City most of the time from the fall of 1917 to the spring of 1920; before going to work in the store he would see her probably once in every two weeks, meet her on the street or at home, and had general conversations with her now and then; she did some of her trading at the store and he generally waited on her. He had opportunities to observe her conduct and manner generally and he would say that she was very much of sound mind; she knew exactly what she was coming to the store for, the price of everything she wanted, whether it was cheaper at one place than another, and could hold an ordinary conversation as well as any one as far as witness could state. The last time he saw her was in January, 1921, in front of the post office, and he had a conversation with her at that time, that she asked him how everything was, about the family, wife, and children. She named the wife and children. He observed nothing in her manner, speech, or conversation at that time indicating any difference in her mental condition from what it had been during the entire period that he knew her.

Dr. Fred B. Tapley testified that he had been a practicing physician since 1916 and had made a study of epilepsy and its effect upon the mind and body of the patient; he knew testatrix in her lifetime, for 15 or 20 years; he called to see her once about 10 years ago when she had an epileptic fit; the next time he saw her was in the Sutter county hospital about a year before the trial, between February 19 and March 7, 1921. He was called there to pass on her mental condition and as to that he stated:

"Well, after talking with her quite a while we decided there wasn't much wrong with her at

that time outside of her age and feeble condition due to her age, found she was mentally competent."

When he made the examination he knew her history in a general way in reference to epilepsy; that epilepsy, even when chronic and extending over a considerable period of years, does not necessarily result in insanity, and does not frequently so result; that these fits did not render testatrix insane or of unsound mind.

He was followed by a large number of witnesses, including nephews and nieces of testatrix, a physician of experience in the treatment of epilepsy who was also acquainted with Miss Ramey, and other acquaintances, who testified that, in their opinion, she was of sound and disposing mind.

There was also evidence of some minor and incidental matters, but we deem it unnecessary to reproduce it.

We have thus called attention to the testimony at considerable length for the reason that appellant earnestly insists that it is utterly insufficient to sustain either finding of the jury, and also to indicate the significance of certain rulings of the court.

[2, 3] In considering the question of the support for the findings, certain legal principles must, of course, be regarded. We may mention only the following: The burden of proof is upon contestant, the presumption being manifestly, that the testatrix was of sound and disposing mind and free from undue influence. *Estate of Latour*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; *Estate of Stone*, 172 Cal. 215, 155 Pac. 992. However, in will contests the rule is the same as in other proceedings, that all questions of the weight of the evidence and the credibility of the witnesses are for the jury and the trial court, and if there be any substantial evidence to support the finding or verdict it cannot be set aside by the reviewing court, although said court might believe the great preponderance of the evidence was the other way. *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598.

[4] But as to the proof justifying a finding or verdict against the will upon the ground of unsoundness of mind, it must go further than to show that the testator was feeble in mind, suffering from disease, and aged and infirm, it must be sufficient to warrant the inference that he was incapable of understanding the nature and situation of his property and of disposing thereof intelligently and was not free from delusions affecting his action. *Estate of Motz*, 136 Cal. 558, 69 Pac. 294.

[5] Also the proof of undue influence must be such as to show that there was a pressure exercised and exerted "which overpowered the mind and bore down the volition of the testator at the very time the will was

made." *Estate of Gleason*, 164 Cal. 756, 130 Pac. 872.

[6] As to the claim of undue influence it is the contention of appellant that the record is destitute of any such showing. He points out that this issue was tendered, if at all, only in the contest of the Clements; that therein the sole specification of fact is that Welsh "by representing to said decedent that he would properly care for her in her sickness and that her other relations did not care what became of her and had no regard for her, he induced and persuaded her to make the said will." Appellant insists that there is no such evidence whatever. Assuredly, there is no direct evidence of any such representation. The nearest approach to a suggestion of that character is found in the testimony of Miss Wilcoxson that Miss Ramey stated to her that "Mr. Welsh intended to take care of her for the rest of her life and was preparing to take her to Oakland to a Home." Nothing was said, however, as to such promise having been made to induce her to make a will in his favor, and it would hardly be just to construe this apparently innocent and praiseworthy intention as evidence of a previous wicked and sinister design to take advantage of Miss Ramey in the disposition of her property.

Without attempting to reproduce the argument of appellant upon this branch of the case, we deem it sufficient to state that he insists that we find none of the usual "earmarks" of undue influence; there was no evidence that she had any particular regard or affection for any of her relatives other than proponent, unless it be her niece, Laura Stevenson, who testified for proponent, or that she was even acquainted with the Clements, the contestants who alleged undue influence; that, on the contrary, she relied upon proponent for several years for assistance when she needed it, and as persuasive evidence of her regard for and confidence in him she sent for Welsh when she became ill a few weeks before the will was executed as she had done on previous occasions; there was no evidence of any attempt at solicitation, coercion, or any misrepresentation of any kind; and if it be admitted that a confidential relation existed between the parties, this does not even raise a suspicion of undue influence. There must be some proof that such relation was used to take advantage of the testatrix, at the time the will was made, overcoming her free will and desire in order to invalidate the testament. *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294; *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532.

While admitting that undue influence may be shown by circumstantial evidence—indeed, it can hardly ever be shown in any other way—appellant insists that the cir-

cumstances can do no more than excite suspicion that the proponent unfairly and unduly influenced the testatrix, and it is rightly said that suspicion is not sufficient. In fact, appellant asserts that every circumstance in the case accords with the hypothesis that the will was the free act of the mind of testatrix, and if some of the circumstances may be consistent with the theory of undue influence the view in favor of the validity of the will must prevail. In *re* McDevitt, 95 Cal. 17, 30 Pac. 101.

In reply to this challenge respondents group certain circumstances, which they claim are sufficient in their cumulative probative force to justify both findings. Of these we select only those that may have a bearing upon undue influence: (1) While Miss Ramey was at the county hospital she had five or six of these epileptic spasms or convulsions; she was sinking rapidly, both physically and mentally; was suffering from a fatal malady and at no time was entirely free from the effect of these epileptic attacks. (2) She had been through life a very economical and thrifty person and had saved an estate of the value of about \$14,000. (3) After going to the Rideout Hospital, although she was ill, her life habit lingered, and, finding that she was paying \$40 per week, she had herself taken to the Sutter county hospital, where she could obtain accommodations for \$30 a week. (4) From the time she entered that institution on February 19 until and including March 1, 1921, proponent called upon and conversed with her nearly every day, and brought to see her at least four or five times the attorney, M. T. Brittan, who finally drew the supposed will. (5) On February 23 she drew a check in favor of respondent for the entire amount of her deposit in the bank, and on the same day in the presence of Brittan and proponent she executed the general power of attorney, which was afterward acknowledged by Brittan before Waldo S. Johnson. (6) Proponent deposited the check to his own credit in the bank and immediately began drawing out the money until the bank refused to honor any of his checks. (7) Having obtained control of all her property, he hunted up a home in Oakland for her, and, as respondents say, ascertaining "that he could place her there at \$60 per month if she occupied a public ward and \$70 in a private room and thriftily, of course, selected for her the public ward, thus saving \$10 per month." (8) Having been unable to obtain all her property through the power of attorney and the check which she gave him, he goes out with Mr. Brittan and Mr. Johnson, and these three men were closeted with her for half an hour or an hour before the will was executed; thereafter Miss Ramey was exhausted and expressed regret that she had signed some papers.

(9) From various circumstances respondents claim it to be a fair inference that the supposed will was prepared in the office of attorney Brittan in the city of Marysville at the request of proponent Charles E. Welsh and that Attorney Johnson was called in and the three went out to Miss Ramey with the paper already drawn. (10) Something like a year prior to March 1, 1921, Miss Ramey had declared her intention to execute a will in favor of respondent May McLaughlin.

[7] Manifestly, as stated by this court recently in the *Estate of Gallo*, 214 Pac. 496:

"In building up a case on circumstantial evidence it is not necessary that any single fact proved, standing alone, shall establish the issue, but it is sufficient if all the facts and circumstances given in evidence, considered together, lead to a rational inference that the ultimate fact is, as alleged."

Some of the facts upon which respondents rely to justify their position are indeed of slight significance, but we think it should not be held by an appellate court that the entire showing is legally insufficient to warrant the finding of undue influence. Of course, as has often been stated, each case must stand or fall upon its own peculiar facts, and precedents are valuable largely for their exposition of the ruling principles in such consideration. Appellant thinks we should follow the teaching of the Missouri Supreme Court in the case of *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W. 1127, wherein it was held that—

"In an action to set aside a will, evidence that defendant was a member of testator's family at the time the will was drawn, and for years prior thereto; that, at testator's request, he went after the attorney who drew the instrument; that he and his brother and sister were the principal beneficiaries; that testator was old and infirm, and in making the will ignored to a great extent a niece who had been his constant attendant for years; and that, prior to the execution of the will, defendant had drawn out, on testators' checks, all the money the latter then had in bank—does not show facts from which undue influence can be reasonably inferred; and a submission of the issue to the jury thereon is erroneous."

No doubt that court is entitled to great respect, but it is to be observed that the decision was not unanimous, that the adverse showing was not so formidable as herein, and it is quite probable that other courts of equal learning would decide that a sufficient case was made out to submit to the jury.

On the other hand, respondents cite *Estate of Snowball*, supra, and *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307, to which they would now probably add *Estate of Gallo*, supra, as authoritative precedents for their contention. It must be admitted, however, that they involved certain facts for which there is no equivalent in the case at bar, but we think without an undue extension of the

doctrine of these cases we may find therein sanction for the conclusion we have reached.

But it is claimed that the foregoing questionable incidents were all explained by proponent and that his explanation should have removed any implication of unfairness. It was for the jury and the trial court, though, to say whether his explanation was satisfactory and to believe a part of his testimony while disbelieving another portion, if their conscientious judgment so directed. They had the right to consider his interest in the case and his manner on the stand, and while not permitted to act capriciously or arbitrarily, yet if they believed that proponent was not telling the truth when stating that his aunt had sent for him and that the suggestions in reference to the disposition of the property came from her, they were authorized to reject it.

Nor is it sufficient reason for us to set aside the finding because we may consider the evidence consistent with good faith on the part of proponent. If there is an intimation to that effect in any of the decisions, it is undoubtedly ill-advised. The rule is, as before stated, that if a rational inference may be drawn from the evidence in favor of the finding of the jury the appellate court is bound by it, although it may believe that a contrary conclusion would have been more reasonable and satisfactory.

The other question seems less difficult of solution. It is apparent that the expression of opinion as to the competency of the testatrix by some of the witnesses for contestants is of no value by reason of their slight acquaintance with her and their infrequent opportunities to observe and converse with her. The reasons assigned for such opinion are also inadequate, and as stated by this court in the *Estate of Campbell*, 46 Cal. App. 612, 189 Pac. 812:

"The opinion of a witness that a person is of unsound mind can be no stronger than or of superior evidentiary weight to the reasons upon which he bases his opinion."

It is equally manifest that the testimony of the physicians in favor of contestants is of slight importance. It is apparent that they were very much in doubt in reference to her mental condition and their admissions were such as to deprive of any substantial probative force their expression of opinion that she was of unsound mind.

As to this issue respondents' case can be upheld only, if at all, upon the testimony of Mrs. Wilcoxson. But, as said by appellant, there is not a word in her testimony of any insanity, delirium, loss of memory or failure to know or understand, upon the part of the testatrix, on March 1, 1921, the day the will was executed, nor at any other time, except when she may have been, as the witness claimed, in an unconsciousness or semiconscious condition after one of these fits, and

she certainly did not have one of these so-called fits on that day and could not have had one later than at least two days prior thereto according to the witness' own testimony. Appellant claims that the vital parts of her testimony are peculiarly "self-contradictory and inherently impossible," but granting that the jury was justified in fully crediting her statements, it nevertheless is true that her opinion of mental unsoundness was based upon the reason that in consequence of the epileptic fits Miss Ramey was unconscious or semiconscious, and that on the day in question she was not in such condition at all. Indeed, she talked with Miss Ramey on business matters on that day and she makes no claim that what was said or done or the appearance of testatrix indicated any mental infirmity. For further consideration of the legal aspect of the question involved, we may refer to the *Estate of Campbell*, supra; *Estate of Guilbert*, 46 Cal. App. 55, 188 Pac. 807; *Estate of Nelson*, supra; *Estate of Motz*, supra; *Estate of Morey*, 147 Cal. 495, 82 Pac. 57; *Estate of Purcell*, 164 Cal. 300, 128 Pac. 932; *Estate of Packer*, 164 Cal. 525, 129 Pac. 778; *Estate of Fraser*, 177 Cal. 266, 170 Pac. 601; *Estate of Casarotti*, 184 Cal. 73, 192 Pac. 1085.

To fortify their position as to mental incompetency respondents cite *Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171; *Estate of Snowball*, supra; *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307. The first of these treated only of the sufficiency of the pleadings and of the findings to support the judgment, the evidence not having been brought up. The estate of Snowball involved only the issue of undue influence, and the Supreme Court held that the evidence was sufficient to support the finding upon that question.

In the *Estate of De Laveaga* it was held, after an exhaustive review of the evidence, that it was sufficient to support the conclusion of the trial judge on both issues. But, as stated by the Supreme Court in reference to the mental competency of the testatrix:

"We find portrayed a woman utterly incompetent at any time to understandingly and intelligently consider her property with a view to its proper disposition by will, and moreover utterly incompetent alone and unaided to compose and write the admirably constructed document in so far as phraseology is concerned, which was offered for probate as her last will. Contestants' evidence tended to show, among other things, that as a girl and young woman she was unable to materially progress in so far as the simplest kind of education was concerned; that her mind remained to the time of her death as that of a child, unable to comprehend anything beyond the most simple matters."

Other considerations are set forth in the opinion which added weight to the inference that the testatrix was entirely without understanding of what she was doing at the

time the supposed will was executed. The foregoing statement is sufficient to show the marked distinction between that case and this.

Objections are made to the action of the trial court in overruling the demurrers to the contests, to the rulings of the court upon the admissibility of evidence, and of giving and refusing certain instructions.

[8] As to the two separate written contests it is plain that they are regarded as the first pleading in the action and are subject to the same grounds of demurrer as any other complaint. Section 1312, Code Civ. Proc. Each of them is undoubtedly defective, but, as we view it, the proponent was not prejudiced by the ruling. He claims that the contest of May McLaughlin was fatally defective in its failure to allege certain facts, which he enumerates. But they were alleged in the petition for the probate of the will, and while as a matter of good pleading, they should have been set out in the written contest, it is apparent after trial that appellant was not damaged by the omission. Besides, they were alleged in the contest of the Clements, and if the latter was sufficient, the final judgment should not be disturbed simply because of an erroneous ruling as to the other contest.

The only serious objection to the complaint of the Clements is that the allegation of undue influence is that of a legal conclusion, but when the whole of it is considered we are satisfied that sufficient facts appear to measure up to the requirement of the rule as stated in the Estate of Olson, *supra*. Here, again, we may say the case was fully tried upon the theory of the sufficiency of the pleadings and appellant was not misled nor injured by any of the supposed shortcomings.

[9] Complaint is made of the instruction by the court that the contest was upon two grounds, namely, unsoundness of mind and the undue influence of Charles E. Welsh. The contention is that two other grounds were attempted to be set up, to wit, the nonexecution of the will and that Charles E. Welsh was not a fit and proper person to be appointed as executor of the will, and as none of these had been withdrawn or dismissed, the court should have directed the jury "to wholly disregard all allegations of contest other than the one of soundness of mind and the question of undue influence." We see no merit in this criticism. The court in effect told the jury to disregard the other grounds when it confined the attention of the jury to the two which were mentioned. We may add that the matter was placed beyond controversy by the second instruction in which the court expressly stated that "the issues which you are to determine in this action are the following" (specifying the two already referred to). If appellant desired a more specific statement as to

the other two supposed grounds, he should have requested it.

[10] It was proper to read section 1575 of the Civil Code as to what constitutes "undue influence." It cannot be supposed that the jury did not need such instruction and, as to the claim that it was not applicable to the facts, since there was no evidence that appellant took "an unfair advantage of the mental weakness of testatrix," we think there was a sufficient showing of circumstances to justify the instruction. The word "her" was substituted for "him" in the section, but manifestly this was harmless, as any application of the instruction would necessarily be to proponent's dealings with her, the testatrix. The masculine pronoun would have answered the purpose, of course, just as well, but the change was innocuous.

A similar objection is made to instruction No. 4 upon the ground that—

"There was absolutely no evidence of 'any improper pressure' or other unfair conduct exercised by Charles E. Welsh or any one else which would overcome the volition of the testatrix."

There was, manifestly, no such direct evidence; but, as already stated, the theory embodied in the instruction finds substantial support in the circumstances of the case. Appellant is entirely mistaken in the claim that the instruction "assumes, in its initial statement, that it is a fact that in this particular case 'improper pressure' and 'unfair conduct' had been used; in other words, that undue influence had been established." The language of the instruction is clearly hypothetical:

"A will is obtained by undue influence where improper pressure or other unfair conduct has overcome," etc.

It left to the jury to determine whether it was a case where such conduct existed. This is made even plainer by the concluding portion of the instruction.

[11] Appellant complains most bitterly of instruction No. 6. He says that—

"The mere fact that he visited testatrix frequently at the said hospital, and which was shown conclusively by the evidence was for the purpose of arranging her affairs at her own request, could not be considered as sufficient evidence at all of any undue influence."

Appellant is clearly right in that claim, but the court did not so instruct the jury. The instruction was that—

"It is proper for the jury to take into consideration all the actions of said Charles E. Welsh as shown by the evidence at and immediately prior to the execution of the instrument."

No specific mention was made of his visits to the hospital.

Nor did the instruction leave the jury at

liberty to find undue influence because Charles E. Welsh "sent Mr. Brittan to testatrix, though at the request of testatrix, if they thought Mr. Brittan had exercised any influence over testatrix." It simply directed the jury that Welsh's relation to and connection with the attorney who drew the will might be considered as a circumstance in the case. There was no necessity for giving such instruction, but we can see no prejudicial error therein.

[12] Appellant, claiming that it violated section 19 of article 6 of the state Constitution prohibiting judges from charging jurors with respect to matters of fact, criticizes the action of the court in giving this instruction:

"The court instructs you that inequality in the distribution of property among those who would inherit if no will had been made, is not of itself evidence of undue influence or unsoundness of mind, yet it may be considered as a circumstance by the jury together with all the other facts and circumstances shown by the evidence as tending to establish undue influence or unsoundness of mind."

We do not consider the instruction as violative of said provisions of the Constitution. The court by said instruction did not direct the jury to consider said circumstance for such purpose, nor was there any intimation as to the weight that should be accorded it; but their attention was specifically directed to it as a part of the evidence which they might regard in the case as tending to establish the claim of respondents, leaving it to the jury, however, to say what importance they should attach to it. The instruction is self-contradictory, as the first part of it implies that such circumstance should not be considered as evidence at all, and, besides, that particular circumstance should not have been singled out for special attention; but we think that appellant was not prejudiced thereby.

Appellant complains of the refusal of the court to give this proposed instruction:

"When fraud or fraudulent representations made to the testator are relied on as an element in undue influence, it must appear not only that the representations were false and believed to be true by the testator, but that they were made the basis of importunity and mental pressure upon the testator and that the testamentary act was the result thereof, before the jury can find that there was any fraud practiced upon the testator in the making of the will."

[13] While the foregoing embodies a sound legal principle, it was not applicable to the case, as there was no evidence of any false representations. In the absence of any evidence to that effect, it surely could not be said that such representations were relied on. It is not error to refuse an instruction which, however correct in principle, is not pertinent to any theory of the evidence.

Certain instructions as to mental soundness, given by the court, are assailed by appellant; but they need not be considered in view of our conclusion that the evidence is insufficient to support the finding upon that issue.

As to the rulings upon the admissibility of evidence we have examined all the assignments of error, and, while we think the ruling should have been the other way in some instances, yet we find nothing therein of sufficient gravity to demand a reversal.

As either finding would support the judgment (*Estate of Baker*, 176 Cal. 430, 168 Pac. 881), and we are of the opinion that there was a sufficient showing of undue influence, the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, Justice pro tem.

191 Cal. 579

FRENCH v. FREEMAN. (S. F. 10027.)

(Supreme Court of California. Aug. 2, 1923.
Rehearing Denied Aug. 30, 1923.)**1. Appeal and error** ⇨1010(1) — Appellate court bound by trial court's findings if supported by evidence.

The appellate court is bound by a trial court's findings if sufficient evidence supports them.

2. Vendor and purchaser ⇨44—Evidence held to support finding in purchaser's favor in action for rescission.

In an action for rescission of contract of sale of land, evidence held to support findings in plaintiff's favor, and particularly the findings that defendant made the representation as to the character of the soil and that plaintiff was unfamiliar with farming pursuits, lands, and the qualities or fitness of the soils thereof.

3. Vendor and purchaser ⇨33—What constitutes expression of opinion held question of fact for trial court.

What amounts to an expression of opinion as compared with a positive statement of fact depends upon all the circumstances of the case and is a question for the trial court to determine.

4. Vendor and purchaser ⇨33—Statement, if based on facts, a statement of fact and not mere opinion.

A statement of what might otherwise be an opinion is, if based on alleged facts, a statement of fact and not a mere expression of opinion.

5. Vendor and purchaser ⇨36(2) — Representation that land was finest sediment soil held statement of fact.

Though the statement that the land was good for raising pears might have been a mere expression of opinion, the representation that the land was the finest sediment soil was a statement of fact, especially where such representation was based upon the further statement that the soil had been analyzed, and that such analysis showed the land to be of the character represented and fitted for the production of pears.

6. Vendor and purchaser ⇨36(2)—Purchaser viewing land, but ignorant as to fitness of soil, held not precluded from relying on vendor's representation as to character of soil.

Where a vendee was unacquainted with soils, the fact that he visited the land did not preclude him from saying that he relied upon vendor's statements as to the character of the soil.

7. Vendor and purchaser ⇨123—Whether defrauded party rescinded promptly within statute held question primarily for trial court.

Whether a defrauded party has, within Civ. Code, § 1691, rescinded promptly upon discovering the facts entitling him to rescind, held a question of fact primarily for the trial court.

8. Vendor and purchaser ⇨123—Whether fraud in one particular is constructive notice of other frauds held question for trial court.

Whether a person who has discovered that he has been cheated in one particular is put on inquiry as to other possible frauds held a question for the trial court.

9. Vendor and purchaser ⇨123—Finding that purchaser offered to rescind within reasonable time after discovery of fraud held justified by evidence.

Finding that plaintiff purchaser offered to rescind within a reasonable time after discovery of facts entitling him to rescind, within Civ. Code, § 1691, held justified under the evidence.

10. Vendor and purchaser ⇨123—Discovery, by purchaser of farm, of fraud in shortage of chickens, held not, as matter of law, constructive notice of other frauds.

Where plaintiff purchased a farm, including the chickens thereon, his discovery of a shortage of chickens held not sufficient, as a matter of law, to put him on constructive notice as to frauds, with reference to representations as to the character of the soil of the land.

11. Vendor and purchaser ⇨123—Finding held equivalent to finding purchaser did not waive fraud.

A finding in an action for rescission of contract of sale of land that plaintiff did not, after the discovery of the fraud and falsity of representations which the court finds were made by defendant, waive said fraud or affirm the said contract or sale, as alleged in defendant's amendment to her answer, or by any other act or conduct on the part of plaintiff, held a sufficient finding that plaintiff did not waive the fraud.

12. Vendor and purchaser ⇨45—Question whether purchaser has ratified voidable contract held for jury.

Whether a person has ratified a voidable contract or elected to affirm it rather than to rescind it depends primarily upon his intention which is shown by his declarations or his conduct, which are matters of fact for the jury.

13. Vendor and purchaser ⇨123—Admission of evidence as to proceeds realized by vendor on sale of pear crop held proper as being within issues raised.

In an action for rescission of contract of sale of fruit lands, admission of evidence by plaintiff that defendant received \$1,000 for pears raised and not \$1,600, as represented to plaintiff, held proper as being within issue raised by pleadings.

14. Vendor and purchaser ⇨126—Payment for value of use and occupation of premises precludes further charge for proceeds realized from raising crops.

Where, in an action for rescission of contract of sale of land, plaintiff was charged with the value of the use and occupation of premises for the time he was in possession, he could not also be charged with the proceeds of the crop of pears grown during his occupation.

In Bank.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by John H. French against Addie V. Freeman. Judgment for plaintiff, and defendant appeals. Affirmed.

Rea, Cassin & Caldwell, of San Jose, for appellant.

Louis Oneal, Maurice J. Rankin, and James P. Sex, all of San Jose, for respondent.

KERRIGAN, J. This is an action for rescission of a contract of sale of 14 acres of land near San Jose, upon the ground of the alleged fraud of the defendant in inducing the plaintiff to enter into the contract.

Briefly, the facts of the case are as follows: The defendant inserted an advertisement in a local newspaper offering the land in question for sale for \$18,000 and describing it as being the finest sediment soil and possessing the best artesian well in the county. Plaintiff saw this advertisement, and, accompanied by his wife and two men, none of whom were farmers by vocation, he called upon defendant at the farm on the morning of March 27, 1920. Defendant's son, Dr. Freeman, acting for her, showed the plaintiff and his friends about the place, and, in the course of the conversation which ensued, certain representations, charged to be untrue, were made. Plaintiff and his friends returned to the farm in the afternoon, when plaintiff paid a deposit of \$200 on the purchase price, which was \$18,000. On March 28, 1920, plaintiff moved on the land, and on this day he made a further payment of \$7,300, and gave his note, secured by a trust deed, for the balance of the purchase price. On July 29, 1920, plaintiff, through his attorney, served on defendant a formal notice of rescission, claiming that the property did not conform to the representations made by the defendant. The following week defendant commenced proceedings to have the land sold under the terms of the trust deed, and shortly thereafter the present action was brought.

The alleged misrepresentations, as set out in the complaint as constituting the grounds of fraud, are: (1) That the character of the soil was suitable for raising pears and that it was "the finest sediment soil"; (2) that the land was well and abundantly watered by means of a well and pump which would supply sufficient water to sell to adjoining neighbors in addition to that needed for the irrigation of the entire tract of land; (3) that the poultry on said premises consisted of at least 250 chickens of good quality and breed; and (4) that said property had in the year 1919 produced pears of the reasonable value of \$1,600, and that said crop was sold for \$1,600.

The trial court, sitting with an advisory jury, found that to induce plaintiff to enter into said contract for the purchase of said

property defendant, immediately prior to making the said contract and sale, represented and stated to plaintiff as follows: That all of said land was of the finest sediment soil, and that the said land was fitted for the growing and production of pear trees, and that pear trees would produce good crops of pears on all of said land; that said land and soil had been analyzed, and that a sample of same had been sent to the University at Berkeley, Cal.; that such analysis showed all of said land and soil to be the finest sediment soil and fitted for the growing of pear trees and the production of pears; and that defendant further represented and stated to plaintiff that said property had in the year 1919 produced pears of the reasonable market value of \$1,600; that the pear crop produced by said property in the year 1919 was sold by defendant for the sum of \$1,600; that \$1,600 was paid to defendant for the said crop of pears on the trees; that said representations were of facts material to said contract and sale and materially affected the value of the said property sold to plaintiff, and plaintiff believed and relied on said representations and statements made by defendant as aforesaid and was induced by same to enter into said contract and to purchase said property; that all of said representations and statements so found to have been made by defendant to plaintiff were false and known by defendant to be false when made by her, and were made by her to deceive plaintiff and to induce him to enter into said contract and to purchase said property.

There were also findings that plaintiff had never been a farmer or orchardist by vocation or otherwise nor had experience in farming, fruit-raising or in the work of an orchardist, and at all times plaintiff was ignorant, unacquainted, and unfamiliar with farming, agricultural pursuits, fruit-raising, and lands and soils and the qualities or fitness thereof, and plaintiff was not capable of judging the character of said land for himself and did not know its true quality or character; that, three days prior to the said contract between plaintiff and defendant, plaintiff's five-year-old son had died and the day before said agreement was made plaintiff had buried his said child, and because of the death and loss of his said child plaintiff was at the time when said representations were made by defendant and said land was purchased on the verge of a nervous breakdown and suffering from nervous and mental disturbances and was ill in body and mind, and not in condition of body or mind to properly investigate or determine the real value or character of said property, or the truth of the said representations of defendant; that if said land had been of sediment soil, as represented by defendant, all of it would have been reasonably worth \$1,000 an acre, but that a portion

of said land, consisting of 5.75 acres, which was and is alkali and marsh land, was and is not reasonably worth more than \$100 an acre, and the entire property sold to plaintiff is not now and was not at the time of said sale reasonably worth more than \$8,000.

In accordance with these findings judgment was entered in favor of plaintiff rescinding the contract, canceling the promissory note, and awarding plaintiff \$7,200 in cash. It was also decreed that plaintiff restore to defendant all the property, real and personal, except the personal property which plaintiff had sold, and that the defendant be restrained from selling the real property under the terms of the trust deed.

[1, 2] Defendant strongly attacks the findings of the court as unsupported by the evidence, but we are bound by these findings, if there is sufficient evidence in the record to support them. Plaintiff testified as follows:

"The defendant told my wife when I bought the place that I would buy all the finest sediment soil; I seen the ad 'Sediment soil,' and she said it was sediment soil; I was not accustomed to soils, and I had always heard sediment soil was good soil, and I thought it was A-1. She did not say it was only part sediment soil. * * * Dr. Freeman said it was all fine sediment soil; that he had it sent to Berkeley and had it analyzed, and got a report on it, and it was the best pear soil in the state. They did not say anything about the front portion of the land being different soil. This statement about the soil being analyzed was made in the presence of the defendant. * * * I made no further examination. I was broken down and sick over the death of my boy. I paid the \$200 after I had heard the statements made by Dr. Freeman and the defendant concerning which I testified. I believed these statements. If I had not believed these statements to be true, I wouldn't have purchased the place. * * * I know nothing of soils. I never did any farming."

Plaintiff further testified that Dr. Freeman told him that he had sold the 1919 pear crop for \$1,600 on the trees, and it was proved at the trial that defendant only received \$1,000 for the 1919 pear crop on the trees.

These few extracts from the plaintiff's testimony show that there was sufficient evidence in the record to support those findings which we have quoted above, and particularly the findings that the defendant made the representations as to the character of the soil, and also to support the further finding that plaintiff was ignorant, unacquainted, and unfamiliar with farming, agricultural pursuits, fruit-raising, and lands and soils, and the qualities or fitness thereof.

[3] Defendant contends that the statement that the land was good for raising pears and that it was the finest sediment soil were matters of opinion. The statement that the land was good for raising pears might have been a mere expression of opinion, but we cannot

say that the statement that the land was the finest sediment soil was an expression of opinion. What amounts to an expression of opinion as compared with a positive statement of fact depends upon all the circumstances of the case, and is a question for the trial court to determine. *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351; *Stockton v. Hind*, 51 Cal. App. 131, 196 Pac. 122; 26 Cor. Jur. 1083. In *Stockton v. Hind*, supra, 51 Cal. App. at page 136, 196 Pac. at page 124, the court said:

"It is conceded that the general rule is that an expression of opinion or belief, if nothing more, and if so understood and intended, is not a representation of fact, and although false, does not amount to actionable fraud. Ordinarily a person has no right to rely upon such statements, and if he does so rely, he cannot treat them as fraudulent, either for the purpose of maintaining an action in damages for deceit, or for the purpose of rescinding the contract. Where there is any doubt as to whether or not a representation was intended and understood as a mere expression of opinion or a statement of fact, the question is one not of law but of act for the court or jury."

[4, 5] The trial court here found that defendant stated, as a fact, that the soil was the finest sediment soil, and we are bound by that finding. Furthermore, the misrepresentations of the defendant relative to the character of this land were based upon the further statement that the soil had been analyzed, and that such analysis showed the land to be of the character represented, and fitted for the production of pears. And it is well established that a statement of what might otherwise be an opinion, if based on alleged facts, is a statement of fact and not a statement merely of an opinion. *Tracy v. Smith*, 175 Cal. 161, 165, 165 Pac. 535; *Brandt v. Krogh*, 14 Cal. App. 39, 49, 111 Pac. 275; *Winkler v. Jerrue*, 20 Cal. App. 555, 560, 129 Pac. 804. In *Tracy v. Smith* the court said:

"Hence, considered alone, the statement that the land was 'absolutely free from frost' might be deemed merely a prediction or an expression of Mizener that in his opinion the locality would never be subject to frost. It was, however, a positive representation by one assuming to have knowledge of the subject, based upon a statement known by him to be false in fact, that 'a damaging frost had never been known in that neighborhood,' which, if true, when made in connection with the statement that the property was absolutely frostless, warranted the making of the latter and gave it the character of a like statement of fact rather than a mere opinion."

[6] Plaintiff testified that he relied on these representations, and we do not believe that he was under any obligations to investigate and to verify their truth. In *Teague v. Hall*, 171 Cal. 668, at page 670, 154 Pac. 851, at page 852, it is said:

"We think it must be held that the court erred in directing the jury, as it did in effect, that a party who has relied upon a misrepresentation made by another and has suffered injury thereby is precluded from recovering, if he had an opportunity, and did not avail himself thereof, to test the truth of the representations by independent investigation. Some of the earlier cases state the rule in this broad way, but, as Mr. Bigelow says in his work on Fraud, volume 1, page 523, 'the proposition has now become very widely accepted, at law as well as in equity, at least as general doctrine, that a man may act upon a positive representation of fact, notwithstanding the fact that the means of knowledge were specially open to him. * * *' Similarly in Pomeroy, Equity Jurisprudence, section 896 [895], it is said that 'whenever a positive representation of fact is made, the party receiving it is, in general, entitled to rely and act upon it, and is not bound to verify it by an independent investigation. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The mere existence of opportunities for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact.'"

Defendant argues that in the case of *Teague v. Hall*, supra, no inspection of the land was made; hence the rule there laid down, that a vendee has a right to rely on the express statement of the vendor, is not applicable. This contention is untenable. If the defrauded party is not competent to judge the quality of the land, we do not see that it can make any difference whether or not he actually visits the premises. Assuming that if plaintiff had not visited the land he would be entitled to rely upon the representations, it would be unreasonable to say that he would not likewise be entitled to rely upon the representations, even though he visited the land, if as a matter of fact, by reason of his inexperience and ignorance, he was incompetent to judge the quality of the soil. In other words, the fact that the vendee visited the land is important in determining whether he relied and was entitled to rely upon the statements of the vendor. It is apparent that a vendee who actually knew the character of the soil on the land which he inspected would not be heard to say that he relied upon the statements of the vendor; but, where it is shown that the vendee was unacquainted with soils, the fact that he visited the land does not preclude him from saying that he relied upon the vendor's statements. In *Beggs v. Spalding* (Cal. App.) 204 Pac. 429, cited by the defendant, the person claiming to have been de-

frauded, not only visited the land, but had experts inspect and examine it. The people who accompanied plaintiff on his inspection of the land were not experienced farmers, nor is there any showing made that they were there to assist plaintiff, so the court was justified in believing that plaintiff relied upon defendant's representations.

In her amended answer defendant set up as a special defense that after the discovery of the alleged fraud plaintiff affirmed the contract by requesting of said defendant that she remit \$2,500 of the purchase price due under said contract, and by requesting of said defendant and accepting from her extensions of time for the making of said payments of \$2,500, and by selling the pear crop on July 22, 1920, and by selling part of the personal property conveyed to him by said contract and sale, and by offering the land in question for sale.

The evidence on this branch of the case was that soon after he entered into possession of the land plaintiff had trouble with the well and pump, and he discovered that he had not as many chickens as was represented. In the latter part of April, or the early part of May, 1920, plaintiff testified that he was informed by a Portuguese that the land was not sediment soil. Plaintiff sold a cow and some pigs, and in June listed the property for sale. About May 30, 1920, an installment of \$2,500 became due, which was never paid. On July 3, 1920, Dr. Freeman visited plaintiff, who complained that various things were not as represented, but plaintiff told Dr. Freeman that he would try to borrow some money in order to meet the installment. Three days later plaintiff wrote to the defendant. In the concluding paragraph of this letter plaintiff said:

"I think you people have taken advantage of me when my mind was not sound and I figer that I paid you all the place was worth and about \$5,000 more as nothing is as you said. I am getting despart a I have to hal water for everything on the place. A man from Hunts packing co told me that you were almost crazy last year because you could not get water. If you are honest and mean to do right with me you should give me a chance and make good all this representation. There will have to be a pit dug or a new pump which is going to be a great expence and I think you had better let that 2,500 off as I have tried to sell the place for \$15,000 and eight different people looked at and would not even consider. And if the place is worth that much to you I will give you the chance to make \$3,000. Please give this your attention as I want to hear from you at once."

On July 18, 1920, plaintiff learned for the first time that the defendant received only \$1,000 for the 1919 pear crop. He was told this by the purchaser of the 1919 crop. On July 22, 1920, plaintiff sold the pear crop for \$1,075, and seven days later the formal

notice of rescission was sent to the defendant.

[7-10] Section 1691 of the Civil Code requires the party entitled to rescind "to rescind promptly, upon discovering the facts which entitle him to rescind." Whether or not the defrauded party has rescinded "promptly" will depend upon all the circumstances of the particular case, and is, of course, a question primarily for the trial court. As has been pointed out, there was evidence that plaintiff did not learn of the true character of the soil until the latter part of April, or the first of May, and that in July he learned for the first time that the 1919 crop was sold for \$1,000. It is true that plaintiff found out earlier that other things were not as defendant had represented, such as the number of chickens, and that the well was not sufficient to supply the farm. But we may reasonably presume that plaintiff decided that he would put up with these things; and had the farm been of "the finest sediment soil" it might have been worth \$18,000; so plaintiff would no doubt hesitate to repudiate his contract for slight cause. There was evidence that all wells in the region of San Jose were low during the summer of 1920, and plaintiff no doubt took this into consideration when he discovered the shortage of water. Further there were no findings with reference to the well or the chickens, so we may presume that the court did not think that they amounted to misrepresentations. We cannot say as a matter of law that when plaintiff discovered the shortage of chickens he was put on constructive notice as to the other frauds. The rule that a person who has discovered that he has been cheated in one particular is put on inquiry as to other possible frauds must be applied with reference to all the circumstances of the case, and is, of course, a question for the trial court to determine. Therefore it would seem that the court was justified in holding that plaintiff offered to rescind within a reasonable time after he discovered the facts which entitled him to rescind.

[11, 12] The findings of the court with reference to the alleged waiver were:

"That plaintiff did not, after the discovery of the said fraud and falsity of the representations which the court finds were made by defendant waive said fraud or affirm the said contract or sale as alleged in defendant's amendment to her answer filed herein or by any other act or conduct on the part of plaintiff."

We consider this a sufficient finding that the plaintiff did not waive the fraud. The question of waiver or nonwaiver was one of fact for the trial court to pass upon, and the acts or conduct which defendant claims constituted said waiver were the evidence to be

considered in determining the ultimate fact of waiver or nonwaiver. We have already referred to these acts of the plaintiff, after discovering the alleged fraud, in discussing the question of laches, which is practically the same as the alleged waiver. We cannot say, as a matter of law, that plaintiff intended to and did waive the fraud herein complained of. Whether or not a person has ratified a voidable contract, or elected to affirm it rather than to rescind it, depends primarily upon his intention, and this is shown by his declarations, his acts, or his conduct, which are matters of fact. The question is therefore a question of fact for the determination of the jury. *Del Vecchio v. Savelli*, 10 Cal. App. 79, 82, 101 Pac. 32; *Wilder v. Beede*, 119 Cal. 646, 651, 51 Pac. 1083; 27 Cor. Jur. 22, 77.

[13] It is not necessary to discuss all the various alleged errors of law committed by the trial court. The evidence that the defendant received \$1,000 for the pears "on the trees" in 1919 was properly admissible, being within the issue raised by the denial of the allegations of the complaint that the defendant stated to plaintiff that said property had, in the year 1919, produced pears of the reasonable value of \$1,600, and which were sold for that sum; that such statements were false; and that said crop sold for a sum not exceeding \$1,000.

Nor was it necessary that the court should make a finding as to each ground of fraud alleged in the complaint, since, if the findings in plaintiff's favor as made support the judgment (and we are of the opinion that they do), a finding against him upon the remaining charges of fraud would not affect his right to the relief given.

[14] Although there was no specific finding as to the fact that plaintiff received the sum of \$1,075 for the 1920 pear crop, plaintiff had so testified, and we must presume that the court took this into consideration when it found—

"that there is due from plaintiff to defendant the sum of \$300, being the difference between the value of the said personal property sold by plaintiff, together with the value of the use by plaintiff of all the property conveyed to plaintiff by defendant, and, the interest due to plaintiff on the purchase price paid by him to defendant."

In any event, since the plaintiff, in the calculation by which the amount of the offset due to the defendant was found, was charged with the value of the use and occupation of the premises for the time he was in possession, he could not also be charged with the proceeds of said crop of pears.

The judgment is affirmed.

We concur: WILBUR, C. J.; WASTE, J.; MYERS, J.; LENNON, J.; LAWLOR, J.

191 Cal. 578

**SANTA CRUZ PORTLAND CEMENT CO. v.
SANTA CLARA COUNTY et al.**
(S. F. 10394.)

(Supreme Court of California. Aug. 2, 1923.)

Courts ⚡90(6)—Decision of Supreme Court that stop notice statute was not applicable to work on public highway adhered to under principle of stare decisis.

Where Supreme Court's decision that Code Civ. Proc. § 1184, providing for a notice to owner to stop payments to contractor, did not apply to work on public highway, has been followed in subsequent decisions and has resulted in an amendment to the statute by enactment of St. 1921, p. 144, making the statute applicable to work on public highways, and, where all the work done on public highways and all payments and adjustments thereunder have been made upon the faith of such decisions, the Supreme Court will adhere to the decision on the principle of stare decisis, regardless of its opinion as to correctness thereof.

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the Santa Cruz Portland Cement Company against the County of Santa Clara and the E. B. & A. L. Stone Company, in which the last-named defendant filed a cross-action against the plaintiff and the first-named defendant. From the judgment rendered, the plaintiff and the last-named defendant both appeal. Affirmed.

Morrison, Dunne & Brobeck, of San Francisco, and Louis Oneal and Wm. F. James, both of San Jose (J. F. Shuman, of San Francisco, of counsel), for appellants.

Rea, Cassin & Caldwell and C. C. Coolidge, all of San Jose, and Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

WILBUR, C. J. The appellants in this case concede that the judgment of the trial court is correct and must be affirmed, unless we overrule the decision of Slayden v. O'Dea, 182 Cal. 500, 189 Pac. 1066, to the effect that a stop notice under section 1184, Code of Civil Procedure, does not apply to work done in grading a public highway. That decision has been frequently referred to and followed in subsequent decisions, and has resulted in an amendment to section 1184, Code of Civil Procedure. Stats. 1921, p. 144; Hunt v. Empire Securities Co., 50 Cal. App. 43, 194 Pac. 744; Cotton-Macauley Co. v. De Shields (Cal. Sup.) 204 Pac. 386; McMorris v. Superior Court, 54 Cal. App. 76, 201 Pac. 797; County of Sutter v. Sup. Court of Sacramento Co. (Cal. Sup.) 204 Pac. 849. Under these circumstances, even if we considered that that decision was erroneous, as applied to public streets, we must now adhere to the decision upon the principle of

stare decisis, particularly as all of the work done upon public streets, and all payments and adjustments thereunder have been made upon the faith of that decision. This, respondents contend, was done in this case.

Judgment affirmed.

We concur: MYERS, J.; WASTE, J.; SEAWELL, J.; KERRIGAN, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

191 Cal. 577

**HADLEY et al. v. RAILROAD COMMISSION
OF CALIFORNIA.** (S. F. 10794.)

(Supreme Court of California. Aug. 2, 1923.)

Certiorari ⚡60—Petition containing scandalous and irrelevant matter stricken from files.

A petition for a writ of certiorari containing scandalous and irrelevant matter reflecting on the integrity of the respondent Railroad Commission will be stricken from the files of the court.

In Bank.

Application for writ of certiorari by O. D. Hadley and others, to review an order of the Railroad Commission of the State of California. Application stricken from files.

Robert G. Hill, of El Centro, for petitioners.

PER CURIAM. This is a petition for a writ of certiorari to review an order of the Railroad Commission. It contains much matter of a scandalous nature which is wholly irrelevant to the questions raised by the petition, and which appears to have been inserted therein for the sole purpose of reflecting upon the integrity of the respondent Commission. For this reason it is ordered that said petition be, and it is hereby, stricken from the files of this court.

191 Cal. 510

SATO v. HALL, County Clerk. (Sac. 3249.)

(Supreme Court of California. July 26, 1923.)

I. Aliens ⚡68—Judgment naturalizing person appearing on face of judgment to be Japanese void.

Where it appears on the face of a judgment admitting a person to citizenship that he is a member of the Japanese race, the court was without jurisdiction, and its judgment is void.

2. Aliens ⚡67—Though naturalization exclusively within control of federal government, jurisdiction thereof is conferred by Congress on federal and state courts.

Though the naturalization of aliens is exclusively within the control of the federal gov-

ernment, under Act Cong. June 29, 1906, § 3 (U. S. Comp. St. § 4351), jurisdiction to naturalize aliens as citizens of the United States is conferred alike on federal and state courts.

3. Judgment $\Leftrightarrow$ 829(1)—Judgment of federal court, invalid on face, may be disregarded by state court.

The rule that a judgment, invalid on its face, may be assailed in any court is applicable to a judgment by a federal court, and the state court may refuse to recognize such void judgment.

4. Aliens $\Leftrightarrow$ 65—1918 amendment of Naturalization Act does not authorize naturalization of Japanese who served in army; "any alien."

Act Cong. May 9, 1918, amending Act Cong. June 29, 1906, § 4, subd. 7 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 4352), so as to authorize naturalization of Filipinos and Porto Ricans who served in the military forces of the United States and permitting naturalization of any aliens who had so served without compliance with many formalities required of others, section 2 of which repealed inconsistent acts, with a proviso that it should not repeal or enlarge Rev. St. § 2169 (U. S. Comp. St. § 4358), limiting naturalization to free white persons and persons of African descent, except as specified in subdivision 7, in view of the fact that by judicial interpretation "any alien" means any alien of the white or black races, did not enlarge the right to naturalization except in the case of Filipinos and Porto Ricans, and therefore did not authorize the naturalization of a Japanese honorably discharged after service in the United States army.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Any.]

5. Statutes $\Leftrightarrow$ 217—Ambiguous statute construed with aid of debates and discussion attending its passage.

Where a statute is ambiguous, the courts may ascertain the legislative intent by examining the debates and discussions attending its passage.

6. Aliens $\Leftrightarrow$ 65—Act July 19, 1919, did not authorize naturalization of Japanese who served in army.

Act Cong. July 19, 1919, § 1, giving to any alien who served in the forces of the United States during the World War the benefits of Act Cong. June 29, 1906, § 4, subd. 7, as amended (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 4352), which subdivision authorized the naturalization of aliens who had served during the World War, without many of the formalities required of other aliens, does not relax the provisions of previous amendments under which naturalization was limited to Filipinos and Porto Ricans, in addition to persons of the white and African races, and therefore did not authorize the naturalization of a Japanese who served in the army.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Application for mandamus by Ichizo Sato against Harry W. Hall, to compel respondent,

as Clerk of the County of Sacramento, to place petitioner's name on the register of voters. From a judgment refusing to permit registration, petitioner appeals. Affirmed.

Williams & Fenstermacher, of Fresno, for appellant.

Albert H. Elliot, of San Francisco, amicus curiæ.

J. M. Inman, of Sacramento, for respondent.

KERRIGAN, J. Petitioner appeals from a judgment of the superior court refusing to issue a writ of mandate to compel the defendant, the county clerk of Sacramento county, to place petitioner's name on the register of voters.

On January 21, 1919, petitioner was admitted to citizenship by the United States District Court of the Territory of Hawaii, and a certificate of citizenship was thereupon issued to him. This certificate recites that he is a member of the yellow race, and that at the time of his admission he was a subject of the Emperor of Japan. Petitioner presented his certificate to defendant, and demanded that his name be placed on the register in order to qualify him to vote. The clerk declined to accede to this demand, and pleads as a justification for his action that members of the yellow race are not entitled to naturalization, and that the order admitting petitioner to citizenship is void on its face.

[1] The appellant contends that the order admitting him to citizenship is a final judgment of a court of competent jurisdiction, and that this judgment is conclusive as against collateral attack.

This position is untenable. The judgment or certificate shows that the petitioner is a member of a yellow race, and this showing renders the judgment void unless its integrity is preserved by some one of the acts to be hereafter noted. If petitioner were ineligible to citizenship, and this ineligibility appeared upon the face of the judgment of the court admitting him to citizenship, that court was without jurisdiction and its judgment was void.

In *Yamashita v. Hinkle*, 260 U. S. 199, 43 Sup. Ct. 69, 67 L. Ed. —, recently decided, certificates of naturalization were issued to two Japanese by the superior court of the state of Washington prior to 1906. The secretary of state of the state of Washington refused to receive and file articles of incorporation executed by the two Japanese upon the ground that they were not at the time of their naturalization and never had been entitled to naturalization under the laws of the United States, and therefore were not qualified to form the corporation proposed. The Supreme Court of the state refused a writ of mandamus to compel the secretary of state

to issue and file the articles of incorporation, and the case was taken by a writ of certiorari to the Supreme Court of the United States, where Mr. Justice Sutherland, speaking for the court, said:

"Upon the authority of *Takao Ozawa v. United States*, supra (43 Sup. Ct. 65), we must hold that the petitioners were not eligible to naturalization, and as this ineligibility appeared upon the face of the judgment of the superior court, admitting petitioners to citizenship, that court was without jurisdiction and its judgment was void. In *re Gee Hop* (D. C.) 71 Fed. 274; In *re Yamashita*, 30 Wash. 234, 70 Pac. 482."

[2] Petitioner's next contention is that, assuming that a federal court can set aside as void a certificate of naturalization issued by a state court, there are no cases in which a state court has declared void any certificate of naturalization issued by a federal court.

This contention is also without merit. Jurisdiction to naturalize aliens as citizens of the United States is conferred alike upon federal and state courts (Act of June 29, 1906, § 3, 34 Stats. at Large, 596 [U. S. Comp. St. § 4351]), so we cannot see that it makes any difference whether it is a federal or a state court which issues the void certificate. In either case, if the certificate is void, no rights are created under it, and no one is obliged to recognize it. It is true that the matter of naturalization is exclusively within the control of the government of the United States, but in determining whether or not a state officer has acted properly in refusing to recognize a certificate of naturalization, alleged to be void upon its face, the state court must of necessity inquire whether the court issuing the certificate had jurisdiction.

[3] We therefore hold that the rule that a judgment which shows on its face that it is invalid may be assailed in any court, is applicable to judgments rendered by federal courts.

[4] We then come to the question of whether petitioner is entitled under the general naturalization laws to the privilege of citizenship.

On May 9, 1918 (40 Stats. at Large, 542 [U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 4352]), Congress amended the naturalization laws by adding seven new subdivisions to section 4 of the Naturalization Act of 1906. This Act of June 29, 1906, entitled "An act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States," consists of 31 sections, and deals primarily with the subject of procedure, and it did not change the fundamental principles of existing law governing in such matters. *Ozawa v. United States*, supra. We will quote that portion of the seventh subdivision of section 4 of the act of

1906, as amended by the act of 1918, pertinent to our inquiry:

"Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States navy or marine corps or the naval auxiliary service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for re-enlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the regular or the volunteer forces, or the national army * * * may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States. * * * Any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; * * * and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, * * * provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court. * * *"

Section 2 of the Act of May 9, 1918 (40 Stat. 547), which we will hereafter refer to as section 2, provides that:

"All acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined. * * *"

Section 2169 of the Revised Statutes (U. S. Comp. St. § 4358), referred to in section 2 of the Act of May 9, 1918, reads as follows:

"The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

In all of the naturalization acts from 1790 to 1906 the privilege of naturalization was confined to white persons (with the addition in 1870 of those of African nativity and descent), although the exact wording of the various statutes was not always the same. See *Ozawa v. United States*, 260 U. S. 178, 43 Sup. Ct. 65, 67 L. Ed. —.

The term "any alien" used in the seventh subdivision of the act of 1918, standing by

itself, would certainly be broad enough to include the petitioner; but as this term had been used in prior acts we must assume that Congress, in passing this law, acted with knowledge of all previous legislation and of its interpretation by the courts. We will refer to two acts of Congress granting the privilege of naturalization to aliens who had engaged in military service. The first of these, the Act of July 17, 1862 (12 Stats. at Large, 597), carried into the Revised Statutes as section 2166, and repealed by the Act of May 9, 1918, read as follows:

"Any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the regular or the volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such. * * *"

In 1908 a Japanese made application under this section, and it was held that section 2169 was controlling, and limited the privilege of naturalization to white persons and to those of African nativity or descent, and that it did not extend the right of naturalization to a person of the Japanese race, although having an honorable discharge. *In re Buntaro Kumagai* (D. C.) 163 Fed. 922.

A statute of like import was passed by Congress and approved July 26, 1894, 28 Stats. at Large, 123, 124. In *Bessho v. United States*, 178 Fed. 245, 101 C. C. A. 605, the Circuit Court of Appeals had before it this act of 1894, authorizing the naturalization of "any alien" 21 years or more of age who had served in the United States navy or marine corps, as therein provided. The court held that this act was limited by the provisions of section 2169, Revised Statutes, in view of the fact that in section 26 of the General Naturalization Act of 1906 (U. S. Comp. St. § 4381), Congress expressly repealed a number of sections of the act of 1873 (as amended in 1875), but it did not mention as repealed section 2169, above quoted. The court construed this omission as a legislative implication that section 2169 was to continue as the law. This was in 1906, and, of course, long after the enactment of the statute of 1894, under which *Bessho* claimed the right of naturalization. The court denied the petition upon the ground that, although he was a Japanese subject who came within the terms of the act of 1894 as having served in the navy of the United States, he was not entitled to naturalization because he was a member of a race other than the white or black races.

We have, then, this highly suggestive condition: The acts of 1862 (section 2166, Rev. Stats.), 1894, and 1918 all use the common term "any alien," and all of them refer to aliens who have served in the army or navy.

We have shown that under the acts of 1862 and of 1894 there is no question that the words "any alien" mean any alien of the white or black races. The matter stood in this shape when Congress enacted the act of 1918. Since we know that these words in the earlier acts are limited to aliens of the white and black races, we are compelled to assume with equal certainty that the words are used throughout in the same sense. Congress cannot have deliberately enacted the statute of 1918 with the expectation that a new and special meaning should be accorded to these words. If these decisions were, as asserted by petitioner, erroneous, it seems to us all the more reason why Congress would have used in the act of 1918 some phrase other than "any alien" in order to show that it disapproved of these decisions; but as Congress did not do so, we must presume that it used the term "any alien" in the sense in which it had been judicially interpreted.

This brings us to a consideration of the meaning of section 2 of the act of 1918, to which we have referred above, and which provides that nothing in that act shall repeal or in any way enlarge section 2169, Revised Statutes, except as specified in the seventh subdivision of the act and under the limitation therein defined. The clear implication is that section 2169 is not to be repealed, except as it is enlarged by the specifications and limitations contained in the seventh subdivision. In the seventh subdivision, Filipinos, who are neither aliens nor citizens (*In re Alverto* [D. C.] 198 Fed. 688), and those Porto Ricans not citizens are given the privilege of citizenship. Thus we find an enlargement of section 2169, extending the right to persons who are neither aliens nor white persons. Petitioner, in order to rebut the inference that Congress intended to make Filipino and Porto Rican soldiers and sailors the only ones excepted from the restrictions of section 2169, Revised Statutes, contends that since the expression "any alien" did not include Filipinos and Porto Ricans, it was necessary for Congress to specifically mention them in subdivision 7, in order that they would share the same privileges as "any alien."

This argument is not sound. If Congress mentioned Filipinos and Porto Ricans in subdivision 7 merely to put them on an equality with "any alien," why were the provisions regarding their naturalization stricter than those terms upon which "any alien" could be naturalized? It will be noticed that, in order to come within the purview of the act of 1918, both Filipinos and Porto Ricans must have declared their intention to become citizens of the United States, and Filipinos must also have had three years' military service, while "any alien serving in the military or naval service of the United States during the time this country is engaged in

the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States."

Further, if petitioner's interpretation is correct, it was only necessary for Congress to say in section 2, "*That all acts and parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed;*" and section 2169 would be repealed in so far as "aliens, Filipinos, and Porto Ricans" who had seen the required military service were concerned. But when Congress continued and said, "*but nothing in this act shall repeal or in any way enlarge section 2169 of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined,*" it is clear that section 2169, Revised Statutes, is to stand, except as to Filipinos and Porto Ricans. (Italics ours.) In short, after having said that section 2169 was not to be repealed, it was necessary for Congress to add, "except," etc., because as a matter of fact there were two classes mentioned in subdivision 7, namely, Filipinos and Porto Ricans, who were neither free white persons nor of African descent or nativity.

We are not without authority for this construction of the act of 1918. In the Petition of Charr (D. C.) 273 Fed. 207, recently decided, it was held that petitioner, a Korean, a subject of Japan, who had been in the military service, was not entitled to citizenship under the act of 1918. Referring to the effect of section 2, the court said:

"The exceptions referred to must have been the races especially mentioned in the seventh subdivision, and the limitation was the military or naval service performed. In other words, under the general law, neither a Filipino nor a Porto Rican could necessarily have been admitted to citizenship. Under this subdivision, he may be, irrespective of race, if he has performed the service specified."

In *Re Para* (D. C.) 269 Fed. 643, the court reached the same result, denying certificates to a South American Indian and to a Japanese, who had served in our military forces during the late war. In the course of its opinion, the court said:

"If the words 'any alien' are to be taken literally, not only would a meaning be given wholly contrary to existing judicial interpretation, but all the definitions of section 2169 would be rendered meaningless, and even Chinese who had served in the army could be naturalized, in spite of the express language to the contrary. However worthy may have been the military services of the petitioners, I can find no warrant in the statutes for their naturalization. The words 'any alien,' appearing in the act of May 9, 1918, are subject to prior judicial interpretation, and in my opinion embrace only such aliens as could theretofore have been admitted to citizenship, and merely provide more expeditious and favorable terms of admission than before existed."

In this contention, it is significant to note that in *Ozawa v. United States*, supra, in which it was held that one of the Japanese race and born in Japan was not eligible to citizenship under our naturalization laws, one of the questions certified to the Supreme Court by the Circuit Court of Appeals was, "If said act of June 29, 1906, is limited by section 2169, and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?" The answer given to this question by the Supreme Court of the United States was "No." In view of the fact that many courts were being called upon to decide the status of Japanese who had seen military service, we are convinced that the Supreme Court had such Japanese in mind when it said that under no conditions could a Japanese born in Japan be eligible to naturalization.

[5] If the act of 1918 is ambiguous, then, according to well-recognized principles of statutory interpretation, in order to ascertain the intention of Congress, we may look to the debates and discussions attending the passing of the act. *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *Heydenfeldt v. Daney Gold, etc., Co.*, 93 U. S. 634, 23 L. Ed. 995. A careful reading of the Congressional Record will show that the committee which reported the bill to Congress, in response to questions from the floor, repeatedly said that the act would not apply to those not capable of citizenship. We will quote a paragraph from a speech in Congress by one of the framers of the bill. He said in part:

"Subdivision 7 has been prepared for the purpose of unifying the rules of exemptions extended to certain aliens, who have received military training in armies of the United States and in the Philippine Islands as well as those serving on vessels of the United States Government and American merchant marine. It also makes the first enlargement ever authorized of the provisions of section 2169, by allowing Filipinos who have served in the United States navy or marine corps or the naval auxiliary service, and have been honorably discharged therefrom after the term of enlistment specified in the petition for naturalization under the conditions and limitations defined in the seventh subdivision, and includes all those who are at present in the military service of the United States, whether they have declared their intention or not. * * * In the general repealing portion of the section the provision as to the effect of this act upon section 2169 of the Revised Statutes, is clearly shown not to enlarge it in any way except as to the Filipinos who have performed the service in the navy as defined in subdivision 7." Congressional Record, May 3, 1918, pp. 6022, 6023.

It appears also from the discussion before the committee which drafted the amendment

that it was clearly intended to give the amendment the construction herein reached.

[6] Our attention has been called to the Act of July 19, 1919 (41 Stats. at Large, 222), which reads as follows:

"Any person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section 4 of the Act of June 29, 1906, Thirty Four Statutes at Large, part. 1, page 596, as amended, and shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all the American troops are returned to the United States."

It will be noticed that petitioner's naturalization preceded the enactment of this statute, but it is claimed that this statute being the latest legislative expression of this subject-matter, evinces a congressional intent to include all aliens, soldiers, and sailors who complied with the terms of the statute. This act appears to extend the period of six months specified in said subdivision 7 to one year, to extend its provisions to aliens serving during the present war to one year after their discharge, and to dispense with the payment by them of any fee. It makes no other changes. In the Petition of Charr, supra, in speaking of the act of 1919, the court said:

"Because of the importance of the question involved and the earnestness of counsel, the court has made further investigation of the proceedings in Congress attending this legislation, in order, if possible, to ascertain the intent and purpose of that body in view of the claimed ambiguity in the language employed. This enactment appears in the naturalization section of the Sundry Civil Act, Public No. 21, 66th Congress. It is not mentioned in the report on the bill, and a search of the Congressional Record discloses that it was not mentioned in any of the debates, either in the House or Senate, and therefore there is nothing in the records of Congress to show the intent of Congress as to this particular section. * * * It would seem, therefore, that this clause of the naturalization section of the act approved July 19, 1919, was simply attached as a rider to an appropriation bill, and went through without scrutiny or debate by either house. It cannot, therefore, in the absence of language clearly expressing that purpose, be held to relax the provisions of the prior Act of May 9, 1918, which have been duly considered."

In view of the fact that the discussions preceding the enactment of the act of 1918 emphatically show that Congress did not intend to include within the scope of that act persons not otherwise entitled to citizenship, we cannot believe that it would have changed

this policy after the war was over, without mature consideration. Therefore we do not regard the act of 1919 as expressing a different legislative intent from that of the previous acts.

As was said in a recent case, it may be conceded that the services rendered by the petitioner should be appropriately rewarded; but the privilege of citizenship resting with Congress, and with Congress alone, the courts have no power to alter or extend the provisions of law to that end.

We are constrained to hold that the petition was properly denied and accordingly the judgment of the trial court is affirmed.

We concur: SEAWELL, J.; WASTE, J.; MYERS, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

191 Cal. 521

IN RE BRYSON'S ESTATE.

ASHBY v. BRYSON et al.

(L. A. 7460.)

(Supreme Court of California. July 27, 1923.)

1. Wills ⚡166(1) — Evidence held not to prove undue influence.

In a will contest, evidence *held* insufficient to make out a prima facie case of undue influence.

2. Wills ⚡165(2)—Testimony of conversation with testatrix eight years after execution of will held properly excluded.

In a will contest on the ground of undue influence, a question whether witness had a conversation with testatrix relative to her property on a certain date eight years after the will and codicils were executed was too remote, and had no tendency to prove undue influence at the time of execution, and was properly excluded.

3. Wills ⚡384—Testimony of attesting witness that testatrix was free from undue influence, though improperly admitted, harmless.

In a will contest on the ground of undue influence, testimony of an attesting witness that testatrix was acting of her own free will, and not under undue influence or fraud, even if erroneously admitted in the absence of an issue of insanity, was harmless.

4. Wills ⚡163(1)—Fraud must be proved, and cannot be presumed.

Fraud must be proved, and cannot be presumed.

5. Wills ⚡159—Necessary that undue influence produce effect.

To prove undue influence in procuring the execution of a will, it is necessary to show that the undue influence was exercised at the very time the will was executed, and that it produced an effect on testator's mind by which the will he executed was not an expression of his own desires.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Application by Isaac H. Bryson and another for the probate of the will of Evaline Bryson, deceased, contested by John Bryson Ashby. From a judgment of nonsuit, contestant appeals. Affirmed.

Newby & Palmer and O. L. Anderson, all of Los Angeles, for appellant.

Ingall W. Bull, Henry T. Gage, and Harold Larson, all of Los Angeles, for respondents.

SEAWELL, J. At the close of appellant's case respondents moved for a nonsuit, which motion was granted. The appeal is from the judgment entered thereon.

Evaline Bryson died testate on or about June 17, 1920, in the county of Los Angeles, a resident of said county, this state, leaving personal and real property of the value of about \$91,000. Decedent's will was executed November 1, 1909. Two codicils, the first of which was dated February 22, 1915, and the second April 2, 1915, were executed. All of the children living, and the representatives of deceased children of the marriage of John Bryson, Sr., and Evaline Bryson, were made beneficiaries under the provisions of said will. Evaline Bryson survived her husband by several years.

The Bryson Block, a very valuable piece of property, situate in the city of Los Angeles, and acquired a number of years prior to the execution of said will, was the principal source of the elder Bryson's wealth, and the accumulated earnings therefrom constitute the greater portion of decedent's estate, the distribution of which is contested. Isaac H. Bryson and John Henry Bryson, son and nephew, respectively, of decedent, were named in said will executors without bonds. They filed a petition praying that said will and codicils be admitted to probate, and that letters testamentary be issued to them. Objections and a contest to the probate thereof were filed by John Bryson Ashby, a grandson, July 20, 1920, alleging that the will and codicils are the products of undue influence exercised and brought to bear upon the mind of decedent by her son, Isaac H. Bryson. The facts specifically alleged by contestant are that decedent was unfamiliar with business affairs, and for a period of 20 years prior to her death, by reason of her advanced years, she had been and continued until her death to be weak in body and mind, unable to transact business or care for her property, and that she was in constant need of personal care and attention; that during all of said period she resided with and was cared for by her son, Isaac H. Bryson, at decedent's home, and was entirely dependent upon him for care and attention; that, by reason of her advanced years, lack of business experience, and also by reason of her dependency upon her said son for care and attention, said son

acquired and had at the time of the formal execution of said will and codicils a great and controlling influence over her mind and will, and was able thereby to, and did, direct and dictate to her in matters relative to her property; that said Isaac H. Bryson possessed, and for many years prior to the execution of said will and codicils possessed, a most violent temper, and at many times prior to, and about the time of the execution of said will and codicils, displayed in the presence of testatrix fits of anger when she did anything that displeased him, and he raved at and scolded decedent to the extent that she was in fear and dread of his wrath; that while she was in the condition of body and mind described, and under the domination and control of her said son, he, with the intent and for the purpose of procuring the said Evaline Bryson to execute said purported will and codicils, and for the purpose of "taking an undue and unfair advantage of her said condition and of his domination and control of her, as aforesaid, and taking a grossly oppressive and unfair advantage of her necessities and distress of mind and body, at, and many times before, the time of the formal execution of said purported will * * * and codicils, did present to the said Evaline Bryson papers and documents for her signature, and did not read or explain to said decedent what the documents were, and said decedent had confidence in and depended entirely upon her said son, Isaac H. Bryson, for the handling of and the transacting of all her said business"; that said son stated to her that her children were spendthrifts, and could not preserve or care for any property which they might receive from her estate, and that they had no filial affection for her, but were anxiously awaiting her death to obtain and squander her property; that said son, Isaac H. Bryson, demanded of decedent that "she should by codicils declare a complete settlement with him [Isaac H. Bryson], and provide in said will a condition of forfeiture if any of the heirs should attempt to contest the same"; that, by means of the statements and demands hereinbefore set out, said Isaac H. Bryson prevailed upon said decedent while she was in said weakened condition, and so under his domination and control as to be unable to resist his influence upon her, both at the time of the execution of said will and said codicils, and did thereby influence her against her will and wishes to execute in form said purported will and codicils; that all of said statements made by said Isaac H. Bryson to influence said decedent were untrue, and were known by said Isaac H. Bryson to be untrue at the time the same were made, and were intended to and did prejudice testatrix against her children and grandchildren; that by reason of her weakened mental and bodily conditions she was unable to resist said undue influence of said Isaac H. Bryson, and

that said will and codicils are the product of said undue influence; that, had she been free from said undue influence, she would not have executed said will and codicils, or either.

As a second ground of contest it is alleged that many years prior to the execution of the will or codicils said Isaac H. Bryson had complete control of all the business affairs of decedent, and controlled her property and money as his own, and so great was her confidence in him that she signed papers and documents prepared or caused to be prepared by him without reading them or knowing the contents thereof; that for the 10 years preceding her death she kept no account of her property, and at the time of the execution of said codicils she did not know what property stood in her name; that on the 10th day of February, 1915, with the intention of defrauding said decedent he caused her to convey by grant deed to him, Isaac H. Bryson, and to Susan E. Bryson, his wife, as joint tenants, certain described Kern county lands; that since 1907 large sums of money belonging to said Evaline Bryson came into the hands of said Isaac H. Bryson as her agent, which moneys were handled and controlled by him for her; that the said Evaline Bryson depended upon and trusted the said Isaac H. Bryson in the handling thereof; that, if the said Evaline Bryson had known the facts about her money and property and the amount expended by the said Isaac H. Bryson, she would not have executed the codicil declaring a full settlement with him; that it was because of a lack of knowledge in this respect that she was induced by the said Isaac H. Bryson to declare a full settlement with him, and to declare an exoneration of the moneys and property used and held by him, and she was thereby influenced to declare in her said codicil that he was the owner of the real estate heretofore referred to; that, believing and relying upon said Isaac H. Bryson in the handling of said property, and believing that said property would be accounted for, she was induced to execute the said purported codicil, which she would not have done had she known the real facts concerning her property.

All of the material allegations laid as a basis for the charges of undue influence, or which may be claimed to show mental weakness, are specifically denied. It is admitted by petitioners that since about the year 1907, in obedience to the earnest request and wish of Evaline Bryson, her said son, Isaac H. Bryson, took up his residence with her, and thereafter resided continuously at her home in the city of Los Angeles until her death, and gave her all proper care and attention of which she was in need, and which he as a dutiful son should have given, but it is denied that she at any time entirely depended upon him solely because of the care and attention he gave her as a son. It is also admitted

that Evaline Bryson had confidence in said Isaac H. Bryson during the time he was handling and transacting all of her business which she voluntarily intrusted to his care, but it is alleged that she at all times did receive from him proper accounts and reports of all business handled or transacted by him, and that she personally examined said reports and accounts, and approved the same when correct, and that she was at all times mentally capable of doing so. It is denied that Isaac H. Bryson had control of her property or that she signed papers or documents without a knowledge of the contents thereof. It is affirmatively alleged that she was at all times acting freely and voluntarily in all matters of business and otherwise, and that at the time of the execution of said will and codicils she was of sound and disposing mind and memory, free from duress, menace, undue influence, or deceit of any kind whatsoever.

Testatrix by her will gave to her daughter, Margaret Jane Krause, mother of contestant, the piano then at the home of the latter, and all jewelry she should own at the time of her death. To Nettie E. Bryson, widow of her deceased son, William, she gave \$2,000. In the event of her death this bequest was to be distributed to the other legatees in equal shares. To her sons Isaac H., John M., James F. and to her daughter, Margaret Jane Krause, and to Nettie E. Bryson, widow of her deceased son Edward Bryson, and to Alice Bryson, widow of her deceased son Albert F. Bryson, she gave an undivided one-sixth interest in the piano and all the furniture which she should own at the time of her death. Upon the death of Isaac H. Bryson, his wife, Susan E. Bryson, was to succeed to his one-sixth interest in said furniture. Any disagreements between said heirs as to the selection of particular articles or pieces of furniture was to be overcome by the sale of such particular piece or pieces in disagreement, and the proceeds were to be divided proportionately among said heirs. All existing notes, accounts, and debts, with legal interest due thereon, owing to her by any of her beneficiaries, whether barred or not by the statute of limitations, were to be treated as advancements made to said beneficiaries respectively, and deducted from his or her share of decedent's estate. The executors were instructed not to sue for the collection of said indebtednesses, but to inventory the same, and cause the proper deductions to be made from the distributive share of such beneficiaries as may be shown to be her debtors, and not expressly released from their obligation. Specific instructions were given that the indebtedness of Margaret J. Krause should be deducted from her share. This indebtedness was evidenced by two promissory notes, one of which was dated August 15, 1905, and was given for the payment of the sum of \$1,410, signed by Margaret J.

Krause and O. W. Krause; the other bore date June 2, 1902, and was for the payment of a note in the sum of \$1,705, executed by John B. Ashby, contestant herein, and his mother, Margaret Jane Krause. The will declares that all of testatrix's heirs had been theretofore provided for by a deed and trust agreement executed by her and her predeceased husband, John Bryson, Sr., by the terms of which the remainder in fee of a very valuable piece of property situate in the city of Los Angeles, known as the Bryson Block, was conveyed to the Bryson Estate Company, a corporation, for the benefit of said heirs subject to certain trusts. John Bryson, Sr., had, some time prior to the incorporation of said trust estate company and prior to the execution of said will, executed a mortgage upon his undivided one-half interest in said property to the Title Trust & Guaranty Company, a corporation of the city of Los Angeles, as security for the payment of \$25,000, which principal sum was still unpaid at the time the will was executed. Apprehensive that said heirs would be unwilling or unable to discharge this mortgage indebtedness at maturity, and to the end that said Bryson Block might be preserved to her said heirs, and to prevent the foreclosure of said mortgage, she bequeathed and devised to her executors herein, in trust, the rest, residue, and remainder of her estate, with full power to collect, receive, and accumulate all the rents and profits of said property, and to pay from the net income of said property the balance of the principal and interest as may become due upon the maturity of said note and mortgage given by John Bryson, Sr., to said Title Trust & Guaranty Company, with full authority to pay the note and to discharge the mortgage in such manner as they may deem fit and proper. Subject to said trust created by will, and in the event of its failure or termination, said testatrix devised and bequeathed all the rest, residue, and remainder of her estate to the heirs above named in undivided one-sixth interests. In the event of the death of Isaac H. his wife was to succeed to his interest. Mrs. Nettie E. Bryson, widow of a deceased son, was to enjoy her interest during widowhood, the remainder upon remarriage or death to vest in her two children. All other devises or bequests were absolute. In the event that said mortgage was fully paid before the close of the administration of her estate the income from said Bryson Block was to be equally divided, and be payable monthly to said heirs. Testatrix declared that her son, Isaac H., named as one of the executors of her will was not indebted to her in any sum whatever, and she expressly stated that she did not wish, in any event, that any deduction should be made from his share on account of any claim or any pretended advancement made to him.

Clause "Seventh" of said will provides that, in order to guard against waste and

willful or negligent expense to her estate caused by litigation, and to the end that the beneficiaries named in her will who are satisfied to abide by its provisions may receive their respective allotted shares undiminished by the expense caused by dissatisfied heirs or legatees, each devise and bequest is made subject to the provisions of said clause "Seventh," which in effect provides that, should any of said heirs, legatees, or devisees, or any of their heirs or descendants entitled to succeed to his or her share under said will, individually or jointly, bring, instigate, or maintain any contest or court proceedings for the revocation of or against the probate of said will, or who shall refuse to abide by all or any of its provisions, such heir, devisee, or legatee shall bear the costs, expenses, charges, and attorneys' fees which said estate may incur in the defense of said contest or opposition should the same prove unsuccessful, and the executors are authorized and directed to deduct said costs of defense, including attorneys' fees, from the distributive share or shares of such heir or heirs as should contest.

Said Isaac H. Bryson and John Henry Bryson, named executors without bonds, are authorized to sell, mortgage, or lease any or all of decedent's property, real, personal, or mixed, without being first required to obtain an order of court so to do or to file any petition therefor, and are empowered to make sales, mortgages, or leases in such manner as may seem to them to be for the best interests of said estate.

On February 22, 1915, decedent executed a codicil to said will whereby she revoked the legacy giving to Margaret Jane Krause all of the jewelry which she might own at the time of her death. She explained that this change was made necessary for the reason that, since the execution of said will, she had made presents of diamonds and valuable jewelry to certain of her children, and only trinkets and inconsequential pieces of jewelry such as she might own at the time of her death were to be distributed to said heirs on the same terms as were prescribed for the distribution of her furniture. It was also provided that the following gifts should not be treated as advancements: The house and lot situate at Tropico, county of Los Angeles, deeded to John F. Bryson; the house and lot, being No. 158, South Oxford avenue, Los Angeles city, granted to John M. Bryson; certain land situate in Kern county granted to Isaac H. Bryson and wife. It was also expressly directed that the bequests of \$25,000 theretofore given to each of her children then living (including the mother of contestant) and to the wives of deceased sons should not be deemed advancements. Clause "Seventh" of said will was modified so as to provide that, should any heir, devisee, or legatee under said will, maintain, instigate, and contest or bring any action for the revocation

thereof, individually or jointly, such heir or heirs should not share in her estate, and the share of such contestant shall be distributed ratably to the residuary devisees and legatees who had taken no part in instigating or conducting such contest or litigation. It is provided, *ex industria*, that, in the event that the children of Margaret Jane Krause and Alice Bryson shall bring any action or contest or claim against her estate, the provisions made by her will for the said Margaret Jane Krause and Alice Bryson shall fail, and the share of each shall be ratably apportioned among such remaining residuary legatees and devisees as shall not take part in or instigate such contest or opposition. The legacy of \$2,000 made to Nettie E. Bryson was withdrawn by the codicil for the reason that substantial advancements had been made to her since the execution of said will.

All of the devises and bequests were made subject to the forfeiture clause. On this subject the testatrix made the following observations:

"Said provisions made for my said beneficiaries are conditioned upon their acceptance without question of these my last wishes, and are especially subject to this [forfeiture] clause. During my life I have treated all of my relatives affectionately and as fairly and justly as my best judgment permitted, and I have often made not altogether slight sacrifices for many of them, and if my trust in their sense of duty and gratitude shall be disappointed by unseemly and troublesome litigation after my death, I desire that my executors shall enforce this provision to the fullest extent according to law. My abiding faith in God bids me hope, however, that each and all of my heirs, legatees and devisees, and their children, will respect my judgment, name and memory by abstaining from selfish litigation over the small residue left of my estate in consideration of my liberal allowances and benefactions during my long, but not always, happy life."

The only change or modification made to the will by the second codicil consisted in the transfer of the share given to John M. Bryson to his son, Frank Bryson. The cause for this change was the death of John M. Bryson, occurring since the execution of the codicil dated February 22, 1915.

The pleadings are set out at considerable length for the purpose of showing the character of the acts, circumstances, relations, and transactions from which it is claimed the web of undue influence was woven. The allegations of the petition are somewhat vague, and in some instances the allegations of fact relied upon to establish a ground of contest on a particular theory conflict with and are repugnant to the statement of facts essential to and elsewhere pleaded for the purpose of establishing a different theory. The provisions of the will are also set out at large, as they furnish the best answer that may be made to contestant's charges of undue influence. There is nothing about the will or

its codicils that suggests the indulgence of unreasonable preferences made in favor of one heir over another or an unfair or inequitable distribution of testatrix's estate among her children then living and the representatives of those deceased. If the proponent, Isaac H. Bryson, attempted to unduly influence testatrix in the disposal of her property, his efforts for some reason were rendered futile and his plans signally miscarried. The contestant was but a grandchild, and, so far as the record shows, had no reason to expect that he would be made the object of her bounty. In 1902 he borrowed from her, as evidenced by a promissory note executed by himself and his mother, the sum of \$1,705, which he never paid, and it was this indebtedness that testatrix in her will provided should be treated as an advancement made to contestant's mother, and deducted, together with another note made jointly by her and C. W. Krause, from her share of the estate. There is no evidence in the record showing that he held any deep affection for her, or that he was exceptionally considerate of her pleasure and happiness. The record does show, however, that until 1913 he frequently importuned his grandmother for moneys and property on behalf of himself and his mother. From the year 1913 to the year of her death—a period of seven years—he paid but two or three visits to the home of the testatrix. The principal basis of contestant's claim, as we gather it from the record, is to be found in the fact that his own and his mother's indebtedness, amounting to \$3,115, was not forgiven by testatrix. Another cause of grievance arises from the fact that the testatrix did not give his mother, Margaret Jane Krause, a home, inasmuch as she had given homes to three or four of the children. There can be no possible doubt but that Mrs. Krause was attentively cared for by her mother, who seems to have made frequent contributions of money to her, and was at all times solicitous of her comfort. Besides, Mrs. Krause lived on her mother's property for a considerable portion of time, visited her house frequently, received gifts of jewelry and diamonds, and was treated by testatrix in a fair and generous manner. This appears not only from the evidence, but also from the observations made by testatrix as set forth in her will, and which stand undenied. Mrs. Krause had received, as had each of the children, a gift of \$25,000 in cash. By the will she shared equally with the balance in all the property that testatrix left. She was called upon, however, to pay from her legacy the debts that she and contestant justly owed the estate. This requirement on the part of testatrix seems to constitute, so far as contestant is concerned, the real "head and front of her offending." Neither contestant nor his mother contributed especially to, or aided in

the accumulation of the estate which contestant would now have distributed in a manner contrary to the wishes of testatrix. She, better than any one else, knew of the many benevolences she had bestowed upon each of her children and the justice of the situation which should direct her course. Running through the whole case may be traced the thread of suspicion that Isaac H. Bryson took a dishonest advantage of the confidence that was reposed in him. His mother unquestionably had abiding faith in his integrity and his business judgment. In 1907 he displaced as manager of the Bryson Block a brother whose management had been very unsatisfactory. He was also made vice president of the Bryson Estate Company, of which his mother was president. He held her general power of attorney and transacted practically all her business. From 1907 until her death he and his wife resided at her home. For a time he paid for himself and wife \$70 a month as board and also contributed toward supplying household provisions. Full and complete reports of the receipts and disbursements in the management of the Bryson Block and the business transacted for his mother were made monthly. Books of account were kept in perfect shape, and showed the full volume of business transacted in the management of said Bryson estate, as well as for and on behalf of the mother. The record does not contain one transaction that would justify the inference of dishonesty on his part. All funds were accounted for. While he and his wife were residing with testatrix other members of her family often visited the home, consulting and advising with testatrix as freely as they desired.

[1] The directors of the Estate Company consisted of the members of testatrix's family—sons and daughters, and in some instances wives of deceased sons and grandchildren. They met in large numbers at testatrix's home to transact the business of the company. These meetings furnished the occasion not only for the discussion of business matters, but family affairs as well. On numerous occasions discord prevailed. Harsh accusations and bitter denunciations, occasioned by jealousies, suspicions, and fears that Isaac H. Bryson or some one of the heirs had ingratiated himself or herself into the favor of the mother, and was receiving more than an equal share of the estate, were not infrequently heard. Much anxiety was manifested by certain of the heirs as to whether or not testatrix had made a will, and, if so, the nature of its provisions. It was at these meetings that most all of the statements relied upon to sustain the charge of undue influence were made by Isaac H. Bryson. The statements charged against him were, no doubt, in some instances caused by provocative circumstances. In other instances they were made by way of disap-

proval of the personal conduct of some one of the heirs, or their descendants, or in resentment of an attempt on the part of certain heirs to frustrate some business policy advanced by him. All of the statements were made during open discussions, in a loud voice, in the presence of a number of the heirs, and were at no time made with the slightest regard of secrecy. It is not to be wondered at that such inartful and uncrafty methods as shown by the testimony should have failed to unduly influence, if such was the intent. It is contrary to the experience of life that a person moved by a design to unduly influence one to the hurt of others openly forewarns his intended victim of his purpose.

A few quotations from and references to the testimony will serve to illustrate the language used by Isaac H. Bryson to his mother and to other members of the family in her presence upon which contestant relies very largely to make out a case of undue influence.

Mrs. Lillian Burns, a witness personally unfriendly to respondent Bryson, who had resided at testatrix's house for a short time either in 1913 or 1916 (she was uncertain as to time), testified that she had heard respondent say to his mother concerning the visits made by other members of the family to the Bryson home, "What do you want them for; what are they coming here for; they want your money; they are always after your money," and the mother would reply, "Not necessarily." Isaac would say: "He didn't want them to come; he disliked them and they were not fit to associate with." He spoke of Ashby as a dishonest man; he couldn't do anything that was right; he never did do anything that was right, honest, and upright; he didn't wish him to come to the house." He also stated that he would be glad when the Bryson property should be sold for taxes; that it would be sold for taxes, and that the young people would be through with it. He further said that the sooner "we get through with the property the sooner they will have less to fight about." Witness heard testatrix say that she expected to give each one of her children a home. Isaac remarked to his mother that if she was not careful they would go to the poorhouse; that they were spending money carelessly.

Louise Gerstmann did the housework at the Bryson home from February, 1907, to February, 1918. During the first two or three years of her connection with the family she heard frequent conversations with Isaac and his mother. "I heard them talk about the will, because you know they never had any secrets; they just told everything; everything was open; everybody knew what I know. They told me that Mrs. Krause was going to get the diamonds." The witness

believed that it was in 1909 she heard them talking about the will. Mrs. Isaac Bryson told her that Mother Bryson had made a will. Isaac never talked with the witness about his business. She could not state what Isaac had said about the execution of the will. The making of the will was discussed at the table in the presence of company. She heard Mrs. Krause say that Mother Bryson had made a will. Isaac said that Mrs. Krause was to get the diamonds. "That is all [diamonds] I remember about that will. I don't know if there was anything else in it." Isaac said the rest of the family would "go through with everything; they would spend everything." The witness stated that "there was always trouble among the relatives; somebody always done something or said something." There was always turmoil. She heard Isaac say that if it was not for him the mother would not have anything, as the others did not save, and he saw to it that she had plenty of money. When the question was raised by Isaac about the selling of the Bryson Block there was a big "fuss." She heard him say that Mrs. Krause had received too much money already; that they had been supporting her right along. He also made the statement that contestant drank, and that he was "just like his father." The witness said there were six or seven at the table at every meal. She heard Isaac denounce Mrs. Webber, Mrs. Krause's daughter. He was angry at other members of the family, but never at his mother. He was always kind to her. He did not want the other members of the family to visit so often. Mrs. Krause was given money by her mother; if she did not come to the house it was sent to her. Witness thought she was given about \$5 per week. Witness heard Mrs. Krause complain to her mother that Mrs. Isaac Bryson knew the contents of her will, and she, a daughter, should also know the provisions of her will. The mother said: "Maggie, Isaac will do the right thing." Testatrix also said that if it was not for Isaac she would not have anything; that she depended upon him because he was honest. She heard her say: "I hope Isaac will outlive me, for I wouldn't know what to do without him." She never knew his mother to oppose him.

Mrs. Alice Bryson Ashby, the wife of contestant, testified that she heard testatrix state to Mrs. Krause that she would do anything in the world for her, but she could not give her money because Isaac would not let her have it; that he took care of her business. Mrs. Krause had commenced a suit against her father, John Bryson, Sr., which made Isaac very angry, and he told contestant that if he did not have his mother withdraw the suit he did not want him or his wife to ever again speak to him; that "if he didn't have his mother withdraw the suit she wouldn't get a cent of father's or mother's

money; we will have them cut out of the will without a dollar." This occurred in 1895.

Ella H. Fisher, a daughter of Jane Bryson, who resided in Colorado, visited testatrix in 1902. She had not been in the house more than two weeks before she had a "fuss" with Isaac. She took exception to the location of the home testatrix had purchased for witness' mother and father. This ended in angry words with Isaac, who made reference to her in uncomplimentary terms.

Hattie Bryson, wife of James S. Bryson, testified that in 1910 testatrix said that she was going to give each of her children \$5,000 with which to purchase a home. John had already received that amount, and witness received \$3,500 to pay on a home.

In 1913 Lillian Webber, contestant's sister, visited the Bryson home in company with her mother, Mrs. Krause, and asked testatrix if she intended to give her mother a home. Testatrix said: "You will have to ask Uncle Isaac." Isaac became angry, "and told us both to get up and get out; he wasn't going to be annoyed by us." Testatrix said she was poor, and had no money. Mrs. Webber replied by stating that testatrix was receiving \$1,500 or \$1,600 a month from the Bryson Block. Testatrix said, "I haven't got it." The witness related a difficulty that occurred between her and Isaac concerning the release of a \$6,000 mortgage made by Henry Bryson to testatrix. Isaac said the mortgage had not been released, and witness said it had been satisfied, citing the page and book of the records. Isaac said he would rather see the beggars in the street have it than to have any of "you people get any of this money." He said the notes held against contestant and his mother would be paid, all right; that they would be deducted from Mrs. Krause's interest in the estate.

Vernon H. Peck, a real estate agent, gave testimony to the effect that in the year 1915, while calling in a social way at the residence of testatrix she stated that she wanted to get a couple or three homes—one for Maggie, one for John and Lizzie, and she might want to get a third one. On his fourth call in respect to the matter she told him that she was disappointed; that Isaac would not let her buy anything because he said there was not any money. The purchase price of one of the houses submitted was \$8,400. The witness had formerly been associated with contestant in a business way.

Joseph Sentman Bryson, a son of Samuel Albert Bryson, was asked by his grandmother to become a director of the Bryson Estate Company. He said that if he became a director he wanted it understood that he would not take orders from any one. Isaac asked him why he would refuse to take orders from him. He said that he thought he was biased towards certain members of the family, and, if elected a director, he would do

what was just and right. Isaac said that taking orders from him was not worse than taking money from the company, as his father had done when he was agent for the Bryson building. This reference to an unpleasant subject caused testatrix to begin to cry, and she said: "Yes; your father took money while he was agent of the Bryson building, and Isaac can prove it." Witness was not elected a director, but Henry Bryson was elected to fill the vacancy. He had also heard Isaac speak many times of the \$1,700 that John Ashby owed testatrix, and had heard him use bad names when speaking about him. The witness, however, was elected a director of the Bryson Estate Company in 1909 and continued thereafter to serve with Isaac as such. He said that Isaac put all the motions that were voted on at the directors' meetings. Isaac claimed that the property was depreciating in value, and, as there were many untenanted rooms, he advocated dissolving the trust and giving each heir \$10,000 for his or her interest. This was opposed by certain of the heirs. Upon the defeat of his plans he said: "All they are waiting for is for you to die to get your money, and that the block might be sold for taxes." He also said the mother might have to go to the poorhouse, and if the heirs received their money they would go through it in a short time. He had heard Isaac in conversation with his mother upon many occasions, as witness was in the habit of visiting the Bryson home almost daily, and took part in the conversations. He had seen Isaac arise when anything displeased him and clench his fist and use profanity. Witness heard him say that John Bryson was a crook and a deadbeat. On one occasion, as John Ashby was passing out of testatrix's house, Isaac cried: "There comes that God damn deadbeat all dressed up like a millionaire; if he would pay his bills he would not be able to dress that way."

John F. Bryson, son of testatrix, repeated very largely the testimony already given. He spoke of Isaac's dislike of Mrs. Krause, and had heard him say that she was "no good," and disparage her character. He also spoke very disapprovingly of John Ashby.

Several instances were related by members of the Bryson family showing what is claimed to have been outbursts of anger on the part of Isaac. No doubt those instances were related to show that they must have produced a coercive or terrorizing influence upon the mother's mind. The few exhibitions of temper described occurred at meetings of the family, and were provoked in the discussion of business affairs. They also arose out of the resistance offered by Isaac to the efforts of certain heirs to obtain money or property from testatrix, or criticisms of his management of the estate, or were the effect of insinuations made affecting his honesty

and motives. In no sense was the display of temper calculated to influence nor could it have had the effect of unduly influencing the mother to disinherit a single member of her family. She was by no means in fear of her son Isaac. Every witness who spoke on the subject admitted that he was always kind to her, and never spoke in harsh terms to her. The evidence has impressed us, as it did the trial judge, that he was a dutiful and affectionate son.

Much of the evidence introduced into the case would have been relevant in an action for an accounting—a theory on which a pleading was at one time framed—but was wholly immaterial to the issue of undue influence. A good part of it was directed to conversations had a long time after the execution of the will and codicils.

The suggestion that testatrix did not know that she owned property or what its value was or the kind and character of such property at any time during her life is an absurd contention in the face of the testimony and the statements of those who were importuning her for favors. It is true that she told real estate agents, who doubtless were using their best efforts to persuade her to purchase rather expensive homes for certain children, that Isaac had said there was no money, or that she told them she was poor. It is a fair and natural inference to be drawn from the history of the family transactions that testatrix made Isaac her business agent and attorney for the purpose of protecting herself from both the stress of importuning heirs and from the annoyances of business life. Testatrix was 82 years past at the time Isaac became her attorney and agent; she was 84 years of age when she executed her will, 90 when she executed the codicils, and 95 at the time of her death. Witnesses who had known her long and well and had seen her often in her later life wondered at her strength of mind. Henry T. Gage, a former Governor of this state, said of her: "She was a woman of remarkably clear mind, a bright woman; remarkably bright for a woman of her years or not of her years." Witnesses to the execution of the will and codicils testified to the same effect. Louise Gerstmann, the lady in charge of her household affairs from 1907 to 1920, testified that "she was the dearest old lady that ever was, and very patient. She seemed to be a sensible old lady; the dearest lady I ever knew." No attempt was made to show that her mind had weakened or become impaired under the weight of years. Physically she grew more or less feeble, but her mental powers were not questioned by a single witness. She took occasional distant trips, rode a great deal in her automobile, discussed all her business affairs with her son Isaac, as testified to by Louise Gerstmann, and was mentally alert. That she took pains to husband her strength and protect herself against embarrassing and

annoying situations is additional evidence of a sound mental condition.

The transaction in which testatrix deeded 400 acres of Kern county land, acquired in 1914 by an exchange of properties, to Isaac, is offered as a circumstance pointing to undue influence. The value of the land is not shown, and we conclude that it was not of great value. The uncontradicted evidence is that Isaac did not want the land, told his mother that he did not want it, but she said she wanted to give him a home, as she had given homes to the other children. He afterwards deeded the largest part of this land to John Henry Bryson, a nephew, for a home. This was done before testatrix's death, and it met with her approval.

The claims of contestant are thus answered: If Isaac attempted to keep other members of the family from the home of testatrix, he failed, for they came in large numbers; if it was his will that the mother should refuse to give them money or property while living, he suffered disappointment, because she gave to each one of her children either personal or valuable real property; if he attempted to influence her unduly in her testamentary disposition, he again failed. The will itself is indisputable evidence of a rational disposition of her estate. That Isaac's indebtedness, if any, was forgiven, was a matter for the determination of testatrix, and no one else. Under the evidence it was not an unnatural thing for her to have done.

[2] Only two assignments of error are noticed in the briefs of appellant. The first is on the ruling of the court sustaining an objection to a question asked by appellant as appears below:

"Q. Did you have a conversation with Evaline Bryson in May, 1913, relative to her property? A. I did.

"Q. State to the court what was said."

An objection was made and sustained to the question. It will be noted that the time fixed was eight years after the execution of the will and two years after the execution of the codicils. The reason assigned for the materiality of the question was that, "if decedent had fully known about her property, the condition and amount thereof, she might have executed another codicil to her will." We see no merit in this contention. No claim is made of unsoundness of mind, and we can see no reason, in the light of the pleadings and the theory of the case, why the inquiry as to the sole issue of undue influence should have been directed to a remote subsequent period of time, rather than confined to a period at or near the time when the act complained of was consummated. The question presented in *Estate of Carson*, 184 Cal. 437, 194 Pac. 5, 17 A. L. R. 239, to which appellant directs our attention bears no resemblance to the question or situation before us,

and it is therefore passed with a mere reference.

[3] The second assignment arises upon an objection raised to a question asked Joseph Smith, a subscribing witness to the will, under the following circumstances:

"Q. At that time [when she executed the will] was Mrs. Bryson acting of her own free will, not acting under duress, or undue influence, or fraud?

"Mr. Himrod: Just a moment. We object to that as calling for a conclusion of the witness.

"The Court: You may answer so far as you know.

"A. So far as I know she was acting freely.

"The Court. And not under undue influence? A. Not under undue influence.

"Mr. Bull: Q. Or fraud? A. Or fraud of any one."

Counsel, in discussing this ruling in his brief, suggests that, as the question of insanity was not involved, the opinion of a subscribing witness was not particularly material so far as the issues of the contest were concerned. If this is true, no harm was done. The witness, however, was closely examined on all that was done and said by testatrix at the time the will was executed, and no possible harm resulted from the ruling complained of.

[4, 5] Adopting, as we must, the rules of construction that apply to cases of nonsuit, by indulging every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence, and giving to contestant the benefit of every piece of evidence which tends to sustain his averments, as fully stated in *Berger v. Lane* (Cal. Sup.) 213 Pac. 45, and cases cited, it is clear that he has completely failed to make out a prima facie case. The rule of law is that fraud must be proved, and cannot be presumed, and its application to the facts of this case is sufficient alone to defeat contestant's case. The inferences and presumptions spoken of above must fall within the realm of rationality. There is nothing in contestant's case which amounts to more than mere conjecture, surmise, or suspicion. To justify the submission of any question of fact to a court or jury there must be proof of a substantial character that the fact is as alleged.

"In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will which he executes is not the expression of his own desires." *Estate of Calkins*, 112 Cal. 296, 44 Pac. 577.

"The presumption of undue influence is not raised by proof of interest and opportunity alone. * * * In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made." *Estate of Langford*, 108 Cal. 608, 41 Pac. 701.

It may be stated that, so far as opportunity is concerned, any one of the heirs of the testatrix had equal opportunity to visit with, consult, and advise with testatrix. We entertain no doubt that Isaac H. Bryson advised with his mother fully on both business and personal matters and on subjects affecting the present and future welfare of the family. This was not only his privilege, but his duty. Unpleasant as well as pleasant matters were no doubt the subject of consideration. Proof to establish undue influence must be had of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made. *Estate of Carithers*, 156 Cal. 422, 105 Pac. 127. It consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating upon it, some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment. *Estate of Kilborn*, 162 Cal. 11, 120 Pac. 762. It is unnecessary to further multiply authorities.

The mind of testatrix was not held under subjugation by any one. There cannot be the slightest doubt but that her will reflects the free and voluntary wish of a just mind.

There is little merit in this appeal to commend it to the consideration of an appellate tribunal. To hold that the acts and conduct described by the evidence are to be regarded by the law as sinister attempts to unduly influence a parent in the disposition of her estate would be to requite filial duty with punishment.

The judgment is affirmed.

We concur: LENNON, J.; WASTE, J.; KERRIGAN, J.; LAWLOR, J.

62 Cal. App. 644

WESTERN LITHOGRAPH CO. v. VANOMAR PRODUCERS. (Civ. 4483.)

(District Court of Appeal, First District, Division 1, California. June 25, 1923.)

Interest @50—To stop running, tender necessary, though larger sum than due is demanded.

In view of Civ. Code, § 1917, cl. 1, as to interest on money due under written instrument, and sections 1500 and 1504, as to extinction of obligation by offer of payment and deposit in bank, and effect of offer of payment on running of interest, tender of payment of whole amount due under instrument as price, with interest to time of tender, is necessary to stop running of interest, though in reliance on a subsequent void agreement for increase in price, a larger sum is demanded.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the Western Lithograph Company against the Vanomar Producers. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Bryant, of Los Angeles, for appellant.

E. A. Lane, of Los Angeles, for respondent.

RICHARDS, J. This is an action for the recovery of the purchase price of certain fruit labels manufactured by plaintiff upon the defendant's order and delivered to it. The original complaint herein contained two counts, each in the form of the common count; the first of which was for the recovery of \$9,525.70, in which sum it was alleged the defendant was indebted to the plaintiff for labels, stationery, and merchandise sold and delivered to the defendant at its special instance and request; the second count was for the recovery of the same sum alleged to be the reasonable value of said labels, stationery, and merchandise sold and delivered to the defendant as averred in the first count. The answer of the defendant denied that the defendant was indebted to the plaintiff in the sum of \$9,525.70 or in any other sum whatsoever in excess of the sum of \$6,788.41, on account of said transaction, and alleged that the said admitted indebtedness of defendant to plaintiff arose out of a certain agreement in writing entered into between plaintiff and defendant's predecessor for the purchase and sale of said labels, stationery, and merchandise for said last-named price. The cause went to trial upon the issues as thus framed, and upon said trial the plaintiff presented in evidence the agreement in writing between the parties referred to in the defendant's answer as of the date of February 16, 1916, with evidence showing that the said agreement, the term of which was five years, had been performed by it for the year 1916 by the delivery of said merchandise at the prices stipulated therein, but that during the following year the cost of labor and material had so increased as to materially affect the cost of manufacture of said labels, and that the plaintiff had procured from the president and general manager of the defendant a letter consenting to an increase in the price of the labels to be thereafter supplied under said former agreement. The defendant denied the validity of this later arrangement, and offered evidence tending to show that its said official had no authority to make the same. It also contended that said later arrangement, even if legally made, was without consideration and therefore void. The trial court found in favor of the plaintiff upon the facts as thus presented and gave judgment in its favor for

practically the amount claimed in its complaint. The cause was appealed by the defendant to the Supreme Court where the judgment was reversed upon the second ground urged by the appellant, viz.: That the subsequent agreement to pay a higher price for said labels than that provided in the original agreement was void as without consideration; the decision of the Supreme Court to that effect being reported in *Western Lithograph Co. v. Vanomar Producers*, 185 Cal. 366, 197 Pac. 103.

The cause having thus been remanded for a new trial, the plaintiff, by stipulation between the parties, was permitted to file an amended complaint in two counts, which were in substantially the form of those in the original complaint except as to the amount of the recovery sought, which in the first count therein was stated to be a balance due of \$8,897.14 with interest from the date of delivery amounting to the sum of \$558.83 and making a total of \$9,455.97, which the plaintiff claimed to still remain due and unpaid. To this first amended complaint the defendant filed an answer in substantially the same form, somewhat amplified, of its original answer, denying that any sum in excess of \$6,788.41 was due the plaintiff and setting forth in the form of an exhibit to its said answer the original agreement between the parties. The cause again came to trial upon the issues thus presented and was submitted to the trial court upon a stipulation between the parties providing that the reporter's transcript of the evidence taken and admitted at the former trial should be admitted in evidence with the same force and effect at the retrial of the cause, and that certain additional facts covering the amount of labels actually delivered according to the invoices, and also as to certain demands made by the plaintiff for the payment of the larger sum claimed to be due prior to the former trial and appeal and as to the fact that no demand had been made by plaintiff for any payment under the precise terms of the original agreement since the decision of the Supreme Court reversing the former judgment. The cause being again submitted for decision upon the record as thus presented, the trial court duly made and filed its findings of fact and conclusions of law wherein it was found that within two years prior to the commencement of the action the plaintiff had sold and delivered to the defendant certain labels, stationery, and merchandise pursuant to the express contract of February 16, 1916, as set forth in the pleadings of the parties and pursuant to no implied or other agreement, and that there was due and payable to plaintiff therefor, after deducting all payments and offsets, the sum of \$7,309, and that there was also due and payable to said plaintiff interest at 7 per cent. per annum, figured upon each invoice of said merchandise beginning aft-

er the lapse of 30 days from the delivery of the same down to the date of judgment; said interest aggregating the sum of \$2,026, the total aggregate of said sums due with interest as thus computed amounting to the sum of \$9,335, for which sum judgment was ordered and entered in the plaintiff's favor. This appeal is from said judgment.

The only serious contention which the appellant makes upon this appeal relates to the allowance of interest. The appellant predicates this contention upon the fact that the plaintiff in its original complaint and upon the former trial of the cause was insisting upon the recovery of a larger sum than that which would have been due under the original contract of the parties, relying upon the subsequent agreement for an increase in the price of labels. This, according to the appellant's contention upon this appeal, rendered the balance due the plaintiff uncertain until the date of the second judgment rendered in the action. There is no semblance of merit in this contention, since it is not only at variance with the defendant's own position and claim that its conceded liability arose and at all times existed, under the express terms of the original written agreement pleaded in its original answer and set forth in full as an exhibit to its amended answer, but it is also at variance with the findings of the court upon the second trial of the action that the rights and liabilities of the parties were fixed by the terms of said original agreement in writing. It being thus the fact that the plaintiff's rights and the amount of its recovery of both principal and interest were fixed as the defendant always heretofore contended, and as the trial court finally found, by the terms of said express contract, the first clause of section 1917 of the Civil Code as it existed prior to November 5, 1918, and the provisions of the initiative law relating to interest which became effective on said last-named date, had full application to the plaintiff's right to interest upon the principal sum payable under the terms of said contract after the same fell due. The amount of interest to which the one party is entitled or for which the other is bound is not determinable by the misconceptions of the parties as to their rights or duties under the terms of their express contract, but by the terms of the contract itself as finally interpreted by the court. By the terms of this contract the defendant was bound to pay plaintiff the amount due upon his delivery as specified therein within a stated time after such delivery had been made and interest began to run upon such deferred payments under the foregoing provisions of the law relating to interest from the date they became due. The only way in which the defendant could have avoided or terminated his liability to pay interest under his said agreement would have been to have made a tender of payment of the whole amount of

principal and interest due up to the date of such tender. *Sutherland on Damages* (4th Ed.) § 266; *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93. The defendant made no such tender at any stage of the case, and he was not excused from doing so by the mere fact that the plaintiff was demanding a much larger sum than was actually due, since the defendant's right and duty in that regard are defined by the provisions of sections 1500 and 1504 of the Civil Code, and are not measured by the plaintiff's insistence as to the amount which it claims to be due. *Robinson v. American Fish Co.*, 17 Cal. App. 212-220, 119 Pac. 388; *Fairchild v. Bay Point, etc.*, Ry. Co., 22 Cal. App. 328, 134 Pac. 338; *Brazzil v. Azevedo*, 32 Cal. App. 364, 62 Pac. 1049.

There is no other point made by the appellant deserving of serious consideration.

The judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

62 Cal. App. 408

MARBLEHEAD LAND CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (two cases). (Civ. 4345, 4346.)

(District Court of Appeal, Second District, Division 1, California. June 6, 1923.)

1. Eminent domain — 70—Constitution, as to compensation, satisfied by provision for security on taking property for public use by state or political subdivision thereof.

The rule that private property shall not be taken for public use without just compensation is satisfied by Const. art. 1, § 14, as amended November 5, 1918, which provides that, in eminent domain brought by the state or political subdivision thereof, appropriator may take immediate possession and use of any right of way required for a public use, on giving such security as the court may direct and in such amount as may be reasonably adequate to secure to the owner immediate payment of just compensation for such taking and damages incident thereto, the amount of which security may be altered on motion.

2. Constitutional law — 280—Eminent domain — 70—Taking property by state or political subdivision thereof, after giving security to secure compensation to owner, not violative of due process clause.

Const. art. 1, § 14, as amended November 5, 1918, which provides that, in eminent domain by the state or a political subdivision thereof, appropriator may take immediate possession and use of any right of way required for a public use, on giving such security in such amount as may be reasonably adequate to secure to the owner immediate payment of just compensation and damages incident thereto, the amount of which security may, on motion, be altered by the court as required by

such proceeding, is not violative of the due process clause of the federal Constitution.

Separate applications by the Marblehead Land Company against the Superior Court in and for Los Angeles County and C. S. Crail, as Judge thereof, for writs of certiorari to review and annul certain orders of the superior court in condemnation proceedings. Applications denied.

See, also, 215 Pac. 922.

Grant Jackson, and Newby & Palmer, all of Los Angeles, for petitioner.

CONREY, P. J. The petitioner in case No. 4345 applies for a writ of certiorari, that this court may review and annul certain orders of the superior court in an action commenced by the county of Los Angeles to condemn land of the petitioner for road purposes. The orders in this action by their terms permit the county to take immediate possession of the land sought to be condemned, notwithstanding that no judgment of condemnation has been entered, and the compensation to which the owner of the land will be entitled has not been ascertained. The first order was based upon an application of the plaintiff in the action, accompanied by an affidavit received as evidence of the amount reasonably adequate to secure to the owner the property sought to be taken, immediate payment of just compensation for such taking, etc. The second order declared that the plaintiff had complied with the first order, and thereupon ordered that the plaintiff may take immediate possession and use of the described right of way. Both orders were made ex parte, without notice to petitioner, who was a defendant in the action.

[1] These orders were made pursuant to or in attempted compliance with the provisions of article 1, § 14, of the Constitution of California, as amended November 5, 1918. Prior to that time the unqualified provision of that section was such that a right of way could not be appropriated to the use of any corporation other than municipal "until full compensation therefor be first made in money or ascertained and paid into court for the owner." By the amendment of 1918 it was likewise provided that no right of way shall be appropriated to the use of any corporation, "except a municipal corporation or a county, until full compensation therefor be first made in money or ascertained and paid into court for the owner," etc. The amendment of 1918 added to this requirement the following proviso:

"That in an action in eminent domain brought by the state, or a county, * * * the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use whether the fee thereof or an easement there-

for be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposits as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings."

Petitioner contends that said section of the Constitution, as amended, violates the Fourteenth Amendment of the federal Constitution (which forbids the state to deprive any person of property without due process of law), if it be held that the section means that possession can be taken without notice, upon deposit being made, upon an ex parte order. There is nothing unusual or unknown to the ordinary process of law in the taking possession of property without the consent of the owner, during the pendency of actions which either directly or incidentally contemplate the complete taking of the property, although in such cases the law always provides security for the owner. But the amount of that security is frequently determined by the court upon an ex parte showing, usually in the form of affidavits. This is constantly done in cases of attachment, in proceedings for appointment of receivers, and other forms of relief. In the present instance, as in some others, the right to obtain further security is given, if it be made to appear that the amount specified in the first order was inadequate; for, as we have seen, it is provided in section 14 of article 1 of the state Constitution that:

"The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings."

It is our opinion that the decision in *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404, 92 Am. St. Rep. 183, does not sustain petitioner's contention that said constitutional amendment of 1918 does not authorize the taking possession of property by the county for the purpose and under the conditions indicated in the present case. That decision was made in the year 1902. After reviewing decisions upon this subject under the Constitution preceding the present Constitution, which was adopted in 1879, the court summarizes the law as existing at the time of the adoption of this Constitution as follows:

"The possession and use in terms authorized by the statute, before compensation had been made and while the proceeding was pending, is a taking within the meaning of the Constitution; but the requirement of the former Constitution, which only provided that private property should not be taken for public use without just compensation, was satisfied by a provision which insured the payment on reasonable terms as to delay and difficulty in the enforcement of the right. Viewed in the light of these facts, the change made in the language by the new Constitution becomes significant. The following italicized words were added, and no other change was made in the general provision: 'Private property shall not be taken *or damaged* for public use without just compensation *having been first made to or paid into court for the owner*.' The purpose of the amendment is perfectly obvious. If the preliminary possession during the pendency of the proceeding is a taking within the meaning of the Constitution, it cannot be authorized until the damage resulting therefrom has been judicially determined and the amount has been paid or tendered to the owner."

But, as we have seen, the amendment of 1918, so far as applicable to a condemnation by a county for public use, restores the law to the condition in which it was prior to the adoption of the present Constitution in 1879. Therefore, in this instance, the rule that private property shall not be taken for public use without just compensation is satisfied by the provisions made in the amendment, which provisions insure the payment "on reasonable terms as to delay and difficulty in the enforcement of the right."

[2] Nor does this construction of the state Constitution bring it into conflict with the Constitution of the United States. In *Turpin v. Lemon*, 187 U. S. 51, 58, 23 Sup. Ct. 20, 23, 47 L. Ed. 70, 74, the court referred to the principle that:

"In proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential."

But to define and limit the time when that opportunity must be afforded was found to be a task of great importance and of some difficulty. In *Hagar v. Reclamation Dist.*, 111 U. S. 701, 708, 4 Sup. Ct. 663, 667, 28 L. Ed. 569, 572, referring to the phrase "due process of law" as contained in the Fourteenth Amendment, the court says that by due process is meant—

"one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding

against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Counsel for petitioner have not referred to any case, and we are aware of none, in which the federal Supreme Court has held that a procedure like that described in the 1918 amendment of article 1, section 14, of the California Constitution, is in violation of the "due process of law" clause of the federal Constitution. We are not in agreement with their contention that said 1918 amendment does not purport to authorize the court in a condemnation proceeding by a county (provisionally and subject to the right to alter the amount of security required) to determine the amount reasonably adequate to secure the owner for the purposes stated, and to make such orders as were made in this case.

As we read the petition, counsel are in error in their statement that under the orders in question, the deposits of money were made to the credit of the county, and also in their contention that the deposits were not separated as required by law. We think that they were separated in a manner which complies with the rule laid down in *Marblehead Land Co. v. Superior Court*, 215 Pac. 922, recently decided by Division 2 of the Second District.

The petition in case No. 4346 is like that in case No. 4345, except that it relates to separate condemnation proceedings, in which other land is taken, for another road. In conformity with the views hereinabove stated, we think that in each case the petition for a writ of review should be denied; and it is so ordered.

We concur: HOUSER, J.; CURTIS, J.

62 Cal. App. 320

BANK v. BELL, City Auditor (DUVAL, Intervener. (Civ. 4382.)

(District Court of Appeal, First District, Division 1, California. May 29, 1923. Hearing Denied by Supreme Court July 26, 1923.)

1. Municipal corporations ☞56—Under constitutional amendment, powers over city affairs derived from charter.

Under the municipal affairs amendment (Const. art. 11, §§ 6, 8, as amended in 1914), cities derive their powers over municipal affairs from their freeholders' charter directly provided for by the Constitution, and not from the Legislature.

2. Municipal corporations ☞275—Establishment and maintenance of municipal market for sale of foodstuff held "municipal affair" within statutes.

Under Berkeley City Charter, art. 16, § 115, called the "municipal affairs" amendment

to the city charter, passed in conformity to Const. art. 11, §§ 6, 8, as amended in 1914, authorizing cities and towns organized under the Constitution to amend their charters so as to remove all restrictions on regulation of "municipal affairs" not embodied in their charters, the general laws to control all other matters, the establishment and maintenance of a municipal market for the sale of foodstuff is a "municipal affair," and within the plenary power of the city.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

3. Municipal corporations ☞111(1)—Municipal market ordinance not void because no check on manager's financial activities is included.

The mere fact that certain ordinances creating a municipal market allow the manager to handle all money derived from it without any check upon him, and contrary to law, does not render the ordinances void, since the court cannot anticipate such results.

4. Appeal and error ☞907(3)—All findings assumed true on appeal from judgment roll.

Where an appeal comes up on the judgment roll alone, all findings are taken as true, including a special finding that the auditor had sufficient funds available to pay petitioner's salary.

5. Mandamus ☞102(2)—Manager of municipal market entitled to mandate compelling auditor to pay salary.

The manager of a municipal market is entitled to a peremptory writ of mandate commanding the city auditor to honor warrants authorized by the council to pay his salary.

Appeal from Superior Court, Alameda County; H. D. Burroughs, Judge.

Petition by E. Carl Bank for writ of mandate against Elmer F. Bell, as Auditor of the City of Berkeley, in which Ethel M. Duval intervened. Judgment for petitioner, and defendant and intervener appeal. Affirmed.

Richard B. Bell, of Berkeley (R. M. F. Soto, of San Francisco of counsel), for appellants.

Lemuel D. Sanderson, City Atty., of Berkeley, for respondent.

ST. SURE, J. This appeal involves the decision of the question whether or not the city of Berkeley has the power to acquire, establish, maintain, own, and operate a municipal market. In this connection provisions of the Constitution of California relative to municipal affairs, certain sections of Berkeley's charter vital to its claims of "home rule," and ordinances passed in conformity therewith, are to be considered and discussed and an opinion thereon given.

The city of Berkeley, through its council, on February 23, 1921, adopted Ordinance No.

699, N. S., establishing a market to be known and designated as the Berkeley Municipal Market, declaring that said market shall be maintained, equipped, owned and operated by the city of Berkeley, declaring the purposes of said market, determining the price at which foodstuffs shall be bought and sold by said market, requiring all funds, from whatever source, to be kept in a bank in the city of Berkeley, creating the office of market manager, providing the mode of filling the office of market manager, determining the mode of removing the market manager, prescribing the duties of market manager, authorizing the employment of other persons, providing the mode of discharging any employee of said market, determining the mode of fixing the compensation of the market manager and other employees of said market, requiring a bond in the sum of \$10,000 to be filed by the market manager, and providing the terms and conditions thereof, and the manner of its approval, providing for a monthly report of said market manager to the council, and providing for a monthly audit of the books of said market manager, and a report thereon by the city auditor to the council, and for the further conduct and carrying on of the municipal market the council also, on March 15, 1921, adopted Ordinance No. 701, N. S., amending Ordinance No. 699, N. S., appropriating the sum of \$5,000, to be constituted a revolving fund, providing that of this sum the sum of \$2,000 shall be used for any necessary equipment for the Berkeley Municipal Market, and the sum of \$3,000 shall be used for the purpose of paying for any shipments of foodstuffs, expenses of maintaining and operating said market, salaries or compensation of any persons connected with said market, or taking care of any unforeseen losses or contingencies, or the future needs of said market, providing for purchases by the market manager, providing the mode of payment for the same, and providing the mode of returning money to said revolving fund.

The appeal comes to us upon the judgment roll. It is taken by Elmer F. Bell, as auditor of the city of Berkeley, and Ethel M. Duval, intervener, from a judgment awarding petitioner-respondent a peremptory writ of mandate commanding defendant as auditor, to allow a warrant issued upon a claim passed and allowed by the council of said city, in favor of said petitioner, in the sum of \$225 as monthly salary for services as market manager of the Berkeley Municipal Market, alleged to have been established under said ordinance. The petition, with appropriate allegations, stated facts sufficient to constitute a cause of action. A demurrer to the petition was overruled, and defendant answered. Ethel M. Duval, as a taxpayer, later, by leave of court, filed her complaint in intervention, joining defend-

ant and adopting as hers the answer filed by him.

The court found that all of the allegations of the complaint were true, and in addition found specially to the effect that at the time of the passage of the said ordinances, and ever since, there has been more than \$5,000 in the general fund of the city treasury which has not been appropriated for any other purpose, and that it is under the control of the defendant as auditor. As conclusions of law the court determined that a peremptory writ of mandate issue in conformity with the prayer of the petition to defendant as auditor, commanding him to obey the ordinances and indorse his allowance on the warrant in question here, and do whatever other acts are necessary to allow the said demand. Judgment was entered in accordance therewith, and defendant and intervener appealed.

Whether or not the judgment of the lower court shall stand must be answered on this appeal by the decision of the question adverted to in the first paragraph of this opinion.

The provisions of the law under which it is asserted the municipal market may be established and operated are the following:

Amendment of 1914 to the Constitution of California, art. 11 § 6, reading:

"Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." Treadwell, Constitution (4th Ed.) p. 376.

Also section 8, of the same article of the Constitution, which was amended to read:

"It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." Treadwell, Constitution (4th Ed.) p. 405.

Section 47 of article 9 (Powers of the City and of the Council) of the charter of the city of Berkeley:

"General Powers of the City. Sec. 47. Without denial or disparagement of other powers held under the Constitution and laws of the state, the city of Berkeley shall have the right and power:

"Public Buildings, Works and Institutions. (1) To acquire by purchase, condemnation or

otherwise, and to establish, maintain, equip, own and operate, libraries, reading rooms, art galleries, museums, schools, kindergartens, parks, playgrounds, places of recreation, fountains, baths, public toilets, markets, market houses, abattoirs, dispensaries, infirmaries, hospitals, charitable institutions, jails, houses of correction and farm schools, work houses, detention homes, morgues, cemeteries, crematories, garbage collection and garbage disposal and reduction works, street cleaning and sprinkling plants, quarries, wharves, docks, waterways, canals, and all other public buildings, places, works and institutions.

"*Additional Powers.* (62) To enact appropriate legislation and do and perform any and all other acts and things which may be necessary and proper to carry out the general powers of the city or any of the provisions of this charter, and to exercise all powers not in conflict with the Constitution of the state with this charter, or with ordinances adopted by the people of the city."

Section 115 of article 16 of the charter, as added in 1921:

"*Municipal Affairs.* Sec. 115. The city of Berkeley shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in this charter; provided, however, that nothing herein shall be construed to prevent or restrict the city from exercising or consenting to, and the city is hereby authorized to exercise, any and all rights, powers and privileges heretofore or hereafter granted or prescribed by general laws of the state." Stats. 1921, p. 2023, c. 16, assembly concurrent resolution No. 5.

When the California constitutional convention of 1879 met an attempt was made to liberate municipalities from the thralldom of legislative interference in their affairs. As originally adopted, the last sentence of section 6 of article 11 read as follows:

"Cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, * * * shall be subject to and controlled by general laws."

In passing upon certain sections of the new Constitution in *People v. Hoge* (1880) 55 Cal. 612, 618, Chief Justice Morrison said:

"It was manifestly the intention * * * of the Constitution to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature."

However, the municipalities got little comfort and no relief from the decisions of our Supreme Court construing section 6 of article 11, and the doctrine was settled that the Legislature had power by general laws to supersede or take away without the consent of the municipality the powers conferred upon it either by a special legislative charter or by a constitutional freeholders' charter, and also to prevent, by anticipation, free-

holders' charters from regulating matters covered by general laws.

"These decisions had demonstrated," said Mr. Justice Angellotti in *Ex parte Braun*, 141 Cal. 204, 209, 74 Pac. 780, 782, "that the power given by the Constitution to cities to frame charters for their own government for the purpose, as was said in *People v. Hoge*, 55 Cal. 612, 618, of emancipating them from the authority and control formerly exercised over them by the Legislature in municipal matters, were unavailing if such charters could at once be superseded by any general legislative enactment. Under these circumstances, the section of the Constitution providing that all cities and towns and the charters thereof should be subject to and controlled by general laws was [1896] amended by the addition of the words 'except in municipal affairs.'"

The purpose of this so-called "municipal affairs" amendment was explained by Mr. Justice Garoutte in *Fragley v. Phelan*, 126 Cal. 383, 387, 58 Pac. 923, 925, as follows:

"For the purpose of getting at the true significance of these words, there is no brighter light to be shed upon them, than is disclosed by a consideration of the reasons which moved the Legislature to propose the amendment, and the people to adopt it. What was the evil to be remedied? What was the good to be gained by this amendment? The answer is common, every day history. It was to prevent existing provisions of charters from being frittered away by general laws. It was to enable municipalities to conduct their own business and control their own affairs to the fullest possible extent in their own way. It was enacted upon the principle that the municipality itself know better what it wanted and needed than did the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs."

Since the decision in *Fragley v. Phelan* the "municipal affairs" provision of the Constitution has been considered and construed in many cases by our Supreme Court; but, as was said by Mr. William Carey Jones in an article on the subject, "Municipal Affairs of the Constitution" (*California Law Review*, January, 1913):

"The determination by the court whether any matter is or is not a municipal affair has not occasioned any serious trouble. Justices Garoutte, Harrison, and Temple, in their several opinions in the *Fragley* Case, took somewhat different views as to the import of the term and as to the criterion for deciding when an affair was municipal or was not municipal; but the solution of the question has never caused the court any real difficulty. Justice Angellotti has said in *Sunset Telephone & Telegraph Co. v. Pasadena*, 161 Cal. 265, 118 Pac. 796: 'There has been much discussion in our decisions as to what matters are embraced in this term, and it has been said that it is very difficult, if not impossible, to give a general definition clearly defining the term "municipal affairs" and its scope.' Accordingly the court has wisely abstained from attempting to tie

itself up with a definition, the concrete question being in each case whether the matter at issue was or was not within the scope of municipal functions. The court has carefully and judiciously discriminated between local and state affairs, and as a matter of fact in the larger number of litigated cases has held the 'affair' in question to be within the purview of municipal activity."

Sections 6 and 8 of article 11 of the Constitution were amended in 1914 as hereinbefore noted. In 1921 the city of Berkeley, in conformity with these amendments, added section 115, art. 16, to its charter. This charter amendment is in language identical with language contained in the charter of the city of Los Angeles, which has been construed by our Supreme Court in several recent cases.

The first case was that of Civic Center Ass'n v. Railroad Co., 175 Cal. 441, 166 Pac. 351. Mr. Justice Shaw, in writing the opinion of the court, after quoting the words of the charter section, "To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter, * * *" said:

"The city has brought itself within the conditions of the amendments of 1914 to sections 6 and 8 of article XI of the Constitution. Thereupon according to the terms of those sections of the Constitution, its powers over municipal affairs became all-embracing, restricted and limited by the charter 'only,' and free from any interference by the state through general laws, including laws giving the Railroad Commission powers over public utilities. The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force with respect to Los Angeles. If its charter gives it powers concerning them, it has those powers; if its charter is silent as to any such power, no general law can confer it. Whether such powers heretofore conferred upon it by general law, if any there be, are now abrogated or suspended, is a question we need not decide."

Then followed the opinion of Mr. Justice Wilbur in *Cole v. City of Los Angeles*, 180 Cal. 617, 622, 182 Pac. 436, 438, in which he quotes with approval the following language from *Civic Center Ass'n v. Railroad Co.*:

"The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force with respect to Los Angeles. If its charter gives it powers concerning them, it has those powers; if its charter is silent as to any such power, no general law can confer it."

Soon thereafter our Supreme Court again had occasion to consider and pass upon the Los Angeles charter amendment. This time Mr. Justice Lawlor, writing the opinion in *Morgan v. City of Los Angeles*, 182 Cal. 301, 306, 187 Pac. 1050, 1052, said:

"To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter; provided, however, that nothing herein shall be construed to prevent or restrict the city from exercising or consenting to, and the city is hereby authorized to exercise, any and all rights, powers and privileges heretofore or hereafter granted or prescribed by general laws of the state." This charter provision was in effect at the time the city initiated the bond proceedings in question, and respondents contend 'that the plain intent of the provision is to the effect that, if the city is independent of general laws upon municipal affairs, save only as it may be restricted or limited by its own charter, it has the power to exercise any right, power or privilege heretofore or hereafter granted or prescribed by general law, and nothing in the charter shall be construed to prevent or restrict the city from exercising or consenting to such right, power or privilege.' This contention is, in our opinion, sound, and it must be held that under subdivision 51 of section 2 of article I of its charter, as amended in 1919, the city of Los Angeles was empowered to issue bonds under the provisions of the Municipal Bond Act of 1901."

Next Mr. Justice Lennon wrote the opinions in *Matter of Frank Nowak*, 184 Cal. 701, 195 Pac. 402, and in *Matter of Elon G. Galusha*, 184 Cal. 697, 195 Pac. 406. In *Matter of Nowak* he said:

"The net result of this situation is that, as to municipal affairs, the charter, instead of being a grant of power, is, in effect, a limitation of powers, and, the imposition of the tax for revenue purposes being strictly a municipal affair, the city has the power to impose that tax unless the power was taken from it by the charter itself."

And in *Matter of Galusha*:

"Petitioner then raises the question as to whether or not such power has, in fact, been delegated to the city of Los Angeles. It must be borne in mind that, as stated in *Matter of Nowak*, post, p. 701 (195 Pac. 402), the city of Los Angeles is operating under a charter amended so as to render the charter a limitation upon powers rather than a grant of powers, so far as municipal affairs are concerned. Charter of City of Los Angeles, art. 1, § 2, subd. 51; Const. art. 11, § 6. The question, then, is not whether the charter grants the power to impose the tax, but whether it prohibits the tax, and no such prohibition is to be found in the charter. Even if it be conceded, however, that an express grant of power is necessary in the instant case for the reason that the taxation of attorneys is not a purely municipal affair but one in which the state is directly concerned, that would not defeat the tax in question, for the charter does contain an express grant."

The latest expression of the Supreme Court upon this important constitutional question emanated from Mr. Justice Wilbur, author of the opinion in *Los Angeles Gas &*

Electric Corporation v. City of Los Angeles (Cal. Sup.) 205 Pac. 125. He said:

"This provision of the Constitution is in the article regulating the powers of the legislative department of the state government, and is a limitation upon the power of the state Legislature. The powers of the city of Los Angeles are not derived from the Legislature, but from a freeholders' charter directly provided for by the Constitution. That is to say, the people of the state, through the Constitution, authorize the people of the city to regulate its affairs by a charter to be framed by a board of freeholders and voted upon by the people of the city, and approved by a resolution of the Legislature. Section 31 of article 4 has no application to a city charter. It is expressly provided by the Constitution (article 11, § 6) that the city in its charter may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws. The sale and distribution of electrical energy manufactured by a city is a municipal affair, and one over which the Legislature of the state has no control."

[1] To recapitulate, it appears that, since the "municipal affairs" amendments of 1914 to the Constitution for such cities as have brought themselves within the condition of the amendments, the law is firmly established as follows: The powers of the cities are not derived from the Legislature but from a freeholders' charter directly provided for by the Constitution. The city in its charter may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by the general laws. The powers of the city are all-embracing, restricted and limited by the charter only, and free from the interference of the state by general laws. The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force. If its charter gives it powers concerning them, it has those powers. If its charter is silent as to any such power, no general law can confer it. As to municipal affairs the charter, instead of being a grant of power, is, in effect, a limitation of powers. The city can exercise the power if the charter does not prohibit it. In a case (*Matter of Galusha*) not involving a purely municipal affair, one in which the state is directly concerned, the city may exercise the power where its charter contains an express grant. And a city that has, like Berkeley, amended its charter (section 115 of article 16 of Berkeley charter) in order to conform to the "municipal affairs" amendments to the Constitution, is independent of general laws upon municipal affairs, and, save only as it may be restricted or limited

by its own charter, it has the power to exercise any right, power, or privilege heretofore or hereafter granted or prescribed by general law, and nothing in the charter shall be construed to prevent or restrict the city from exercising or consenting to such right, power, or privilege.

The decision in this case turns upon the answer to the question which now presents itself to us: Is the establishment, maintenance, equipment, ownership, and operation of the "Berkeley Municipal Market" a municipal affair?

In defining a "municipal affair" it has been said that—

"The true test is that which requires that the work should be essentially public, and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need, or contribute to the convenience, of the people of the city at large. Within that sphere of action, novelty should impose no veto." *Sun Printing, etc., Ass'n v. New York*, 8 App. Div. 230, 238, 40 N. Y. Supp. 607, 611, 612; *Id.*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788.

Time was when the sale of light and water to the public was attacked in the state of New York because it was thought not to be within the purview of the municipal powers of the city. The idea was then something new, and it met with opposition. It was contended that the business that the city proposed engaging in was of a private, commercial nature, and that therefore the municipality was debarred from entering upon it. The case is to be found in 49 Hun, 550, 2 N. Y. Supp. 447, and is entitled *Hequenbourg v. City of Dunkirk et al.* In declaring the business a public use the court said:

"What is or what is not a municipal purpose is in many cases doubtful and uncertain, and it is the duty of the court in such cases to give weight to legislative determination, and not to annul its acts, unless it clearly appears that the act was not authorized."

In *Laughlin v. City of Portland* (1914) 111 Me. 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916C, 734, the court said:

"The courts have never attempted to lay down with minute detail and inexorable rule distinguishing public from private purposes because it would be impossible to do so. Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago, may, because of changed conditions, have ceased to be such today. * * * What could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now. * * *

In *State v. Toledo*, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729, cited in *Jones v. City of Portland*, 245 U. S. 224, 38 Sup. Ct. 212, 62 L. Ed. 252, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660, the court discussed the question as follows:

"Taxation implies an imposition for a public use. * * * But, what are public purposes, is a question that must be left to the Legislature, to be decided upon its own judgment and discretion. * * * It is sufficient 'if every inhabitant who is so situated that he can use it, has the same right to use it as the other inhabitants.' * * * The establishment of natural gas works by municipal corporations, with the imposition of taxes to pay the cost thereof, may be a new object of municipal policy. But, in deciding whether in a given case, the object for which taxes are assessed is a public or private purpose, we cannot leave out of view the progress of society, the change of manners and customs, and the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power. And, in deciding whether such taxes shall be levied for the new purposes that have arisen, we should not, we think, be bound by an inexorable rule that would embrace only those objects for which taxes have been customarily and by long course of legislation levied."

Again, in the case of *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, 408, 34 Sup. Ct. 612, 617 (58 L. Ed. 1011, L. R. A. 1915C, 1189), where the regulation of rates and premiums of fire insurance companies was upheld, Mr. Justice McKenna said:

"The principle was expressed to be, quoting Lord Chief Justice Hale, 'that when private property is "affected with a public interest it ceases to be *juris privati*" only' and it becomes 'clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.' * * * Against that conservatism of the mind which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired. * * * They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. * * * It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application."

Mr. Justice Oliver Wendell Holmes, Jr., in *Opinion of Justices*, 155 Mass. 607, 30 N. E. 1146, 15 L. R. A. 809, said:

"I am of the opinion that, when money is taken to enable a public body to offer to the public without discrimination, an article of general necessity, the purpose is no less public when that article is wood or coal than when it is water, or gas, or electricity, or education, to say nothing of cases like the support of paupers or the taking of land for railroads or public markets. I see no ground for denying the power of the Legislature to enact the laws mentioned in the questions proposed. The need or expediency of such legislation is not for us to consider."

A case of compelling interest is that of *Green v. Frazier*, 253 U. S. 233, 40 Sup. Ct. 499, 64 L. Ed. 878, Mr. Justice Day delivering the opinion of the court, in which it was held that legislation which provides for engaging the state in the business of manufacturing and marketing farm products, and providing homes for the people, and which appropriates money, creates a state banking system and authorizes bond issues and taxation for carrying this scheme into effect, is not unconstitutional as respects taxpayers. In considering the matter the court upheld the state statute, laid down the following general principles, and disposed of the matter as follows:

"What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a 'public' as distinguished from a 'private' purpose, but have left each case to be determined by its own peculiar circumstances. Gray, *Limitations of Taxing Power*, § 176. 'Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people.' Cooley, *Justice*, in *People v. Salem*, 20 Michigan, 452. Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 569; *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389. With the wisdom of such legislation, and the soundness of the economic policy involved, we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire."

In *Veterans' Board v. Jordan*, 208 Pac. 284, 22 A. L. R. 1515, our Supreme Court, through Mr. Justice Wilbur, mentioned the policy of *Green v. Frazier*, supra, as follows:

"We therefore turn to the question of whether or not the purpose sought to be achieved by the law for the settlement of large tracts of land after their improvement by the state is a public purpose. The question is a federal as

well as a state question, for the taking of money by taxation for private instead of public purposes is a violation of the federal as well as of the state Constitution. For that reason the decision of the Supreme Court of the United States in *Green v. Frazier*, Governor, et al., 253 U. S. 233, 40 Sup. Ct. 499, 64 L. Ed. 878, in passing upon certain statutes of North Dakota, is of great, if not controlling, importance."

In the cases last above cited and quoted from are discussed the questions, what is a municipal purpose, taxation for a public use, and the effect of legislative determination. As the statements and conclusions set forth in these cases meet with our approval, many of the points raised by defendant and intervenor are thus disposed of, and detailed notice and discussion by us obviated.

[2] The ordinances of the City of Berkeley under attack comprehensively provide for the establishment and maintenance of a public market where foodstuffs shall be bought and sold, and where the public, without discrimination, may come and buy. Anything used for the sustenance of man is foodstuff. Before and since the great World War there has been a quickening of public interest in economic questions. Throughout the Union efforts have been made by commonwealth and municipality alike to exercise control over living costs. The efforts have, in the main, been directed toward lessening the cost of foodstuffs—necessities of human existence. The situation has, in some instances, become so acute that it is matter of common knowledge, and cannot be overlooked by the court. There have been public meetings of the people at which on many occasions were discussed the supply, demand, and price of milk, bread, potatoes, sugar, meats, and other products of the farm and packing house, all of which come under the designation of foodstuffs. Public welfare leagues and co-operative clubs have been organized in various communities throughout the state having for their avowed object and purpose the purchase and sale of foodstuffs, to the end that the pinch of poverty might not be felt by a long-suffering public. There has been and is popular demand upon government, national, state, and municipal, for relief, and it was undoubtedly in response to such urgent public necessity that the city of Berkeley established its municipal market. We therefore have no difficulty whatever in deciding that the establishment and maintenance of the municipal market is a municipal affair and a municipal purpose.

Furthermore, addressing ourselves generally to this important question, we are of the opinion that the city of Berkeley, under the provisions of its charter, has plenary power to acquire, establish, maintain, equip, own, and operate a municipal market, and also, acting through its council, power to take such legislative action as it may deem necessary and advisable in the premises.

[3] In answer to the argument that the ordinances are void because the market manager is permitted to handle the money derived from the market without any check upon him, and contrary to law, we reply that "we are not required to anticipate that this will be done." *Veterans' Board v. Riley*, (Cal. Sup.) 206 Pac. 631, 63 Cal. Dec. 490, 498. On the contrary, we should assume that the market manager will perform his duties in a lawful manner. As Mr. Chief Justice Beatty said in *Rode v. Siebe*, 119 Cal. 520 and 521, 51 Pac. 870, 39 L. R. A. 342:

"The validity of a law is not to be tested, however, by its application to extreme cases involving the assumption of grossly arbitrary violation of their duties by public officers. If every law were declared unconstitutional which by the application of such a test could be shown capable of working injustice, we should have very few laws left."

[4] As to the duties of the market manager and how they shall be performed, and as to whether or not the market shall be conducted for profit, these and kindred matters are all proper subjects for legislation by the city through its council, and with which, in the instant case, we can have no concern. The appeal, as we have stated, comes up on the judgment roll alone. It is therefore assumed that the findings are true. The court specially found that there was in the general fund in the city under control of the defendant auditor ample funds with which to pay petitioner's claim.

[5] We are satisfied that the judgment of the lower court was correct, and that the petitioner-respondent is entitled to a writ of mandate commanding defendant auditor to allow said warrant issued upon a claim passed and allowed by the council of said city in favor of petitioner-respondent in the sum of \$225 as monthly salary for services as market manager of the Berkeley municipal market. This being so, the judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

62 Cal. App. 465

PIERCE v. SOLANO COUNTY et al.
(Civ. 2629.)

(District Court of Appeal, Third District, California. June 8, 1923. Hearing Denied by Supreme Court Aug. 6, 1923.)

1. Statutes §130—Words "revised" and "amended" within constitutional provision held interchangeable.

The words "revised" and "amended," within Const. art. 4, § 24, providing that "no law shall be revised or amended by reference to its title," are interchangeable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Amend—Amendment; Revise.]

2. Statutes §230—In construction no difference between "revision" of a statute and the "amendment" thereof "to read as follows."

In the construction of statutes, there is no difference between the "revision" of a particular act, or a section thereof "to read as follows," and the "amendment" of the same act or section "to read as follows," since in either case the revising or amending act is intended as a substitute for the original statute, or section, continuing in force that which is re-enacted and repealing what is omitted.

3. Highways §107(1)—Resolution of intention held sufficient.

Resolution of intention to order certain road work under "Road District Improvement Act, approved March 21, 1907 (St. 1907, p. 806), and acts amendatory thereof," held not void for failure to state that the proceedings were pursuant to the Road Improvement Act of 1921 (St. 1921, p. 311), providing in section 2 that the act of 1907 "is hereby revised to read as follows," etc.; the act of 1921 being "amendatory" of the act of 1907.

4. Highways §90—Courts cannot interfere with establishment of boundaries of road district where complaining owner was given opportunity to complain before board and failed to object.

The courts cannot interfere with the determination of the board of supervisors in the establishment of the boundaries of the road district, under Road District Improvement Act of 1907 (St. 1907, p. 806) as amended by St. 1921, p. 311, and the ordering of work to be done therein, where the complaining property owner was given a reasonable opportunity to be heard in the proceeding before the board and there failed to object to any action taken by it.

Appeal from Superior Court, Solano County; R. H. Latimer, Judge.

Action by William Pierce against the County of Solano, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

W. U. Goodman, of Fairfield, and Arthur Lindauer, of Vallejo, for respondents.

FINCH, P. J. In this action the plaintiff prayed that the organization of a certain road improvement district be adjudged void and the defendants enjoined from further proceedings in connection therewith. Defendants were given judgment, and plaintiff has appealed.

The proceedings sought to be annulled were had under the "Road District Improvement Act of 1907." On the 3d day of January, 1922, the board of supervisors adopted a resolution of intention to order certain road work to be done, containing the following provisions material to this discussion:

"Resolved, that it is the intention of the board of supervisors, * * * proceeding under and by virtue of the Road District Improvement Act approved March 21, 1907, and acts amendatory thereof, * * * to order work to be done as follows: * * * Notice is hereby given that at the time specified hereinbefore for ordering the work * * * all objections which are, under the provisions of said Road District Improvement Act of 1907, and acts amendatory thereof, entitled to be heard or determined, will then be heard and determined."

The later resolution ordering the work to be done provides:

"All of the herein proposed work shall be done in pursuance of an act of the Legislature of the State of California, entitled (here follows the original title of the act) approved March 21, 1907, and the several acts amendatory thereof."

Appellant contends that the supervisors followed the original act of 1907 (Stats. 1907, p. 806) and amendments thereof, and "not the revised 'Road District Improvement Act of 1907,' as revised by the Legislature in 1921," and that, therefore, their proceedings are void.

Section 14 of the act of 1907 was amended in 1911 (St. 1911, p. 506); sections 2, 6, 8, 11, 12, and 13 in 1915 (St. 1915, p. 1394); sections 1, 3, 4, 7, 14, and 15 in 1917 (St. 1917, p. 1369); and sections 9a and 12 in 1919 (St. 1919, pp. 558, 516). A new section, numbered 15½, was added in 1919 (St. 1919, p. 1336). In 1921 the Legislature passed an act entitled "An act to amend the title of and to revise an act entitled [giving the title of the act of 1907], approved March 21, 1907, as amended, and to include therein provision for the doing of work adjacent to said public roads, streets, avenues, boulevards, lanes and alleys which is incidental to the work thereon." Stats. 1921, p. 311. The main provisions of the act of 1907 and its amendments were carried forward into the revised act, many of them literally. Section 1 provides that the title of the act of 1907, "as amended, is hereby amended to read as follows," setting out the title as amended. Section 2 reads: "Said act is hereby revised to read as follows," followed by the body of the statute

divided into 33 sections. Then follows section 3 of the act, providing that proceedings commenced before the act went into effect should be governed by the law in force at the time of the passage of the resolution of intention therein, with certain exceptions. Section 33 of the revised act provides:

"This act shall be known as the 'Road District Improvement Act of 1907' and by such designation shall be sufficiently identified in any proceeding thereunder, and whenever in the resolution of intention it shall be set forth or recited that the proceeding is under the 'Road District Improvement Act of 1907,' this act shall be construed as the paramount statute for such proceeding, independently of, and alternatively for, other statutes for the improvement of public ways not within incorporated cities and towns."

Section 4 provides that—

The resolution of intention "may, in form, and shall, in substance, be (filling all blanks) as indicated following, to wit: * * * Resolved, that it is the intention of the board of supervisors of the county of —, * * * proceeding under and by virtue of the Road District Improvement Act of 1907, * * * to order work to be done as follows: * * * Notice is hereby given that at the time specified * * * all objections which are, under the provisions of said Road District Improvement Act of 1907, entitled to be heard or determined, will then be heard and determined."

Section 9 provides that—

"The board of supervisors may order the work to be done and if it so do shall fix a time for receiving bids for doing the work and direct the clerk to give notice accordingly, inviting sealed bids. Such notice shall include a statement that the work is to be done 'under the provisions of the Road District Improvement Act of 1907.'"

It thus appears that the proceedings of the board of supervisors were in literal conformity with the provisions of the act of 1921, except that the terms "Road District Improvement Act approved March 21, 1907, and acts amendatory thereof," were employed instead of "Road District Improvement Act of 1907."

[1-3] "No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended." Const. art. 4, § 24. Counsel for appellant quote the foregoing constitutional provision and say: "A revised act is a new and original piece of legislation." In Lewis' Sutherland on Statutory Construction (2d Ed.) § 269, it is said:

"Revision of statutes implies a re-examination of them. The word is applied to a restatement of the law in a connected or improved form. The restatement may be with or without material change. A revision is intended to take the place of the law as previously formulated. By adopting it the Legislature say the same thing, in effect, as when a particular sec-

tion is amended by the words 'so as to read as follows.'"

In section 273 it is said:

"Where an act is amended or revised, and the former act expressly or by implication repealed, such provisions of the old law as are substantially re-enacted are deemed to be continuous."

The inheritance tax law of 1905 (Stats. 1905, p. 341) was complete in itself and it expressly repealed the act of 1893 (Stats. 1893, p. 193), and all amendments thereto. In *Estate of Martin*, 153 Cal. 225, 228, 94 Pac. 1053, 1055, it is said:

"The act of 1905 containing the repealing clause above mentioned is practically a revision of the act of 1893 and its amendments, providing for succession taxes. Certain changes are made in the new law. * * * These changes are found, for the most part, in sections 1, 2, 3 and 4 of the new law. * * * The other portions of the old law are substantially re-enacted in the act of 1905 with a few alterations and additions which do not affect the question. * * * These re-enactments come within the scope and effect of section 325 of the Political Code, declaring that, when a part of a statute is amended, it is 'not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted.' The rule particularly applicable to this case is thus stated in Sutherland on Statutory Construction (2d Ed.) § 238: 'Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time.'"

While abstractly there are well-understood differences in meaning between the words "revise" and "amend," they are interchangeable in the sense in which they are used in the constitutional provision quoted. There is no shade of difference in meaning, under the rules governing the construction of statutes, between the "revision" of a particular act, or a section thereof, "to read as follows," and the "amendment" of the same act or section "to read as follows." In either case it is clear that the revising or amending act is intended as a substitute for the original statute or section, continuing in force that which is re-enacted and repealing what is omitted. The act of 1921 is certainly "amendatory" of that of 1907, and the statement in the resolution of intention that the supervisors were "proceeding under and by virtue of the Road District Improvement Act approved March 21, 1907, and acts amendatory thereof," was not inappropriate or misleading.

It is contended that, at the hearing upon the formation of the district, the supervisors denied plaintiff's right to be heard upon the

question of the boundaries thereof. The statute (section 7) provides that if a majority of the owners of land make written "objection going to the entirety of the work described in the resolution of intention," the board of supervisors shall proceed no further in the matter, but that if a majority do not so object the board shall so find and thereupon proceed with the hearing. In this case the board found that a majority of the owners had not so objected and there is no complaint as to the regularity of the proceedings up to and including such finding. The statute provides that the board shall next "proceed to hear such objections as may be made to the grades." There were no such objections in this case. The next paragraph of the statute is as follows:

"Thereafter, in the order of hearing shall be heard such objections as shall be made to the boundaries of the district as set forth in the resolution of intention. Objection to the grades or to the boundaries of the district may be made by an owner of land lying within the district upon the hearing without any written statement of the same."

Plaintiff testified that he was present at the hearing in the forenoon when the announcement was made that a majority of the owners of land had not filed written objections to the formation of the district; that "a very short period after that, the district attorney presented a resolution for the board to act upon"; that no member of the board "called for any protests or objections, or remarks, either on the subject of grades, or boundaries, or benefits, or anything of that nature"; that the board adjourned after adopting the resolution, to 1:30 p. m.; that at the afternoon session he presented written objections to the boundaries of the district, as set forth in the resolution of intention, and requested that his own lands be excluded therefrom; and that the board refused him a hearing upon the ground that his objections were made too late. The minutes of the forenoon session of the board, material here, are as follows:

"The board proceeded to hear and consider protests on file and it being found that a majority of the owners of the land lying within the district as set forth in the resolution of intention, had not in writing made objection to the ordering of the work as an entirety:

"The chairman of the board then called for other protests and objections, if there were any to be made. Lewis Hilborn thereupon, on behalf of himself and others, made objection orally to the boundaries of the district which were considered by the board. No objection to the grades were made."

[4] Following the foregoing is a copy of the resolution of the board, establishing the boundaries of the district as set forth in the resolution of intention and ordering the work to be done. The district attorney testified that—

Before the board had ascertained whether a majority of owners had objected to the work in its entirety, "Mr. Hilborn then addressed the board on the matter of the protests to the boundaries. * * * He didn't complete the talk that he was making at that time when Mr. Halliday returned with the lists (of owners of land), as amended by the recorder. That list was submitted by Mr. Halliday, who stated to the board the number on the list and the number of objections as a matter of record. Then Mr. Fleming (chairman of the board), I believe, announced that there not being sufficient objections to the work, that the meeting would proceed. I believe that Mr. Fleming called for other objections and, at that time, Mr. Hilborn, as I recall, again took the floor; and at that time * * * I was called out of the room and what took place then for a few minutes I do not know, and I returned. * * * About the grades, what was done on that I don't recall, only this, the final words of Mr. Fleming, 'Are there any further objections?' He announced that from his chair. Nobody had anything to say. Nobody had any objections at that time. Mr. Pierce sat there in the front row. * * * He (Fleming) said, 'No further objections?' and, there being no further objections, he said, 'What is the next thing?' * * * I said, 'I will go in my office and get the resolution and present it,' and I presented it, and there was a motion made by Mr. Connelly that the resolution be adopted, and it was moved and carried."

There is other evidence in harmony with the foregoing and some in contradiction thereof, but enough has been stated to support the findings of the court to the effect that plaintiff was present at the hearing before the board of supervisors "and did not orally or in writing make any objections as to the boundaries of said district," that "after a full, thorough and complete hearing of the entire matter, said resolution ordering said work was introduced and read in open meeting * * * in the presence and hearing of said plaintiff, and no objections were made or filed to the adoption of such resolution, and the same was thereafter adopted in open session by the unanimous vote of said board * * * at about 12 o'clock" of the day of said hearing and that plaintiff's objections were not made until 2:30 p. m. of said day. The courts cannot interfere with the determination of the board of supervisors in the establishment of the boundaries of a road district and the ordering of work to be done therein, where the complaining property owner was given a reasonable opportunity to be heard in the proceeding before the board and there failed to object to any action taken by it. *Dillingham v. Welch*, 179 Cal. 656, 178 Pac. 512. Since plaintiff made no objection, at the hearing before the board, to the inclusion of his lands or the exclusion of other lands, it is unnecessary to consider the evidence bearing upon the question of boundaries, because the de-

termination of the board, under such circumstances, is conclusive.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

62 Cal. App. 593

IMPERIAL WATER CO. NO. 4 v. ME-SERVE et al. (Civ. 3810.)

(District Court of Appeal, Second District, Division 2, California. June 19, 1923.)

1. Pleading ⚡147—Cross-complaint must allege facts showing that the demand is a proper subject for cross-complaint.

A cross-complaint must allege, not only all the facts necessary to constitute a cause of action, but also all facts essential to show that the demand is a proper subject for cross-complaint.

2. Pleading ⚡148—In action for water furnished, defendant could not file cross-complaint for plaintiff's failure to deliver water to which he was entitled as lessee of plaintiff's stockholder.

In an action for water delivered for the irrigation of a certain tract of land, cross-complaint alleging that the plaintiff was a mutual water company organized to furnish water at cost to its stockholders, that defendant as lessee of a stockholder was entitled to receive water from the plaintiff but that the plaintiff failed to deliver such water, *held* demurrable, since it sought to enforce a real property right and did not claim damages for breach of a contract with the plaintiff, and therefore the relief sought did not relate to or depend upon the "contract or transaction upon which the action is brought," as required by Code Civ. Proc. § 442.

3. Pleading ⚡148—Cross-complaint held demurrable for failure to show that tract of land mentioned was same as that referred to in complaint.

In water company's action for water furnished for irrigation of a particular tract of land, cross-complaint seeking damages for plaintiff's failure to furnish water *held* demurrable for failure to show that the tract of land for irrigation of which the plaintiff was alleged in the cross-complaint to have failed to deliver water, was the same tract as that for which the water mentioned in the complaint had been furnished.

4. Set-off and counterclaim ⚡34(1)—Defendant being sued for water for irrigation could not counterclaim for company's failure to deliver water to which defendant was entitled as stockholder's lessee.

In water company's action for water furnished for irrigation, defendant could not counterclaim for failure of plaintiff, a mutual water company organized for the purpose of furnishing water at cost to its stockholders, to furnish defendant with water to which he was entitled as the lessee of a stockholder,

under Code Civ. Proc. § 438, subd. 1, authorizing a counterclaim stating a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action, and subdivision 2, authorizing a counterclaim stating a cause of action arising on a contract existing at the commencement of the action, in an action arising on contract.

5. Pleading ⚡8(2) — Statement in cross-complaint that defendant's cause of action arose out of same transaction as complaint held mere conclusion of law.

Allegation in cross-complaint that defendant's cause of action "is of and concerning the subject-matter of plaintiff's complaint, and his cause of action arises out of the same transaction," *held* not sufficient to show that defendant's cause of action concerned the subject-matter of plaintiff's complaint, and arose out of the same transaction; being a mere conclusion of law not justified by the facts specifically alleged.

6. Waters and water courses ⚡254—Purchasers of water from corporation could not defend on ground that act of corporation in selling water was ultra vires.

In water company's action for water furnished for irrigation, defendants having purchased the water from the company could not defend on the ground that the act of the corporation in selling the water to them was ultra vires.

7. Pleading ⚡398 — Variance between complaint alleging sale of water and proof that water was supplied to defendants at cost by virtue of ownership of stock held not misleading.

In water company's action for water, furnished for irrigation, variance between allegation of complaint that the "water was sold and delivered" to the defendants, and proof that the water was furnished to defendants at cost because of ownership of stock, *held* not fatal, where it did not appear that the defendants were deceived thereby, under Code Civ. Proc. § 475, and Const. art. 6, § 4½.

8. Appeal and error ⚡761—Each point should be separately stated in brief under appropriate heading.

The purpose of a brief is to enlighten the court, and can best be accomplished when each point is separately stated under an appropriate heading; thus showing the precise nature of the question of law intended to be presented.

9. Appeal and error ⚡761—Presentation of points in brief held insufficient.

Appellants' statements in brief that "the first questions propounded to 'the named witness' involved in errors No. 1, No. 2, and No. 3, speak for themselves, and we submit need no other argument to show their error than the argument presented in the very statement of the objections," and that "we submit that the objections embodied in errors No. 4, No. 5, and No. 6, speak for themselves," *held* insufficient for consideration, since the appellate court should not be expected to do the work of counsel and hunt up and consider what coun-

sel have not argued or supported with a citation of authorities.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Imperial Water Company No. 4 against Edwin A. Meserve, Harry W. Meserve, and another. Judgment for plaintiff, and the named defendants appeal. Affirmed.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles, for appellants.

A. L. Sebille and Bruce Sebille, both of Brawley, for respondent.

FINLAYSON, P. J. Plaintiff, a mutual water company incorporated under the laws of this state, brings this action against Lizzie H. Meserve and her two sons, Edwin A. Meserve and Harry W. Meserve, to recover the sum of \$681.28, alleged to be due for "water sold and delivered" to defendants. Judgment for that sum was rendered against the three defendants, two of whom, Edwin A. and Harry W. Meserve, have taken this appeal.

In a complaint consisting of three counts, plaintiff alleges: In the first count, that defendants "purchased from plaintiff" and the latter "sold and delivered to defendants," for agricultural purposes, water to the amount and value of \$681.28, which defendants promised to pay; in the second count, that the water was reasonably worth \$681.28; and in the third, that the defendants are "indebted" to plaintiff in the sum of \$681.28 for water so sold and delivered. Edwin A. Meserve and his mother joined in an answer wherein they denied practically all of the allegations of the complaint. Harry W. Meserve answered separately. Like his codefendants, he also denied substantially every allegation of the complaint. As a further answer, Harry W. Meserve alleged that the plaintiff is a mutual water company, organized for the purpose of furnishing water at cost to its stockholders, and that it had no power under its articles of incorporation to "sell" water as personal property. For a further defense he alleges that, having the right so to do, he ordered water of plaintiff, but that the latter did not deliver all of the water so ordered because it negligently allowed its ditches to become so filled with weeds and grasses, silt and deposits that it was unable to deliver water in time to properly irrigate his crops; wherefore he alleges that his crops were lost and that he was damaged in the sum of one thousand dollars. Harry W. Meserve also filed a cross-complaint wherein, for a first cause of cross-action, he alleged that plaintiff is a mutual water company organized to furnish water at cost to its stockholders and those claiming under them; that he rented of one C. R.

Rockwood a tract of land containing 134 acres; that Rockwood owned 134 shares of plaintiff's capital stock; that as a lessee of Rockwood cross-complainant was entitled to receive water from plaintiff; that he planted barley on the leased land; that he ordered water of plaintiff, but that the latter permitted its canals to become so filled with weeds and grasses, silt and deposits that it could not and did not deliver water on the tract so leased by him of Rockwood; that as a result he lost the crop of barley and was damaged thereby in the sum of \$2,000. The cross-complaint sets forth a second alleged cause of cross-action similar to the first, except that it is based upon plaintiff's alleged failure to deliver water to a different piece of land, namely, a tract containing 320 acres, of which cross-complainant alleged himself to be the lessee. There is nothing in the cross-complaint to show that either of the tracts of land alleged to have been leased by cross-complainant is the same as that for the irrigation of which plaintiff sold and delivered the water mentioned in its complaint; nor is there anything in the cross-complaint to show that the water right which was owned by either of cross-complainant's lessors was the same water right in virtue of which defendants ordered the water for which plaintiff is seeking a recovery here. To the cross-complaint so interposed by the defendant Harry W. Meserve, plaintiff filed a general and a special demurrer. The demurrer was sustained.

Upon the trial of the case the following facts were shown: The articles of incorporation filed by plaintiff, a mutual water company, declare that "the purposes for which it is formed are to secure a supply of water from [here follow the names of certain companies from which plaintiff procured its water] * * * to distribute the same at cost among its stockholders only for use upon lands owned by them." The water mentioned in plaintiff's complaint was furnished by plaintiff for the irrigation of part of a tract of 320 acres in Imperial county upon which A. R. Meserve, the father of appellants, had made a location under the United States land laws. A. R. Meserve died before the issuance of a patent but after he had made his final proof. Prior to the death of A. R. Meserve, plaintiff had issued to him 320 shares of its capital stock. These shares represented a water right appurtenant to the particular tract of land upon which plaintiff furnished the water mentioned in its complaint. This tract of land, officially described as tract 156, will hereafter be referred to simply as the "ranch." Plaintiff having levied an assessment upon its subscribed stock and the amount assessed against the 320 shares standing in the name of A. R. Meserve not having been paid, the shares were sold for the assessment to A. R. Mes-

erve's widow, the defendant Lizzie H. Meserve. She purchased the shares and became the owner thereof about January 4, 1913.

To make it possible for Edwin A. Meserve to supply his widowed mother with funds for her support under such circumstances that she would be led to believe the money came from the profits of the ranch instead of from her son's bounty, as well as to enable the mother to receive a patent to the ranch and have it issued to her in her name, the two sons, Edwin and Harry, with their mother's knowledge and consent, entered into an arrangement pursuant to which it was agreed to farm the ranch on shares, the mother and her two sons each to receive one-third of the profits. Referring to this arrangement, or, as he very appropriately designated it, this "family affair," Edwin A. Meserve, called as a witness for plaintiff, testified:

"It was sort of a family affair, and we were trying to get that property in shape and prevent anybody from going on it and protect it for our mother; that was the idea, and between us we were endeavoring to get some member of the family who would be a legal heir of A. R. Meserve into possession and onto possession of that property. * * * She [the mother] knew Harry was going there to take possession of it, and she knew we were trying to get a patent in her name. * * * The children all wanted her to have it. The proposition was to get one of the Meserves—A. R. Meserve was in the possession—get the Land Office to issue a patent to Lizzie H. Meserve, and we finally succeeded in getting them to do it that way. * * * I was supporting my mother, and it was the means of making it easier for her to come to accept my support. * * * All the time she believed that the money I was giving her for her support and taking care of her came from this ranch, but it didn't come from the ranch. On the contrary, the ranch was an expense, and I have carried on that ranch at an expense of a good many thousands of dollars. * * * She understood that Harry was going down there, and I think I told her that Harry would send up one-third of the gross returns of the ranch, and the money I was turning over to her represented that one-third. * * * She thinks that money she got comes from the one-third Harry produces, and he was doing his best to make it a go, and I was doing my best to make it a go, and it went, but it went the wrong way. * * * It was sort of a family arrangement, Harry being willing to come here and sacrifice his time and try to make a go of it, and then he tried to run it so as to make the thing pay to my mother."

On July 27, 1912, Edwin A. Meserve mailed to plaintiff a letter, duly signed by him, addressed to plaintiff, and reading as follows:

"Gentlemen: Mr. Harry W. Meserve, the tenant in possession of the 320 acres of land formerly belonging to my father, A. R. Meserve, but upon his death passing to my mother, is there now to represent both my mother, Lizzie H. Meserve, and myself. His lease on the 320 acres standing in father's name carried

with it a lease of the water stock and of all the water rights and water privileges, so that he is authorized and empowered to call for the water on that water stock, and has full authority over the 320 acres. He also has charge, as my agent and representative, of the 320 acres formerly in the possession of Mr. Ashton S. Cooke, and full authority to order water on my water stock. You are therefore directed to receive his orders with full authority on the water belonging to either one of the two places, or the stock appurtenant to either."

Harry W. Meserve, who farmed the ranch during all the time that plaintiff furnished the water for which it is seeking a recovery, testified that as between his brother Edwin and himself, he was to pay for the water and that Edwin was to pay the water assessments—by which we presume the witness meant such assessments as plaintiff might levy on its subscribed capital stock.

[1-3] Appellants' first point is that the court erred in sustaining the demurrer to the cross-complaint. We think the cross-complaint failed to state a cause of cross-action, and that therefore the general demurrer thereto was properly sustained. A cross-complaint must allege, not only all the facts necessary to constitute a cause of action, but also all facts essential to show that the demand is a proper subject for cross-complaint. Here plaintiff's cause of action, as alleged in its complaint, is one arising out of contract—a contract, express or implied, to pay for water sold and delivered. To entitle a defendant to affirmative relief by way of cross-action his cross-complaint must allege facts showing that the relief sought by him relates to or depends upon the contract or transaction upon which plaintiff's action is brought, or that it affects the property to which plaintiff's action relates. Code Civ. Proc., § 442. Here the relief which cross-complainant seeks is based upon his alleged right to receive water, not by reason of any contract he ever made with plaintiff, but in virtue of his lessors' shares of stock in a mutual water company—the plaintiff in this action. But such a right to water has been held to be real property. *Stone v. Imperial Water Co.*, 173 Cal. 39, 159 Pac. 164. Cross-complainant, therefore, is seeking to enforce a real property right and is not claiming damages for breach of any contract with plaintiff. It follows, therefore, that the relief sought by him does not relate to or depend upon "the contract or transaction upon which the action is brought." Nor does the cross-complaint allege any fact tending to show that the relief sought thereby affects the property to which the action relates, even if it were possible to regard plaintiff's action as one relating to real property. If the cause of action alleged by plaintiff, which, as we have said, is based on contract, may be deemed to have any direct relation to real property, i. e., to the particular tract of land for the irrigation of which plaintiff

sold the water to defendants, still there is a total absence from the cross-complaint of any averment of fact tending to show that the two tracts of land mentioned therein and alleged to have been leased to Harry W. Meserve embrace any part of the land for which plaintiff furnished the water mentioned in its complaint. It follows, therefore, that the cross-complaint fails to allege any fact showing that cross-complainant's demand for damages is a proper subject of cross-action.

[4, 5] Nor may cross-complainant's demand be regarded as a proper subject of counterclaim. It cannot be regarded as a proper subject of counterclaim under subdivision 1 of section 438 of the Code of Civil Procedure, for no facts are averred showing that the alleged cause of cross-action arose out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or that it is connected with the subject of the action. True, the cross-complaint contains the bald assertion that it "is of and concerning the subject-matter of plaintiff's complaint, and this cause of [cross] action arises out of the same transaction"; but this is the allegation of a mere conclusion of law and is not justified by any of the facts specifically averred in the cross-complaint. Nor is there any allegation in the cross-complaint which would make cross-complainant's demand a proper subject of counterclaim under subdivision 2 of section 438. Though plaintiff's cause of action arises upon contract, the alleged cause of cross-action, as we have shown, is based, not upon contract, but upon the ownership of real property—the water rights owned by cross-complainant's lessors in virtue of their ownership of shares of plaintiff's capital stock. The ownership of each of such water rights it is true, like the ownership of any other species of real property acquired through sale, doubtless had its genesis in contract; but cross-complainant is seeking relief based upon the water right owned by each of his lessors, which is real property, and is not seeking relief based upon the contract out of which that water right accrued. That contract was fully performed when the water right vested in cross-complainant's lessor.

Since the cross-complaint clearly was subject to the general demurrer which plaintiff interposed to that pleading, it is not necessary to consider appellants' technical criticisms respecting the sufficiency of plaintiff's special demurrer.

[6, 7] Appellants earnestly urge that respondent, under its articles of incorporation, had no right to "sell" water—that it possessed only the right to distribute water among its stockholders at cost, and that respondent's claim, according to the case stated in its complaint, is based upon a "sale" of water to defendants and not upon a distribution of water to its stockholders at cost.

Appellants are not in a position to make such defense. It sufficiently appears from the testimony of Edwin A. Meserve and his letter to plaintiff that he and his brother Harry and their mother entered into a "family arrangement," whereby it was understood that the two sons should participate in farming the land, each of them, with the mother, receiving one-third of the crops—Edwin agreeing to contribute towards some of the expense, and Harry agreeing to contribute his services. The latter admitted that as between his brother and himself, he was to pay for the water used on the ranch. From all the evidence in the case we think that the trial court was warranted in finding that, as between the company and the three defendants, the water must be held to have been furnished or "sold" to all of the latter jointly, and that the three were jointly, or jointly and severally, liable therefor. Having thus dealt with the company, appellants are estopped from setting up as a defense that the act of the corporation in "selling" the water to them was ultra vires. *Bay City, etc., Ass'n v. Broad*, 136 Cal. 525, 69 Pac. 225. Moreover, though the complaint may have alleged a "sale," the evidence shows that the water was in fact delivered in virtue of the shares of stock owned by the mother, and that it was furnished to defendants at cost. Witnesses for respondent testified that the charges which were made by plaintiff for the water which it furnished from time to time to defendants were all at the rate of 50 cents per acre foot, that this was the usual charge made against all stockholders who received water from the company, and that the corporation received its water from other companies by paying therefor at the same rate—50 cents per acre foot. There is no fatal variance between this evidence and the case alleged in the complaint. It does not appear that defendants were deceived by the fact that the complaint, instead of averring that the water was furnished at cost in virtue of the mother's ownership of the shares of stock, alleged that the water was "sold and delivered." It is clear that a right result was reached, and under the provisions of section 475 of the Code of Civil Procedure and the requirements of the provisions of section 4½ of article 6 of the Constitution, no miscarriage of justice having resulted, the variance, if any, cannot be availed of to secure a reversal of the judgment.

Upon the occasions when plaintiff delivered water to the ranch, measurements were made by its *zanjeros*, who filled out and filed with the company their "report sheets." These documents or memoranda give the name of the owner of the land, the dates when the water was ordered, the name of the person giving the order for the water, the amounts of water delivered, and the sums charged. If from the aggregate of

the sums shown as charges on these "report sheets" there be deducted, as credits, the payments which are disclosed by the company's books, there will be left a balance of \$681.28, the amount for which plaintiff recovered judgment. One D. L. Smith, a witness for the plaintiff, testified that at one time he leased and farmed a part of the ranch. Wherefore appellants contend that some of the deliveries of water shown by the zanjeros' report sheets may have been used to irrigate that part of the ranch which Smith farmed, and that, if this were the case, the balance, if any, which might be due to plaintiff would be a sum less than \$681.28. There is no merit in the claim. Smith testified that he farmed the land in 1912, and that from and including 1913 to the fall of 1916 he did not farm any part of the ranch. The "report sheets" show that the deliveries referred to therein were made from and including February 13, 1913, to and including September 21, 1915. Between these two dates Smith was not farming any part of the ranch.

[8, 9] The remaining points raised in appellants' brief are either destitute of any merit whatever, or are instances of harmless error, or are points presented in such a desultory manner that we do not feel called upon to consider them. The following is a fair sample of the manner in which many of appellants' points, if "points" they may be called, have been presented to us:

"H. W. Meserve was called for plaintiff. The first questions propounded to this witness involved in Errors No. 1, No. 2, and No. 3, speak for themselves, and we submit need no other argument to show their error than the argument presented in the very statement of the objections. Certainly it was not competent, particularly as against Edwin A. and Lizzie H. Meserve, to prove that the defendant was a corporation in the manner attempted and to thus prove the power of the corporation. To argue these objections would be but to quote what is stated in the transcript and to reprint the same."

Again:

"We submit that the objections embodied in errors No. 4, No. 5, and No. 6, speak for themselves."

The purpose of a brief is to enlighten the court. This can best be accomplished when each point is separately stated under an appropriate heading, thus showing the precise nature of the question of law intended to be

presented. The method of presentation pursued here by appellants is not calculated to aid the court. Take for example that part of their brief from which we have just quoted, wherein we are told that the first questions propounded to Harry W. Meserve involved errors 1, 2, and 3. By these questions the witness was asked if he knew of an organization known as Imperial Water Company No. 4, if he was not a director of that institution and what was the character of its business. The questions were objected to upon the ground that this was not the way to prove a corporation. The objections were overruled. But later in the trial, as our own independent search of the record reveals, plaintiff put in evidence the articles of incorporation, and thus cured the "error" complained of in the questions to which counsel make reference when they refer us to the so-called "errors No. 1, No. 2, and No. 3." If, instead of making a general reference to a particular part of the record and asking us to find there the argument made by defendants' counsel at a certain stage of the trial, counsel for appellants had stated separately, under appropriate headings, the several points upon which they rely for a reversal, they doubtless would not have claimed that the court committed prejudicial error in overruling their objections to these questions. Had they so presented their points, they probably would not have overlooked the neutralizing effect of the subsequent introduction of plaintiff's articles of incorporation. We should not be expected to do the work of counsel and assiduously hunt up and consider what counsel have not argued or supported with the citation of authorities. Speaking of a presentation of points made in a manner similar to that adopted by appellants here, this court, in *People v. Zarate*, 54 Cal. App. 372, 201 Pac. 955, expressed itself as follows:

"Not only, in each instance, does counsel fail to state the question to which objection is made, or the objection itself, but none of the points is argued and no authority is cited in support of any of them. Such a casual presentation of points, if followed up, would impose upon us a labor which is within the peculiar province of counsel, and which does not come within the range of our duty. We are not called upon to consider points so presented."

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

62 Cal. App. 603

IMPERIAL WATER CO. NO. 4 v. MESERVE et al. (Civ. 3811.)

(District Court of Appeal, Second District, Division 2, California. June 19, 1923.)

1. Pleading ⇐148—Cross-complaint seeking damages for injury to crops caused by overflow of water company's canals held to show claim related to plaintiff's cause of action.

In water company's action for water furnished for irrigation, cross-complaint alleging that the company undertook to carry water through its canals and deliver it to the defendants, but because of weeds and deposits with which the company had negligently permitted its canals to become choked, the water overflowed the banks of the canals upon defendants' land damaging and destroying crops growing thereon, and that such water was the water for the delivery of which plaintiff had brought the action, *held* sufficient to show that the relief sought related to the contract or transaction upon which the action was brought.

2. Pleading ⇐12—Cross-complaint not demurrable for uncertainty on failure to allege facts peculiarly within knowledge of plaintiff.

In water company's action for water furnished for irrigation, defendants' cross-complaint alleging that the plaintiff negligently permitted its canals to become choked with weeds and deposits, and that overflow of water injured defendants' crops, *held* not demurrable for uncertainty or indefiniteness merely because it did not state the precise times when plaintiff negligently permitted the canals to become choked, since such matters were peculiarly within the knowledge of the plaintiff.

3. Pleading ⇐148—Cross-complaint seeking damages for injury to crops caused by overflow of water company's canals held not demurrable for failure to describe land.

In a water company's action for water furnished for irrigation, cross-complaint seeking damages for injury to defendants' crops from overflow of water caused by plaintiff's negligence in permitting canals to become filled with weeds and deposits, *held* not demurrable for failure to describe the lands, in view of allegation of cross-complaint that the waters which plaintiff alleged were delivered to defendants were the same waters which overflowed defendants' lands and destroyed his crops, since such allegation identified the land as that described in the complaint.

4. Waters and water courses ⇐179(1)—Cross-complaint alleging amount of damage to crops held sufficient, without allegation as to precise profit cross-complainant would have made if crops had not been damaged.

Cross-complaint seeking damages for destruction of, and injury to, crops caused by overflow of plaintiff's canals, alleging the amount of the damages, was not demurrable for failure to allege the precise amount of profit which cross-complainant would have realized had his land not been wrongfully overflowed.

5. Judgment ⇐250—Plaintiff suing on contract of sale could not recover on contract of guaranty.

Water company suing for water sold and delivered could not recover against one of the defendants on a contract of guaranty, whereby such defendant guaranteed payment by the other.

6. Guaranty ⇐1 — Contract of "guaranty" stated.

The contract of guarantor is his own separate contract in the nature of a warranty that the thing guaranteed to be done by the principal shall be done, and is not an engagement jointly with the principal to do the thing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guaranty.]

7. Guaranty ⇐36(1)—Guarantor liable only for default of principal.

The guarantor is not primarily bound to do what the principal has contracted to do, but is only bound to answer for the consequences of the principal's default.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Imperial Water Company No. 4 against Edwin A. Meserve, Harry W. Meserve, and another. Judgment for plaintiff, and named defendants appeal. Reversed.

Edwin A. Meserve and Shirley E. Meserve, both of Los Angeles, for appellants.

A. L. Seville and Bruce Seville, both of Brawley, for respondent.

FINLAYSON, P. J. The defendants Edwin A. Meserve and Harry W. Meserve have appealed from a judgment in favor of plaintiff in an action brought by it against appellants and one D. L. Smith to recover a sum alleged to be due from the three defendants for water sold and delivered to them by plaintiff.

This is a companion case to Imperial Water Co. No. 4 v. Meserve, 217 Pac. 548, this day decided—case No. 3810. The water for the price of which this action was brought was delivered to, and used upon, a tract of 320 acres of land owned by the defendant Edwin A. Meserve. The complaint, *mutatis mutandis*, is similar to that which plaintiff filed in the companion case. In a broad, general way the facts are quite similar to those of the other case, with, however, certain important differences presently to be mentioned.

The defendant Edwin A. Meserve filed a cross-complaint wherein he alleges substantially the following: Plaintiff is a mutual water company organized for the purpose of delivering water to its stockholders at cost; "the waters hereinafter alleged and referred to are the same waters which plaintiff refers to in its complaint." Plaintiff negli-

gently permitted its canals and distributing system to become choked with weeds, grasses, silt, and deposits, by reason whereof it was rendered incapable of distributing water through its canals to the lands of its stockholders. Cross-complainant owns 320 shares of plaintiff's capital stock, entitling him to water on his 320 acres of land. During all the times in plaintiff's complaint mentioned, cross-complainant's tract of land was highly improved and planted to alfalfa, and but for the circumstances alleged in his cross-complaint he would have received large returns and profits therefrom. At divers times during the four years mentioned in its complaint plaintiff undertook to carry water through its canals and deliver it to the land of cross-complainant and to the lands of other landowners but because of the weeds and deposits the water could not be carried through its canals. As a result of this condition the water was caused to overflow the banks of the canals onto and upon cross-complainant's land "at times when water coming on said land would result in the scalding and burning" of the alfalfa, "with the result that large portions of the alfalfa [on cross-complainant's land] were ruined and destroyed." These overflowing waters frequently and in large quantities "wrongfully flowed out and upon defendant's said 320 acres of land, drowning out, scalding, and destroying the crops growing thereon, thereby causing this defendant to sustain injuries and damages in the sum of \$3,000"—for which amount cross-complainant prayed judgment.

[1] To this cross-complaint plaintiff demurred upon the ground that it is indefinite and uncertain; the particulars of the alleged uncertainty and indefiniteness being specifically pointed out. The demurrer was sustained, and the appellant Edwin A. Meserve now contends, and, we think with reason, that the ruling was prejudicial error. Unlike the cross-complaint filed in the companion case, the one here under consideration shows that the relief sought thereby does relate to and depend upon the contract or transaction upon which the action was brought. It shows on its face, by facts specifically alleged, that the relief sought thereby is related to the contract of sale under which plaintiff alleges that it sold and delivered the water to the three defendants, and that it is relief which depends upon the "transaction" which is involved in that sale and in the delivery of water thereunder. This is the effect of the allegation in the cross-complaint that the waters which damaged cross-complainant's crops are "the same waters which plaintiff refers to in its complaint." Manifestly, if the waters which plaintiff delivered to defendants under its contract of sale are the very waters which cross-complainant alleges damaged his crops

by reason of plaintiff's negligence in permitting its canals to become choked with weeds, then the relief which cross-complainant seeks by reason of such damage is related to that contract of sale and is dependent upon the transaction upon which plaintiff brought its action. Without such sale and delivery by plaintiff there could have been no such damage as cross-complainant alleges. We may entertain some doubt as to the probability that the waters which damaged cross-complainant's crops are the very waters which plaintiff alleges it sold and delivered to cross-complainant and his two co-defendants. But be that as it may, such is the effect of the allegation that the waters referred to in the cross-complaint are the same waters which plaintiff refers to in its complaint, and we are bound to assume the truthfulness of the allegation when considering the sufficiency of the cross-complaint as against a demurrer thereto.

Since it is thus made to appear not only that cross-complainant has a cause of action against plaintiff for damages but that the relief sought relates to "the contract or transaction upon which the action is brought," it follows that the cross-complaint would have been invulnerable as against a general demurrer, had one been filed. The judgment, therefore, must be reversed as to the appellant Edwin A. Meserve, unless his cross-complaint is obnoxious to plaintiff's special demurrer, i. e., unless it is indefinite and uncertain in the particulars set forth in that demurrer.

[2-4] Proceeding now to a consideration of the particulars enumerated in the demurrer as those in respect to which it is claimed there is indefiniteness and uncertainty. The cross-complaint is not demurrable for uncertainty or indefiniteness merely because it does not state the precise times when plaintiff negligently permitted its canals to become filled with weeds and growths or when it undertook to carry water through its canals and deliver it to defendants. These are matters which rest peculiarly within the knowledge of plaintiff. Neither is the cross-complaint indefinite or uncertain because the lands to which plaintiff undertook to carry water are not specifically described, nor because the precise amount of profit which cross-complainant would have realized, had his land not been wrongfully overflowed, is not alleged. By averring that the waters which plaintiff alleges were sold and delivered to defendants are the "same" waters which overflowed cross-complainant's land and destroyed his crops, the cross-complaint plainly identifies the crops and the land whereon they were grown. And when it further is alleged that the overflowing of this land and the "scalding" of the alfalfa damaged these crops in an amount equal to \$3,000, it is made to appear, from

the allegations of the cross-complaint read as a whole, what was the nature, source, and extent of cross-complainant's damage. More than this was not requisite.

"All that is required of a plaintiff, even as against a special demurrer, is that he set forth in his complaint the essential facts of his case with reasonable precision and with particularity sufficiently specific to acquaint the defendant of the nature, source, and extent of his cause of action." *Goldstein v. Healy*, 127 Cal. 210, 201 Pac. 463.

It follows that the demurrer to the cross-complaint should have been overruled, and that the order sustaining it was error prejudicial to the appellant Edwin A. Meserve.

[5] Reversible error also was committed with respect to the appellant Harry W. Meserve. The situation presented by this case differs from that which was before us in the companion case. The two actions differ, in that here the defendants did not jointly participate in farming the land to which the water was delivered, nor did they agree to participate jointly in a division of the crops or in the profits which it was expected would be derived therefrom. Here the land was farmed by but one of the defendants—the defendant Smith—who leased it from the owner, the defendant Edwin A. Meserve. Harry W. Meserve's sole connection with the 320 acres lay in the fact that, as his brother's agent, he represented the latter in certain matters relating to the land. He testified that in all his dealings he was acting for his brother and not for himself. This testimony was not contradicted. If Harry W. Meserve incurred any liability whatever to plaintiff it was that of a guarantor and not that of a purchaser of water primarily liable therefor. The land having been leased by Edwin A. Meserve to Smith, the water was delivered in virtue of the former's ownership of the water right represented by his 320 shares of plaintiff's capital stock. Some six or seven weeks before Edwin leased the land to Smith, Harry signed and delivered to plaintiff, on what evidently was one of plaintiff's blank order forms, the following order for water:

"Brawley, Cal., August 13, 1912. Order of Owner. To Imperial Water Co. No. 4: You are hereby authorized to deliver water, under the rules and regulations of the company, to D. L. Smith and A. G. Grenagle, who are my tenants, as ordered by them, and I hereby guarantee the payment thereof. The property on which this water is to be used is tract No. 133 by the official resurvey T. 13 S., R. 14 E., S. B. M. H. W. Meserve.

"Note: This order must be signed by the party in person or his agent duly authorized in writing."

It is true that in this document Harry W. Meserve refers to Smith and Grenagle as "my tenants." But the document specifically declares that the liability which Harry

undertakes is that of a guarantor. It does not fasten upon him the liability of a purchaser of water nor even that of a landlord ordering water by reason of his status as a stockholder in the plaintiff corporation. He does not undertake to order water either for himself or for those whom he inaccurately refers to as his tenants. What he does do is to authorize the Company to deliver water to Smith and Grenagle "as ordered by them." It is for water thus to be ordered by Smith and Grenagle that Harry W. Meserve guarantees payment.

Plaintiff offered the order in evidence. Defendants objected upon the ground that it was incompetent, irrelevant, and immaterial. It was further objected to by Harry W. Meserve upon the ground that "he is not sued here as a guarantor, but as a purchaser of water." The objection was overruled, and the order admitted in evidence.

The contract of guaranty evidenced by this document seems to be the sole basis for any liability on the part of Harry W. Meserve. Without considering whether the instrument was admissible as against Edwin A. Meserve we think it clearly was inadmissible as to his brother Harry. The contract of guaranty was not the contract alleged in the complaint. Under the contract of sale upon which plaintiff brought its action the undertaking of each defendant was direct and primary. Under that contract, had plaintiff proved it to have been made as alleged in the complaint—that is, had it proved that the three defendants purchased the water—all of the defendants, Harry W. Meserve included, would have been bound as original obligors, and there would have devolved upon them a primary obligation to pay for the water. But the contract of guaranty, which the plaintiff sought to fasten on Harry W. Meserve, was the latter's separate contract, and was wholly distinct from the contract of sale alleged in the complaint. Non constat but that if plaintiff had brought its action against Harry upon the latter's contract of guaranty he could have pleaded and proved a good defense thereto.

[6, 7] The contract of a guarantor is his own separate contract; it is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done, and is not an engagement jointly with the principal to do the thing. He is not a joint contractor with his principal. He is not primarily bound to do what his principal has contracted to do, but only to answer for the consequences of the latter's default. His is an independent contract with which his principal has nothing to do. His liability is secondary, and his contract is collateral to that of his principal. *Adams v. Wallace*, 119 Cal. 68, 71, 51 Pac. 14; *Kinsel v. Ballou*, 151 Cal. 762, 91 Pac. 620; *Cooke v. Mesmer*, 164 Cal. 332, 340, 128 Pac. 917;

Schehr v. Berkey, 166 Cal. 161, 135 Pac. 41; Withers v. Bousfield, 42 Cal. App. 304, 319, 183 Pac. 855; Kelley v. Goldschmidt, 47 Cal. App. 38, 42, 190 Pac. 55; Virden v. Ellsworth, 15 Ind. 144; Shore v. Lawrence, 68 W. Va. 220, 69 S. E. 791; Bodine v. Times-Journal Publishing Co., 26 Okl. 135, 110 Pac. 1096, 31 L. R. A. (N. S.) 149. "There is no privity, or mutuality, or joint liability between the principal debtor and his guarantor." Adams v. Wallace, supra.

Harry W. Meserve having been sued upon a contract under which, had it been proved, he would have been liable as an original obligor jointly with his two defendants, it was error to enter a judgment against him upon a liability created by an entirely distinct and independent contract to the admission of which he made due and timely objection.

The judgment is reversed.

We concur: WORKS, J.; CRAIG, J.

62 Cal. App. 684

COLLINS v. FOLLETTE et al. (Civ. 4517.)

(District Court of Appeal, First District, Division 1, California. June 28, 1923.)

Deeds ⇨60—Delivery held not established.

Delivery of a deed by one prior to undergoing a serious operation, with instructions to deliver to the grantee in the event she did not survive, was insufficient where the grantor subsequently recovered.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Carrie E. Collins, also known formerly as Carrie E. Bauer, against Clark M. Follette and others. From judgment of nonsuit, plaintiff appeals. Affirmed.

Hamilton A. Bauer, of San Francisco, for appellant.

Adams & Adams, of San Francisco, for respondents.

RICHARDS, J. This appeal is from a judgment of nonsuit. The plaintiff commenced this action against the defendant Clark M. Follette to quiet title to a certain lot in the city of Berkeley of which she alleged herself to be the owner and entitled to an undivided one-half of which the said defendant was making an adverse claim. In her complaint the plaintiff averred as the source of her title to the one-half interest in said lot to which said defendant Follette made claim, to be that of a conveyance of the same to her by her sister, the deceased wife of said Follette, which said deed antedated by several years the conveyance to said Follette by said wife, which formed

the foundation of his adverse claim. By his answer in the case said Follette denied that said plaintiff was the owner of the said undivided portion of the premises in dispute in the action and in support of said denial alleged that the deed by which said plaintiff claimed to have received title to said portion of said premises had never in fact been delivered to said plaintiff by the grantor named therein but had been later destroyed by said grantor of her own volition and while she had and retained full control over the disposition of said document; and that thereafter and shortly before her death his said wife had by proper deed conveyed said undivided one-half of said premises to him. The cause went to trial upon the issues as thus framed; at the conclusion of the testimony offered in support of the plaintiff's case, the trial court granted the defendants' motion for nonsuit and entered its judgment accordingly in the defendants' favor.

The sole question presented upon this appeal is as to whether, giving the most favorable interpretation to the testimony adduced in support of the plaintiff's case, she had shown delivery of the instrument through which she claims title. We have examined the entire evidence in the case, and from such examination are entirely satisfied that there is no sufficient evidence showing delivery of said deed to support the plaintiff's claim of ownership in or to that portion of said premises to which the defendant Follette claims title under a later deed. The facts which are practically undisputed are these: The plaintiff, Carrie E. Collins, and her sister, Julia Blanch Golden, were for some years prior to June 1, 1916, the owners as tenants in common of the entire lot, the title to the undivided one-half of which is in dispute in this action, having acquired the same from their mother by deed of gift. Mrs. Collins lived in one of the houses on the property and on and for a short while prior to June 1, 1916, her sister, Mrs. Golden, was staying with her, having returned ill from a trip to Arizona. Her physician informed her that a serious operation was necessary and that she had better put her affairs in order before undergoing said operation. A notary and real estate dealer named Brown who knew both ladies was sent for, and when he arrived Mrs. Golden asked him to make out a deed to an undivided one-half interest in the property to Mrs. Collins. At the time of making this request Mrs. Golden stated to Mr. Brown that she was going to the hospital for an operation and that if she did not survive it she wished her sister, Mrs. Collins, to have the property, and that if she survived she wanted the deed back. She also asked him to make out a bill of sale to some jewelry in her sister's favor upon the same condition. Two witnesses were called

in, and one of these testified to substantially the same effect as the witness Brown with respect to the wishes of the grantor. The other witness who signed the deed as such does not recall that portion of the conversation between the grantor and the notary, while Mrs. Collins herself, when called as a witness, had no recollection as to that portion of the interview, but does not deny that the interview as related by Brown and the other witness actually took place. The deed and bill of sale, when executed, were handed to Mrs. Collins, who read them over. They were then handed to the notary, who placed them in an envelope making a memorandum thereon that it was to be delivered to Mrs. Golden upon her request or to be delivered to Mrs. Collins in case Mrs. Golden died. He took the documents to his office and kept them there until Mrs. Golden had survived her operation and called for them about a year later and when he delivered them to her. Upon the presentation of the foregoing evidence, the trial court held that there had been no delivery of the document in question with intent to deliver, and hence no transfer of title to the grantee named therein. No other legitimate conclusion could have been drawn by the trial court, and it follows necessarily that the motion for nonsuit made by the defendant Follette at the close of the plaintiff's case was properly granted.

The judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

62 Cal. App. 482

POULSEN et al. v. CENTRAL COMMERCIAL CO., INC. (Civ. 4422.)

(District Court of Appeal, First District, Division 2, California. June 11, 1923. As Amended June 26, 1923.)

1. Appeal and error $\hookrightarrow$ 171(3) — Whether pleading was counterclaim or cross-complaint immaterial on defendant's appeal where treated as cross-complaint by trial court and defendant's counsel.

Whether a pleading was an answer and counterclaim requiring no denial by plaintiffs or an answer and cross-complaint requiring an answer *held* immaterial on defendant's appeal from a judgment for plaintiff, where the trial court treated it as a cross-complaint, and defendant's counsel so contended at the trial and on appeal.

2. Judgment $\hookrightarrow$ 101(1) — Amount properly limited to allegations in cross-complaint where defendant refused to consent to setting aside default as a condition of allowing an amendment of error in cross-complaint.

Where defendant's cross-complaint, by mistake, alleged a breach of contract to deliver 150 pounds, instead of tons, of rice, and, on

discovering the error on hearing of default, its attorney rejected the court's suggestion that the default be set aside as a condition precedent to amendment, which condition was authorized by Code Civ. Proc. § 473, providing for amendments on just terms, the court properly allowed defendant only \$2.25 on his cross-complaint, which must be construed most strongly against the pleader in entering judgment thereon on plaintiff's default.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by N. G. Poulsen and another, doing business as Ernst C. Lohse & Co., against the Central Commercial Company, Inc. Judgment for plaintiffs, and defendant appeals. Affirmed.

Joseph E. Bien and Frederick Olschewski, both of San Francisco, for appellant.

E. Lyders, of San Francisco, for respondents.

LANGDON, P. J. Defendant appeals from a judgment against it for \$720, together with interest and costs, particular objection being made to the action of the trial court in allowing but \$2.25 to defendant against plaintiffs upon a so-called cross-complaint.

It is not contended that the defendant was not indebted to the plaintiffs in the amount for which judgment was rendered, but it is claimed by the appellant that it should have recovered \$4,500 upon its cross-complaint instead of the sum of \$2.25.

The plaintiff sued for \$720, commission upon a sale of rice for the defendant. The defendant answered, denying the indebtedness, and alleging "for a second and separate defense and by way of cross-complaint * * * that on or about the 15th day of May, 1918, plaintiffs sold to defendant, and defendant agreed to buy from plaintiffs, 150 pounds of rice, * * * for the price of \$7.50 per hundred pounds, making a total purchase price of \$22,500." Failure of seller to deliver said rice is then alleged, that the value of the rice at the time and place of delivery was \$9 per hundred pounds, or a total of \$29,000, and that the defendant has been damaged in the sum of \$6,500, a judgment for which amount is asked.

[1] There was some controversy between plaintiffs and defendant at the time of the trial as to whether the defendant's pleading was an answer and counterclaim, requiring no denial by plaintiffs, or whether it was an answer and cross-complaint, as it purported to be, requiring an answer. The point is immaterial here, because the trial court treated it as a cross-complaint requiring an answer; counsel for appellant contended in the trial court and is contending in this court that it is such, and for the purposes of this appeal we shall agree with him, and take this view

of the matter, which is the one most favorable to the case of the appellant. We shall refer, hereinafter, to such pleading as a "cross-complaint."

[2] Plaintiffs failed to answer in time said cross-complaint, whereupon defendant caused a default to be entered against them. When the matter came on for hearing, it was pointed out that the cross-complaint alleged a breach of a contract of sale of but 150 pounds of rice, with a resulting damage to defendants of \$1.50 per hundred pounds, or a total of \$2.25. Plaintiffs proved their claim for \$720, and stated, by their counsel, that they were entirely willing that the defendant be allowed on its cross-complaint damages computed on its actual allegations as to the terms of the contract which had been breached. Thereupon defendant insisted that the cross-complaint contained a typographical error; that the 150 pounds should have been 150 tons, and that the computations of \$22,500, \$29,000, and \$6,500 appearing in the pleading should govern, rather than the allegations on which they were based. The trial court, very properly, we think, stated that there was no presumption that the computations were more correct than the statement of weight, and that its power to construe pleadings did not extend to the length required by the defendant, and suggested to the defendant that it amend its cross-complaint, allowing the plaintiffs leave to reply thereto. This was clearly within the power of the trial court, which had discretion to allow amendment upon such terms as might be just (Code Civ. Proc. § 473), and it was clearly just to allow the plaintiffs to reply when claim was sought to be made against them upon a contract different from the one alleged in the pleading with which they had been served. Plaintiffs stated to the court that they had failed to answer the cross-complaint, first, because they regarded it as a counterclaim, not requiring answer, and, second, because they felt that, if there was any doubt about the nature of the pleading, nevertheless damages for failure to deliver so inconsequential an amount of merchandise might well be conceded to defendant without controversy, but that they desired an opportunity to reply to the amended cross-complaint if amendment should be allowed. Attorney for defendant agreed that he would amend his pleading, and that plaintiffs' default should be set aside, and they should be given an opportunity to answer. However, during the course of the colloquy between court and counsel, it was intimated that the plaintiffs would rely upon the statute of frauds as a defense to the contemplated amended cross-complaint. Thereupon counsel for defendant stated that he would not stipulate that the default should be set aside if plaintiffs were to be permitted to rely upon the statute of frauds, and refused to con-

sent to setting aside said default, in consequence of which the court refused to allow an amendment to his pleading.

It would seem that the trial court acted with all fairness and justice in the premises. The defendant had made a mistake in his pleading. The court was willing to exercise its discretion and allow amendment upon terms eminently fair and just; counsel for plaintiff was entirely willing that this should be done, stipulating only that plaintiffs should have an opportunity to reply to the amended pleading. The defendant was not entitled to insist that the plaintiffs should forego a defense which the law provided for them. Clearly, while the cross-complaint was for damages growing out of the sale of 150 pounds of rice, the statute of frauds had no bearing upon the matter. Had the cross-complaint been amended to allege a sale of 150 tons instead of 150 pounds of rice, the plaintiffs might have raised the question of compliance with the statute of frauds by their answer thereto. This was as legitimate a defense as any defense upon the merits, and counsel had no right to insist that it should not be urged.

This is the only point in the case. The trial court could not construe the pleading in accordance with the computations therein, and ignore the allegations of facts upon which the computations were based, and the defendant refused to amend upon the obviously just terms imposed by the trial court. Defendant was entitled, therefore, upon the default of the plaintiffs, to a judgment based upon its pleading construed most strongly against the pleader.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

62 Cal. App. 649

PEOPLE v. BURCHAM. (Cr. 674.)

(District Court of Appeal, Third District, California. June 25, 1923.)

Perjury 33(1)—Evidence held insufficient to support conviction.

Evidence in a prosecution for perjury held insufficient to sustain conviction within Pen. Code, § 1103a, declaring perjury must be proved by testimony of two witnesses or of one witness and corroborating circumstances, and where to sustain the verdict a conviction would be based upon the presumption of identity of person by identity of name within Code Civ. Proc. § 1963, subd. 25.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Kenneth Burcham was convicted of perjury, and appeals. Reversed.

Metzler & Mitchell, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by an indictment found and returned by the grand jury of Humboldt county with the crime of perjury and was subsequently tried on said indictment in the superior court of said county. The indictment was in three counts, and the jury found him guilty on each count.

He appeals from the judgment and the order denying him a new trial.

The indictment charges that the alleged perjury was committed by the defendant as a witness in a criminal action tried in the superior court of Humboldt county and in which one Lawrence Mahach and Marion Rube were charged with the crime of robbery committed in said county on the 3d day of May, 1922.

It appears that in the forenoon of Wednesday, the 3d day of May, 1922, and during business hours, the Bank of Fortuna, situated in the town of Fortuna, in Humboldt county, was entered by a bandit, and in the presence of Fred P. Newell, an officer of said bank, said bandit forcibly took and robbed said bank of the sum of \$18,000. About the time that the robbery was being perpetrated, a young man, a student of the high school of Fortuna, was approaching the bank, having been sent there to procure some change for the principal of the school. He saw an Oldsmobile car standing in front of the bank. As he neared the car a man emerged from the bank carrying with both hands a large sack which appeared to be filled with some article that was heavy and cumbersome. This man stepped to the front of the car and threw the sack in the front part thereof or in front of the seat next to which the driver sits when operating an automobile. This young man stated that, although the curtains of the car were drawn, he was able to observe at least one, and he thought two, men sitting in the back of the car. Immediately upon throwing the sack into the car, the party jumped in and started the machine at a rapid rate around the corner of the street and the car disappeared from sight. Within a short time thereafter several of the employees of the bank rushed out to the sidewalk and exclaimed that the bank had been robbed. At the trial of Mahach and Rube the young man testified to these circumstances and also stated that, although the face of the man who carried the sack from the bank to the automobile was thickly covered with what seemed to him to be white powder and rouge, he was, nevertheless, able to and did positively identify Rube as that party. Subsequently to the commission of the robbery, said Lawrence Mahach and Marion Rube were arrested

and charged with the commission of said robbery.

On the 29th day of April, 1922, one O. J. Pidgeon, the owner of a garage in the city of Eureka, Humboldt county, just before the hour of 8 o'clock p. m., parked his Oldsmobile car in front of the Elks building in said city and thereupon went to the Elks hall to attend a meeting of the lodge and a banquet to be later given that evening under the auspices of said organization. When he returned from the Elks hall to the sidewalk where he had parked his machine, he found that it was missing. On the 30th of April in the forenoon a machine, which bore the description of Pidgeon's Oldsmobile, was seen traveling at a rapid rate of speed over a road leading from the town of Pepperwood, which is about 30 miles from the city of Eureka, and going in the direction of the town of Scotia, in Humboldt county. Later in the day an Oldsmobile of the same description was seen parked in the woods near Pepperwood about 100 yards from the highway. No one was seen about the car at the time and the engine was "dead." Parties going through the woods and who had seen the car earlier on the 30th of April again passed the same spot later in the day and observed that the machine had been taken away.

On Thursday following the day of the robbery, Pidgeon recovered his car, it having been left in the town of Fortuna, where the robbery occurred. The car had been roughly used. It was covered with dust and dirt and the insulation had burned out and the machine could not be operated without the repair of the insulation and other parts of the machinery thereof.

The description of the Oldsmobile seen in the woods near Pepperwood and the car seen by the young man near the Fortuna Bank at the time of the robbery and into which Rube threw the sack tallied with that of the Oldsmobile stolen from Pidgeon.

The theory of the prosecution was, and the people directed their proof to the support of that theory in said case of People v. Mahach and Rube (Cal. App.) 213 Pac. 539, that the said parties stole the machine of Pidgeon and that they used the car for the purpose of carrying out the scheme which evidently they had conceived to rob the Bank of Fortuna. The evidence presented by the people disclosed circumstances from which the jury could well have concluded that said theory was well founded.

The defendant in this case testified as a witness for the defendant Rube. He stated that he met Rube in Eureka near 7 o'clock in the evening of Saturday, April 29, 1922, Rube having a short time before arrived in Eureka on the stage from Crescent City, Del Norte county; that in a conversation with Rube the latter said to him that he had been working "up north" and that he was anxious

to return to his home; that the defendant asked where his home was, and Rube stated it was at Pepperwood, a distance of about 25 or 30 miles from Eureka; that Rube stated to him that he was short of money and that he did not like to be required to hire a car to take him home; that thereupon the witness said:

"Well, I have a friend here, if I can see him. I oftentimes use his car. I will take you home, because I had never been down that way; I had only been over here a short time. Anyway, I told him if he would pay the oil and gas and that sort of thing, and in case we had any tire trouble, I would take him home where he wanted to go."

The defendant stated that he immediately started out to borrow the car from the friend to whom he had referred in his conversation with Rube and promised to meet him (Rube) within an hour in case he succeeded in securing the loan of the car; that he did secure the car and near the hour of 8 o'clock p. m. met Rube and drove him to his home at Pepperwood. Before leaving for Pepperwood, however, Rube stated to Burcham, so the latter testified, that he (Rube) desired to purchase some sugar and corn meal to take home with him; that thereupon he (Burcham) drove the machine to the store of Hinch, Salmon & Walsh in Eureka; that Rube gave him \$20 and asked him to go into the store and purchase three sacks of brown sugar and some corn meal; that he (Burcham) entered the store and purchased the articles named, returned to the car, and then proceeded on his way to Pepperwood; that, arriving at Pepperwood, Rube went to his home, and he (Burcham) returned to Eureka.

In reply to questions by the district attorney on cross-examination, the defendant stated that the name of the man from whom he borrowed the car was E. L. Hartwell; that it was a Dodge automobile; that he and said Hartwell served together as soldiers in the war with Germany and were in Europe together during said war. He was asked where Hartwell resided at the time that he got the car, and he replied that he was not certain, but believed that he stopped at a lodging house known as the Metropole in the city of Eureka. He was then asked these questions and returned the answers which follow them:

"Q. Where is he (Hartwell) now? A. I could not say that. Q. How long did he remain in the county after that night? A. As much as a month. Q. Where did he stay during that time? A. I am not sure, but I think he stayed at the Metropole."

Further cross-examining Burcham, the district attorney asked him what his (defendant's) business was, to which he replied that he had worked at different kinds of labor in different places. Further questions by the

district attorney on this line and answers by Burcham are as follows:

"Q. What have you labored at since you have been in this county? A. Well, I tended bar awhile and worked in a gravel pit. Q. Where did you tend bar? A. At the Wave for about three months. (The Wave was the name of a soft drink establishment conducted in Eureka at the times mentioned by the witness.) Q. When did you commence tending bar there? A. In March. Q. How long did you continue? A. Up until I guess the middle of July—no, I mean June. Q. What were your hours of work? A. 12 to 2 and 6 until 12. Q. From noon until 2 in the afternoon? A. Yes, sir. Q. And then after that from 6? A. Yes, sir; from 6 until 12 at night. Q. Were you on duty that night? A. No, sir. Q. Why were you not working that night? A. Well I worked five or six weeks steady, and I wanted a night off. I had three nights off, not only that one."

It is upon the testimony above recited that the three counts of the indictment are predicated. The first was based upon the defendant's testimony that one E. L. Hartwell lived and was in Eureka on the 29th day of April, 1922; the second upon Burcham's testimony as to his alleged employment as a bartender in the Wave soft drink saloon from the month of March to the month of June, 1922; and the third upon his testimony that he purchased sugar and corn meal for the said Rube at the store of Hinch, Salmon & Walsh on the evening of said April 29th.

It is obvious that the object of the testimony of Burcham that he took Rube from Eureka to Pepperwood on the 29th day of April, 1922, leaving the former place near the hour of 8 p. m., was to overcome the effect of the evidence introduced by the prosecution tending to support the theory that Rube and his confederate stole the Oldsmobile car of Pidgeon at Eureka on said night and used said car in the furtherance of their scheme to rob the Bank of Fortuna.

It is not necessary to consider and determine herein whether the testimony referred to in each of the counts was as to "a matter material to the issue" in the case of *People v. Mahach and Rube*, since we are of the opinion that the contention that the evidence is insufficient to support the verdict was well taken as to all the counts. Referring now to count 1, an examination of the record has convinced us that there is no testimony to show that there was no such person as E. L. Hartwell residing in the city of Eureka on the 29th day of April, 1922. There is some evidence in the record that the defendant Burcham at one time resided in the town of Redding; that there at the same time lived in or about said town a man by the name of E. L. Campbell, who was also known as E. L. Hartwell; that said Hartwell met his death in an accident that occurred near Redding some six or eight months prior to the time at which the robbery of the Fortuna

Bank took place. There is also some testimony that the defendant was an acquaintance of said Campbell or Hartwell and that the latter, while living in Redding, owned a Dodge automobile. There was no testimony showing or tending to show that a man by the name of E. L. Hartwell did not live or reside in the city of Eureka on the 29th day of April, 1922, or that a man of that name had not resided there for several months prior to and down to and including said date. In other words, for aught that the record discloses, there might have been such a man residing in said city at the times material to this inquiry. Section 1103a of the Penal Code declares that "perjury must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances." The testimony introduced for the purpose of establishing the charge of perjury set forth in the first count of the indictment falls far short of meeting the requirements of said section of the Penal Code. Indeed, to uphold a conviction of the defendant upon the charge that he perjured himself in testifying that E. L. Hartwell lived or was in Eureka on the 29th day of April, 1922, it would be necessary to rely wholly upon the testimony that a man sometimes known as E. L. Hartwell lived in Redding, that he owned a Dodge automobile, and that the defendant was acquainted with him. This, in effect, would amount to no more than predicating the conviction of the accused upon the presumption of "identity of person from identity of name." Section 1963, subd. 25, Code Civ. Proc.

As to the defendant's alleged false testimony as to his employment in the Wave saloon from May to June, 1922, and which constitutes the foundation for the charge of perjury contained in the second count of the indictment, it is clear that, unless the purpose of the inquiry as to his said alleged employment was to show that he was not in Eureka on the 29th day of April, 1922, his testimony as to such employment, as well as that of the people tending to prove that his statement that he was so employed during the period mentioned was false was wholly immaterial to any issue in the case of the People v. Mahach and Rube. We can conceive of no other theory upon which said testimony may be held to have been material in said case. But, conceding that the purpose of the inquiry as to his employment during said period was founded upon that theory, and that it was, therefore, pertinent and material, still an examination of the evidence has convinced us that the charge of perjury based upon said testimony is not sustained or supported by that degree or quantum of proof required by the statute. It is not necessary to enter herein into an analytical review of the testimony to verify this conclusion. It is enough to say that the proprietor of the Wave saloon, as well as other witnesses, testified that,

during the months mentioned, the defendant did at times work in said saloon. In fact, the proprietor himself, a witness for the people, testified that he did work in the said saloon at different shifts in the months of April and May, 1922. (Trans., p. 152.) There is no testimony contradicting this testimony, nor, indeed, any testimony that he did not at intervals work in said saloon up to the 29th day of April, 1922.

As to the third count, the testimony presented in support thereof comes entirely from the sales clerk and the owners of the store of Hinch, Salmon & Walsh. Their testimony amounted merely to this: That some of them could not recall that the purchase claimed to have been made by the defendant at said store was made on the evening referred to; that, while one or two of the clerks had at different times seen the defendant in said store, none could recall that he had seen him therein on the evening of the said 29th of April; that none of them remembered having sold the defendant on said evening three sacks of sugar and some corn meal, or having sold him any articles of merchandise on said evening; that maintained in the store was an International cash register containing one main drawer and eight subsidiary drawers; that each of the subsidiary drawers was assigned for use to a different sales clerk; that the register tape always showed each separate sale and the amount thereof in money and also indicated a total of all sales; that goods in large bulk were kept in the warehouse adjoining the store; and that where sales of such goods were made they were customarily delivered directly from the warehouse and not taken through the main store for delivery. The tape of the register for the 29th day of April, 1922, was introduced in evidence, and it showed no such sale as the defendant claimed was made to him on said day. All of these witnesses admitted that a sale might be made and the clerk making it inadvertently omit to record it on the register. The tape of said day contained some figures which were so "blotched" that it was impossible to decipher them or tell whether they represented one, two, or four figures. One of the proprietors of the store, though, thought or "estimated" that the sale represented by the "blotched" figures was made some hours on the 29th of April prior to the time of day at which the defendant testified that he purchased the sugar and corn meal.

The above is practically all the showing that the people made in support of count 3 of the indictment. All the witnesses (clerks in the store and the proprietors) testifying that they had no recollection of selling the defendant the sugar and corn meal on the day mentioned must, within the meaning of section 1103a of the Penal Code, be regarded as one witness. In other words, the testi-

mony of any one of said witnesses was not corroborative of the testimony of any other. Assuming, therefore, that any one witness of the said witnesses testified to any fact or facts which would tend to show that the defendant's testimony as to said purchase was false, the only circumstance which may be said to have been corroborative thereof was the tape register. It is extremely doubtful, from the condition said tape was shown to be in as to blotched figures, and the likelihood that at times (perhaps at a late hour of the day, when the goods sold were in a warehouse and not in the main store) of a failure by a clerk to "ring up" a sale, whether the tape would afford a sufficient corroborating circumstance in this case to square with the requirements of section 1103a of the Penal Code. On the other hand, assuming that the tape register showing no such sale on the day named constituted a "corroborating circumstance" sufficient to meet the requirement of the statute in a case where there is testimony of one witness tending to show perjury, was the testimony of any of the witnesses (the sales clerk and the owners of the store) such as to show that the said crime had been committed? We think not. The testimony of the clerks and the store owners was not positive as to the fact to which they testified. None of it involved a square, unqualified statement that the defendant did not make the purchase referred to. To the contrary, it was based more upon the probabilities of the situation following from the customary method of transacting business in said store. And, as further detracting from its probative value, was the admission by the witness that such a sale might have been made and no record made of it on the cash register.

No man's liberty should be taken from him upon such a flimsy showing as characterizes the evidentiary features of this case.

The judgment and the order are reversed.

We concur: FINCH, P. J.; BURNETT, J.

62 Cal. App. 581

REEDER v. MILLS. (Civ. 2631.)

(District Court of Appeal, Third District, California. June 18, 1923.)

Mines and minerals § 23(1)—Sufficient if required amount of assessment work on mining claim located by association is performed on claim as a whole.

Under Rev. St. U. S. § 2324 (U. S. Comp. St. § 4620), requiring that not less than \$100 worth of labor shall be performed or improvements made on claim during each year prior to the issuance of a patent, it is unnecessary, where a claim is located by an association of persons, that the required amount of work be performed on each subdivision of the claim, but

it is sufficient if it is performed on the claim as a whole.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Action by Benjamin G. Reeder against L. J. Mills. Judgment for plaintiff, and defendant appeals. Affirmed.

B. K. Collier and Jas. D. Fairchild, both of Yreka, for appellant.

Horace V. Ley and Clifford E. Butler, both of Yreka, for respondent.

FINCH, P. J. Plaintiff was given judgment quieting his title to a certain mining claim known as the "Reeder placer mine" containing 130 acres and the defendant has appealed.

The claim was located in the year 1913 by an association of seven persons. The locators subsequently conveyed to plaintiff. In the year 1921 another association of persons posted a notice of location of the same claim. Defendant Mills claims title under the later location. The only question raised by the appeal is whether plaintiff failed to do the required amount of assessment work during the year 1920. Plaintiff testified that the value of such work was \$602.50.

Appellant contends that the location consisted of eight contiguous claims and that the required annual expenditures thereon amounted to the sum of \$800, citing *Morgan v. Myers*, 159 Cal. 187, 113 Pac. 153. The pleadings and the evidence clearly show, however, that the land described in the complaint is a single claim, initiated by a single notice of location. Section 2324 of the Revised Statutes of the United States (U. S. Comp. St. § 4620), among other things, provides:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year."

In *Lindley on Mines* (2d Ed.) § 628, it is said:

"A location by an association of persons, embracing more than twenty acres, may undoubtedly be perpetuated by the performance of the same amount of labor required of an individual locator. * * * While this suggests an inequality of burdens, it is, in our judgment, the only consistent method of construing the statute."

In *Miller v. Chrisman*, 140 Cal. 440, 449, 73 Pac. 1083, 1085 (98 Am. St. Rep. 63), it is said:

"A location made by an association of persons, by the very terms of the law, is one location covering one hundred and sixty acres, and not eight locations, each covering twenty acres. * * * The expenditure of \$500 before

patent issues is an expenditure required upon the whole land, and not an expenditure upon the 20-acre subdivisions thereof, and the only assessment work required is labor to the value of \$100 upon the single location."

See, also, *McDonald v. Montana Wood Co.*, 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616. The judgment is affirmed.

We concur: BURNETT, J.; JONES, Justice pro tem.

62 Cal. App. 588

CENTRAL SAV. BANK OF OAKLAND v. LAKE et al. (Civ. 4543.)

(District Court of Appeal, First District, Division 2, California. June 18, 1923. Hearing Denied by Supreme Court Aug. 16, 1923.)

1. Ejectment ⚡9(3)—Plaintiff must recover on strength of own title.

In ejectment, a plaintiff must recover on the strength of his own title and not upon the weakness of the claim of the defendants.

2. Evidence ⚡271(15)—Recital in trustee's deed held not sufficient in itself to prove trustee's appointment in substitution for trustee named in deed of trust.

In ejectment by plaintiff claiming as purchaser at trustee's sale under deed of trust, recital in trustee's deed as to appointment of trustee in lieu of the trustee named in the deed of trust, held not sufficient in itself to show his status as a trustee.

3. Principal and agent ⚡22(1) — Agency not proved by agent's statement.

Agency cannot be proved by the agent's statement as to his own authority.

4. Evidence ⚡271(15)—Title in grantor not established by grantor's statement.

One cannot establish legal title in his grantor by the grantor's statement in the grant that he has such title.

5. Evidence ⚡309—Certified copy of resolution of corporation appointing substitute for trustee named in deed not necessary in proving trustee's status.

Where one of the trustees who executed a trustee's deed under deed of trust was a person other than the trustee named in the deed of trust which authorized beneficiary, a corporation, to appoint a substitute for person so named, it was not necessary, in proving the status of the person appointed as substitute for the one originally named, to introduce a certified copy of the resolution of the corporation substituting the person who executed the trustee's deed, for the person originally named, duly recorded in the county where the property was situated, but it was necessary to introduce some competent evidence of the passage of the resolution as preliminary to the introduction of trustee's deed; the recital in the trustee's deed being in itself insufficient to prove the passage of the resolution.

6. Appeal and error ⚡1170(12) — Judgment for plaintiff in ejectment not affirmed, where there is a complete absence of proof of a connecting link in plaintiff's title, though equities are lacking in defendant's case.

Judgment for plaintiff in ejectment will not be affirmed, where there is a complete absence of proof of a connecting link in plaintiff's title, though it is apparent from the record that the equities are entirely lacking in the defendant's case, notwithstanding Const. art. 6, § 4½, prohibiting the reversal of a judgment except for prejudicial error.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Central Savings Bank of Oakland against Fannie D. Lake and others. Judgment for plaintiff, and defendants appeal. Reversed.

F. W. Lake, of Oakland, and Walter R. Dunn, of Sacramento, for appellants.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them in an action in ejectment. Plaintiff alleged that it was the owner of the property described in the complaint and was entitled to its possession, which was denied by the defendants. It was admitted that on June 16, 1914, title to the property in controversy was in Fannie D. Lake. On that date, she and her husband, F. W. Lake, executed a deed of trust to J. C. Carlston and Arthur L. Harris, conveying the property as security for the payment of a debt of \$3,500 owing to the Central Savings Bank of Oakland. The other defendants claim their interest through subsequent grant of the defendants Fannie D. Lake and F. W. Lake, and the rights of such subsequent grantees need not concern us upon this appeal under the conclusion we have reached.

The deed of trust executed by Fannie D. Lake and her husband to the trustees above named was introduced in evidence by plaintiff, as was also a deed from J. C. Carlston and H. C. Sagehorn, as trustees, conveying the property to plaintiff as purchaser at a sale made pursuant to the provisions of the deed of trust of June 16, 1914.

[1] Plaintiff relied upon these documents to establish its title to the property. This being an action in ejectment, plaintiff must recover upon the strength of its own title and not upon the weakness of the claim of the defendants. The only question presented by the record, therefore, is: Do these documents, standing alone, establish plaintiff's title? The particular attack made upon their sufficiency by appellants is that there is no connecting link between the trustee Harris, to whom the property was conveyed by Fannie D. Lake, and her husband,

and H. C. Sagehorn, who purports to convey to plaintiff as a trustee. Respondent points out that the deed of trust contains a provision as follows:

"It is expressly covenanted that the party of the third part may, by resolution of its board of directors, from time to time appoint and substitute other trustee or trustees to execute the trust hereby created and upon such appointment, either with or without a conveyance to said substituted trustee or trustees by the grantees herein, the survivor of them, their successors or assigns, the new trustee shall be vested with all the title, interest, powers, duties and trust in the premises hereby vested in or conferred upon the said grantee herein, and such new trustee shall be considered the successors and assigns of the grantees herein within the meaning hereof, and substituted in their place and stead. A copy of such resolution, certified by the secretary of the party of the third part (Central Savings Bank of Oakland) under its corporate seal, and acknowledged by either the president or secretary of the said third party, shall, when recorded in the county in which the property or any part thereof is situated, be conclusive proof of the proper appointment of such new or substituted trustee or trustees."

The deed which purported to convey title to the plaintiff, recited:

"Whereas the Central Savings Bank of Oakland, a corporation, by a resolution duly and regularly passed and adopted by its board of directors, did on the 2d day of January, 1918, substitute and appoint J. F. Carlston and H. C. Sagehorn, trustees in said deed of trust in the place and stead of J. F. Carlston and Arthur L. Harris, a copy of said resolution certified by the secretary and president of said Central Savings Bank of Oakland, a corporation, under its corporate seal, and acknowledged by its president and secretary, was recorded on the 4th day of January, 1918, in liber 2643 of Deeds, page 16, in the office of the county recorder of the county of Alameda, state of California."

It is maintained by respondent that the recital in the deed by Messrs. Carlston and Sagehorn of the regular exercise by the Central Savings Bank of Oakland of the power given to it to substitute trustees, is prima facie proof of the facts recited. This is the only real question presented upon the appeal. Regardless of the equities between the parties, we are constrained to hold that the plaintiff has not made a prima facie case.

[2-5] Recitals in trustee's deeds which have been taken to be evidence of the facts recited are only those recitals which set out the acts done in the exercise of the power, such as notice, sale, and the like. They are, necessarily, recitals of acts done by the trustee in exercise of his power. The trustee is "the accredited historian of his acts under the power." *Hihn v. Peck*, 30 Cal. 288. But in the present case, the only evidence of Sagehorn's status as a trustee (not of his acts in that capacity) is his own re-

cital of it. One does not prove agency by the statement of an agent as to his own power (*Hubback v. Ross*, 96 Cal. 426, 430, 31 Pac. 353; *People v. Dye*, 75 Cal. 108, 16 Pac. 537); nor can one establish legal title in his grantor by the statement of said grantor in the grant that he has such title. Under like reasoning, plaintiff, in the present action, cannot establish Sagehorn's capacity as trustee and his consequent investiture with the legal title, by Sagehorn's declaration of those facts. Sagehorn attempted to pass the legal title to plaintiff; plaintiff must show that Sagehorn had such title. That can only be done by a showing that he was duly substituted for the trustee Harris, in whom, jointly with Carlston, the legal title rested upon the showing made by the deed of trust introduced in evidence. True, plaintiff was not compelled to offer the "conclusive proof" of this fact designated by the deed of trust, i. e., a certified copy of the resolution substituting Sagehorn as trustee, duly recorded in the county where the property was situated—but it should have offered some evidence which was competent of the passage of the resolution substituting Sagehorn as trustee, as preliminary to the introduction of the deed executed by him as trustee, purporting to convey the property to plaintiff.

The case of *Page v. Gillett*, 26 Colo. App. 204, 141 Pac. 866, seems to be directly in point. That was an action in ejectment; plaintiff claiming title through a trustee's deed. The trustees' deed to the purchaser at the sale was executed by two out of three trustees, with a recital that the third was dead. The recital was the only evidence offered of the death of the third trustee. It was held that the recital was not prima facie proof of the death of the third trustee, and judgment was for the defendant in the ejectment suit. In the case of *Lawless v. Stamp*, 108 Iowa, 601, 79 N. W. 365, it was held that a deed by a receiver with full recitals as to the existence of the receivership and his appointment as receiver, was not prima facie evidence of these matters. A deed containing a recital of a grant from a previous owner was no proof of such derogation of title. *Crump v. Thompson*, 31 N. C. 491, 493. Recitals in a guardian's deed are not evidence that he is a guardian. *Lumber Co. v. Alwood*, 141 Ga. 653, 657, 81 S. E. 1119.

"Recitals in a deed which do not constitute an essential part of the conveyance, are certainly not conclusive evidence against a third person of the facts recited; neither is a recital of the power or authority of the grantor, for the making of the conveyance in ordinary cases, even presumptive evidence of the existence of such power. Thus, to sustain a conveyance executed by an attorney under a power, by an executor under a will, or by a sheriff under an execution, the power of attorney, the will or the execution should be produced as the best evi-

dence of the power to sell." Jackson v. Robert's Ex'rs, 11 Wend. (N. Y.) 422, 425.

Respondent relies upon the case of Savings & Loan Society v. Deering, 66 Cal. 281, 5 Pac. 353. That case states that recitals in a deed executed by the trustees to a creditor who purchased the sale under a deed of trust, to the effect that the trustee did, as a condition of sale, permit the creditor to bid and purchase, are prima facie evidence of the facts recited, although the deed of trust is silent as to their effect. That case, however, decides that trustees, having the legal title may convey such legal title either in execution of the trust or in violation of the same, and that in an action in ejectment, where only the legal title is involved, it is only necessary to prove that the legal title was conveyed to plaintiff. The foregoing statement suggests the difficulty in the present case. It is only necessary for the plaintiff to prove that it is the holder of the legal title. In order to do that, it must prove that its grantors, Carlston and Sagehorn, were vested with the legal title. No proof is offered of this important matter except the statement of Sagehorn regarding his appointment as trustee, from which it would follow that he would hold the legal title. That statement of his capacity is insufficient to establish it, and therefore there was no proof that he was vested with the legal title at the time he executed the conveyance to plaintiff. The legal title must be traced to Sagehorn before it can flow through him to plaintiff, and the proof is lacking to establish this connecting link.

[6] This is the type of case where a reversal of the judgment is much to be deplored, as it seems apparent from the record that the equities are entirely lacking in the defendants' case. We do not think, however, that even the wholesome provisions of section 4½ of article 6 of the Constitution of this state justify this court in affirming a judgment for the plaintiff in ejectment, where there is a complete absence of proof of a connecting link in plaintiff's title.

The judgment is reversed.

We concur: STURTEVANT, J.;
NOURSE, .

62 Cal. App. 539

SCHUTT v. SCOTT. (Civ. 3838.)

(District Court of Appeal, Second District,
Division 2, California. June 16, 1923.)

4. Principal and agent §78(1)—Agent held obligated to deliver proceeds to principal, though no demand other than filing suit necessary.

Where defendant was agent for plaintiff for the sale of a tractor, defendant was under

a positive duty to deliver the money thus received by him to plaintiff, and no demand other than the filing of suit was required.

2. Sales §391(1)—Prospective buyer of automobile held not entitled to claim \$325 as return of deposit, where deposit consisted of car credited at \$325.

Where plaintiff buyer contracted with defendant salesman to purchase a D. car to be delivered in 30 days, but if not so delivered plaintiff to have the right to cancel the order, defendant's liability to be limited to the return of plaintiff's deposit, held, that where plaintiff's deposit was an O. car for which he received under the contract a credit of \$325, he could not, by cancellation of the order for failure to deliver within 30 days, claim \$325 from defendant on the theory that the O. car was sold to defendant, but was entitled only to a return of the O. car.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. S. Schutt against C. R. Scott. Judgment for plaintiff, and defendant appeals. Reversed with directions.

C. W. Braswell, of Lindsay, for appellant.
Avery J. Howe, of Lindsay, for respondent.

CRAIG, J. [1] This appeal is from a judgment rendered upon the default of the defendant after the overruling of his demurrer to the complaint. This contains two counts. Both are upon contract. The first is for the direct payment of money due Schutt through the alleged sale of a tractor by Scott as agent for Schutt. The defendant was under a positive duty to deliver the money thus received by him to the plaintiff. No demand other than the filing of suit was required. Danielson v. Neal, 164 Cal. 748, 130 Pac. 716; 13 C. J. 729. As against this cause of action the general demurrer and that on the ground of uncertainty are without merit.

[2] As to the second cause of action, we think the demurrer should have been sustained. The allegations are that Schutt entered into a contract with Scott, acting as agent for the Dodge Automobile Company, to purchase a Dodge touring car; the car was to be delivered within thirty days after September 22, 1922. It was agreed that—

"If the vehicle is not delivered within thirty days after September 22d, I reserve the right to cancel this order, and your liability shall be limited to the return of my deposit on request."

The deposit consisted of an Overland car concerning which the contract provides that Schutt shall receive a credit, the language employed in this behalf being:

"Deposit credit by Overland.....\$325.00."

The complaint avers that the Dodge was not delivered within the period agreed upon; that the plaintiff has canceled the purchase

contract, and has "requested defendant to repay said \$325, as provided by said order," which defendant has refused to do. The prayer is for \$325, and judgment was rendered accordingly.

Under the terms of the contract, Schutt had a right to demand the return of his deposit, which was the Overland. He cannot claim that through this transaction he had sold this car to Scott. The purchase agreement expressly provides that upon cancellation by the buyer his only claim shall be for the return of his deposit.

The judgment is reversed, and the trial court is directed to set aside the default entered upon the second count of the complaint and to sustain the demurrer against it, with leave to the plaintiff to amend, the default on the first count to stand.

We concur: FINLAYSON, P. J.; WORKS, J.

62 Cal. App. 577

PACIFIC AUTOMOBILE EXCHANGE v. STANSFIELD et al. (Civ. 2636.)

(District Court of Appeal, Third District, California. June 18, 1923.)

1. Principal and surety — 29—Surety on undertaking to secure release of attachment held not bound by filling of blanks by attachment defendant.

Where an undertaking to secure the release of property attached recited that the attachment defendant had been sued for the sum of \$600, but left blank the spaces in which to specify the amount which the sureties undertook to guarantee, and the attachment defendant, without the knowledge of his sureties, changed the "\$600" to "\$3,559.85," and inserted "\$4,000" in the blank space as the amount of each surety's undertaking, the bond was not invalid, but the sureties were liable only to the extent of \$600.

2. Alteration of instruments — 12—Authority to fill blanks in instrument cannot be presumed.

It cannot be conclusively inferred from the presence of unfilled blanks in an instrument at the time of delivery that the depository thereof is authorized to fill such blanks.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the Pacific Automobile Exchange against J. S. Stansfield and another. Judgment for plaintiff for less than the amount sued for, and he appeals. Affirmed.

J. H. Morris, of San Francisco, and Bradley & Bradley, of Visalia, for appellant.

E. I. Feemster, of Visalia, and Avery J. Howe, of Lindsay, for respondents.

FINCH, P. J. In an action brought by plaintiff to recover the sum of \$3,609.85 from

Edward L. Tobin, there was issued an attachment under which the sheriff took possession of an automobile belonging to Tobin. The defendants herein executed and delivered to Tobin an undertaking in the following form:

"Whereas, the above-named plaintiff commenced an action in the superior court of the county of San Francisco, state of California, against the above-named defendant, claiming that there was due to said plaintiff from said defendant the sum of six hundred and no/100 (\$600.00) dollars, or thereabouts, and thereupon an attachment issued against the property of said defendant as security for the satisfaction of any judgment that might be recovered therein; and certain property and effects of the said defendant have been attached and seized by the sheriff of the said Tulare county, under and by virtue of said writ;

"And whereas, the said defendant is desirous of having said property released from said attachment:

"Now, therefore, we, the undersigned, residents and householders in the county of Tulare, in consideration of the premises, and also in consideration of the release from said attachment of the property attached, as above mentioned, do hereby, jointly and severally, undertake in the sum of ——— dollars, and promise that, in case the plaintiff recover judgment in the action, defendant will, on demand, pay to plaintiff the amount of whatever judgment may be recovered in said action, together with the percentage, interest and costs; the same to be paid in United States gold coin, if so required by the terms of the judgment."

Tobin, without the knowledge or consent of either defendants or plaintiff, changed the words "six hundred and no/100 (\$600.00)" appearing in the undertaking as delivered to him to "three thousand five hundred and fifty-nine and 85/100," and inserted "four thousand" in the blank space for the amount of the penalty of the undertaking. As so changed, Tobin delivered the undertaking to the sheriff, who thereupon released the attached property. Plaintiff recovered judgment against Tobin in the sum of \$2,250. This action is for the recovery from the defendants of the amount of such judgment. The court found the facts as stated, and gave the plaintiff judgment for the sum of \$600. From this judgment the plaintiff has appealed on the judgment roll alone.

[1, 2] The undertaking, as delivered by defendants to Tobin, was enforceable to the extent of \$600, the sum for which the undertaking recites that plaintiff had sued Tobin. The omission to state the penalty in the blank space provided therefor did not render the undertaking invalid. "The object of a penalty in a bond is to limit the obligation of the signers." 9 C. J. 40; 32 Cyc 121. The recitals in an undertaking, as in other contracts, may likewise limit the obligation of the sureties. In an undertaking for the release of an attachment, the recital of the

amount for which suit was brought is material as showing the extent to which the signers intended to bind themselves, since a judgment cannot exceed the amount demanded in the complaint. The law relative to the filling of blanks in contracts and other changes therein after execution is clearly expressed in the following authorities:

"It is settled law that, where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled up, such instrument so delivered carries on its face an implied authority to complete the same by filling up the blanks; but the authority implied from the existence of the blanks would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what is written or printed as part of the same, nor to prevent the scope and meaning of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before it was so delivered. By virtue of the implied authority, such a depository may perfect, in his discretion, what is incomplete, by filling the blanks; but he may not make a new instrument by erasing what is written or printed, nor by filling the blanks with stipulations repugnant to the plainly expressed intention of the same as shown by its written or printed terms." *Angle v. Northwestern Life Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556.

"Where there is no express authority in the person to whom a note or other instrument is intrusted or delivered to make alterations therein, it is only where such writing is patently incomplete in some respect, such as an omitted date, or a blank space required to be filled to make the contract express the intent of the parties, that there is any implied authority to insert new matter, or make any material addition thereto. Even in such a case the implication must very plainly arise from the circumstances, or the maker will not be bound. This is upon the very obvious principle that any unauthorized change in a material respect destroys the integrity of the instrument as the contract which the maker has executed; it ceases to be his contract and is avoided, even in the hands of an innocent holder for value." *Walsh v. Hunt*, 120 Cal. 46, 50, 52 Pac. 115, 116 (39 L. R. A. 697.)

"His right to fill blanks left in a writing, without any express authority, rests upon an assertion of consent; it is considered that the fact that blanks are left in an instrument implies an authority to fill them, provided the possession of the incompleting paper has been intrusted under circumstances which permit the inference of authority to perfect it, and where, in view of such apparent authority, it would be a fraud upon innocent parties to permit an assertion to the contrary. Consequently, the rule of implied authority to fill blanks does not apply where the circumstances negative consent." 2 C. J. 1244.

In this case the court has found that, after the execution of the undertaking, its terms were changed in the manner stated without the knowledge or consent of the de-

fendants. Since the evidence was not brought up, it does not appear what the circumstances surrounding the transaction were, or whether they were such as to negative the implied consent to fill the blank space, arising from the delivery of the instrument with the unfilled blank. It cannot be conclusively inferred from the presence of unfilled blanks in an instrument, at the time of delivery that the depository thereof is authorized to fill such blanks, but the question of authority so to do is one of fact to be determined by the trial court from all the surrounding circumstances. In the absence of the evidence produced at the trial it must be presumed in support of the judgment that the circumstances proven negated any implied consent of defendants to the making of the alterations in the undertaking.

The judgment is affirmed.

We concur: BURNETT, J.; JONES, Justice pro tem.

62 Cal. App. 541

WEST v. WEST. (Civ. 4045.)

(District Court of Appeal, Second District, Division 2, California. June 16, 1923.)

Marriage ⇐ 58(1)—**Annulment of marriage contract under age of legal consent held warranted.**

Under Civ. Code, § 82, providing that a marriage may be annulled where petitioner was under the age of consent and was married without parents' or guardian's consent, unless, after attaining age of consent, petitioner cohabited with the spouse, annulment of marriage of one less than 18 years old without consent of his parents was warranted, where the parties did not cohabit after attaining age of consent, though the parents had encouraged the parties to continue living together.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Laurel V. West, by Perry C. West, his guardian ad litem, against Lena May West, for an annulment of marriage. Judgment for defendant, and plaintiff appeals. Reversed.

Daley & Byrne, of San Bernardino, for appellant.

Chas. L. Allison, of San Bernardino, for respondent.

CRAIG, J. By this action plaintiff seeks to annul his marriage with defendant. The appeal is by the plaintiff on the judgment roll alone. The findings and facts admitted by the pleadings, among other things, show that the parties were married on the 7th of November, 1917, at which time the said Laurel V. West was under the age of 18 years, and had no guardian other than his parents in whose custody and under whose control he

then was; that the parents had no knowledge of the marriage and did not consent to it; that subsequent to the marriage two children were born to the parties; that after the plaintiff attained the age of 18 years he and the defendant never cohabited together. The further fact appears that the plaintiff's parents after learning that the marriage had been duly solemnized, encouraged the plaintiff and defendant to continue living together as man and wife.

On these facts the superior court rendered judgment in favor of the defendant. Section 82 of the Civil Code provides:

"A marriage may be annulled for any of the following causes, existing at the time of the marriage: That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or person having charge of him or her; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife."

The instant case comes squarely within this section. The plaintiff at the time of the marriage was under the age of legal consent and the marriage was contracted without the consent of his parents, who were the only persons then having charge of him. Under these circumstances, the Code expressly provides that the marriage may be annulled upon application of the infant unless "after attaining the age of consent such party, at any time freely cohabit with the other as man or wife." The facts do not bring the case within this exception. It is obvious that acquiescence or even express consent of the parents after the marriage has been contracted is ineffectual to render the marriage valid. The authority of the parents in the matter of giving consent to the marriage of their infant child is conferred, and also by the statute. This marriage became voidable immediately upon solemnization, and could become binding only in case the plaintiff had freely cohabited with the defendant after attaining the age of consent.

The judgment is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

62 Cal. App. 658

CORNWELL v. MULCAHY. (Civ. 2619.)

(District Court of Appeal, Third District, California, June 25, 1923. Hearing Denied by Supreme Court Aug. 23, 1923.)

1. Witnesses $\S$ 379(7) — Question on cross-examination held proper and pertinent.

In an action for labor done and material furnished in sinking a well, where defendant

testified on direct examination in reference to his agreement with plaintiff's agent, question put to defendant on cross-examination whether he remembered having signed a statement in the original answer, conflicting with his testimony on direct examination, held proper as involving pertinent matter.

2. Witnesses $\S$ 379(7) — Use of superseded answer to impeach testimony on direct examination held proper under statute.

Use on cross-examination of superseded answer to impeach defendant's testimony on direct examination held permissible under Code Civ. Proc. $\S$ 2052.

3. Appeal and error $\S$ 206(2) — Party failing to call for explanation of damaging testimony when he had opportunity to do so cannot complain on appeal.

Where counsel did not see fit to exercise his right, under Code Civ. Proc. $\S$ 1854, to call for an explanation of defendant's damaging answer to question on cross-examination when such explanation was in order, and he had the opportunity, he could not complain on appeal that the answer was unexplained.

4. Work and labor $\S$ 27(5) — Questions held to bear upon issue whether work was done in approved and workmanlike manner.

In an action for labor done and material furnished in the sinking of a well, questions put to plaintiff as to tools used and methods pursued in drilling wells, and the effect thereof on the sand strata, held bearing upon the issue whether the work was done by plaintiff in an approved and workmanlike manner.

5. Payment $\S$ 65(6) — Negative averment of nonpayment need not be proved.

A plaintiff is not required to prove his negative averment of nonpayment notwithstanding that he must allege it in his complaint.

6. Appeal and error $\S$ 1071(5) — Challenged finding ignored if other findings are sufficient to support judgment.

A challenged finding may be ignored without affecting the results of a case where the other findings which respond directly to the material issues are sufficient to support the judgment.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Frank L. Cornwell against James Mulcahy. Judgment for plaintiff, and defendant appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant. Glen West, of Lodi, for respondent.

BURNETT, J. The complaint was upon a common count for \$654 for labor done and material furnished in the sinking of a well by plaintiff upon defendant's land, and the judgment was in favor of plaintiff for the amount of \$563, from which the appeal has been taken. Defendant denied the indebtedness, and alleged that plaintiff agreed to sink the well 12 inches in diameter throughout its

entire depth; that he guaranteed to obtain a sufficient supply of water to irrigate defendant's land, and that he agreed to case the well sufficiently to prevent the same from filling up. It was further alleged by defendant that plaintiff constructed the well 12 inches in diameter to a depth of 46 feet only, and cased it to that depth, and then sank the well from that point only 6 inches in diameter, and put no casing therein; that the well was not straight; that it was insufficiently cased, and that, by reason thereof, it filled up with sand and debris and was worthless. The court found against defendant as to these allegations, and furthermore that plaintiff merely agreed to sink a well upon defendant's land in a good and workmanlike manner, and to install therein such well casing as plaintiff might consider reasonably necessary for that purpose. It was also found that plaintiff performed the work and constructed the well in a proper and effective manner, and installed therein sufficient casing as the condition of the earth required, and that he used due care and skill in every respect.

We can see no merit in the claim of appellant that the evidence is insufficient to support the findings in favor of respondent. It may be admitted that there is a decided conflict in some material respects, but we cannot say that the trial court was in error in according credit to the showing made in favor of plaintiff. Appellant makes a common mistake of quoting a portion of the testimony which favors his view, and ignoring that of a contrary tendency. We have carefully read the transcript, and found therein ample support for the findings, but we see no necessity for quoting it. We may add that the brief of respondent sets it out fully enough to justify the conclusion of the trial court.

[1] Appellant claims that it was error for the court to overrule the defendant's objection to the following question asked of the defendant Mulcahy:

"Q. I will ask you if you remember signing this statement in your original answer: 'Further answering said complaint, the defendant alleges as follows: That it was expressly stipulated and agreed by and between plaintiff and defendant herein, that only ten feet of casing should be put into the well by plaintiff for said defendant, and that plaintiff should use such casing as was furnished by defendant for that purpose?'"

The general objection was made, and also that "the witness cannot be interrogated as to the contents of his previous answer that had been superseded; that it was not cross-examination, and does not tend to contradict anything that the witness has testified to." Thereupon the record shows the following:

"The Court: The objection is overruled. A. I signed that; yes. I have got an explanation to offer. Mr. Carpenter: The witness desires to make an explanation. The Court: That will come along in time."

Manifestly, as claimed by appellant, the cross-examination must be confined to matters which have been elicited on the direct examination. On the examination in chief, though, the witness had testified in reference to his agreement with plaintiff's agent:

"He said he was familiar with all that part of the country and that the casing, whatever casing would be needed, why, he would put in. So we tried to agree on how much the casing would be and he told me he couldn't tell, so I told him to go ahead with the casing at the market price, whatever the price would be. So he went ahead and put the well in. So I asked him again how much casing did he think we would need. Well, he stated in part of it, not all the way, 10 to 30 feet, take a 12 inch."

The foregoing is sufficient to show that the question to which objection was made involved a pertinent matter of cross-examination.

[2] The other objection is equally untenable. Some early decisions seem to go to the extent of holding that a superseded pleading cannot be used even for the purpose of impeachment; but the doctrine has been repudiated by the late decisions of the Supreme Court. Of these we may quote from *Williams v. Seiglitz*, 186 Cal. 767, 200 Pac. 635, as follows:

"In support of his contention that the original answer was improperly admitted as a part of his cross-examination, appellant cites *Morris v. Lachman*, 68 Cal. 109, 8 Pac. 799; *Stern v. Loewenthal*, 77 Cal. 340, 19 Pac. 579; *Mecham v. McKay*, 37 Cal. 154; *Ponce v. McElvy*, 51 Cal. 222. These authorities lay down the rule that in this state an abandoned pleading may not be used as evidence against the pleader. However, it has been held that such a pleading may be admitted for purposes of impeachment of the pleader's testimony by showing prior inconsistent statements. *Estate of O'Connor*, 118 Cal. 69, 50 Pac. 4; *Schuh v. Herron Co.*, 177 Cal. 13, 17, 169 Pac. 682; *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625. * * * Notwithstanding appellant's claim to the contrary, we think it clear from the record that the original answer was admitted for purposes of impeachment, although there is no direct statement to that effect. * * * The pleading was properly admitted."

It is clear that herein the question was asked for the purpose of impeachment, and it was clearly within the contemplation of section 2052 of the Code of Civil Procedure.

[3] In reference to the answer of the witness it is appellant's contention that he "was entitled to make his explanation at that time, and before the intervention of other testimony, and while the matter was fresh in his memory." His right to explain cannot be doubted. Section 1854, Code Civ. Proc. The court, however, did not deny him that right, but, having in view the usual practice in such cases, properly supposed that on redirect examination his counsel would ask for the explanation. It would certainly then

have been "fresh in his memory"; but the record shows that only a few more questions were propounded in the cross-examination, and there was no redirect examination whatever. If counsel did not see fit to call for the explanation when it was in order and he had the opportunity he should not complain now because the answer was unexplained.

[4] Appellant criticizes the action of the court in overruling his objection to the following questions:

(1) "Now, without saying what other people said about it, what was your experience with this rotary tool?" (2) "Now, what would you say was the cause of these rotary tools drilling a crooked hole?" (3) "What is the result of that tool being connected by means of those jointed rods?" (4) "What would you say in that respect to the drilling tools used which are used to sink a well by means of a cable?" (5) "In regard to those stratas of flowing sand that may fill up a well, as you strike those obstacles going down, what is the proper practice?" (6) "After a well is sunk through soil of this character, that is fine soil, dry sand strata, and maybe a small, flowing sand strata, what is the principle, when you are through, in regard to pumping your well out?"

We are satisfied that these questions all had some bearing upon the issue whether the work was done by plaintiff in an approved and workmanlike manner. This issue was directly raised by the answer, and the only objection to the questions was the general one, and that they involved a consideration "not within any of the issues raised by the pleadings."

[5] Appellant contends that the failure of plaintiff to prove the nonpayment of his claim is fatal to the judgment, and he cites some earlier decisions favorable to his contention; but the rule in this state is now well established that in cases of this character the plaintiff is not called upon to prove his negative averment of nonpayment, although, of course, he must allege it in his complaint. *Melone v. Ruffino*, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127; *Stuart v. Lord*, 138 Cal. 672, 72 Pac. 142. In the former it is said:

"Where a plaintiff has proved the existence of a debt sued on—at least, within a period of statutory limitation—the burden of proving payment is on the defendant."

Furthermore:

"Of course, it has been held by this court, as it was always held at common law, that in a complaint upon a promissory note, or other obligation to pay money, there must be an averment that the money had not been paid. This is necessary to make the complaint perfect upon its face. But it is a nonsequitur to say that because such negative averment is necessary in the complaint therefore it is necessary for the plaintiff to prove it. The question is not one of pleading, but of evidence; not

what must be alleged, but where the burden of proof lies. The general rule is that a party is not called upon to prove his negative averments, although they may be necessary to his pleading."

[6] The other material findings, which are challenged by appellant, are sufficiently supported, as already stated.

Appellant asserts:

"The finding that the alleged Cornwell well filled in with sand because the defendant failed and neglected to cause said well to be pumped or operated at the time of its alleged completion is not within any of the issues raised by the pleadings. * * * It is a well-settled rule of law that findings without the issues cannot sustain the judgment, and a decision based thereon must be set aside."

There is no question about said principle of law, but it has no application to the situation herein. At most, said finding involves merely surplusage. The other findings, which respond directly to the material issues, are sufficient to support the judgment, and said challenged finding may be ignored without affecting the result. It may be recalled, however, that the answer of defendant alleged that the well filled with sand because of the defective construction by plaintiff, and it was not inappropriate for the court to find and declare the real cause for this condition.

We think there is no sufficient reason for disturbing the judgment, and it is therefore affirmed.

We concur: FINCH, P. J.; JONES, Justice pro tem.

62 Cal. App. 543

PELLISSIER et al. v. PAN-AMERICAN PETROLEUM CO. (Civ. 3825.)

(District Court of Appeal, Second District, Division 2, California. June 16, 1923.)

Mines and minerals — 78(1)—Lessor held not entitled to recover unpaid lien rentals after termination of lease by lessee's delivery of quitclaim deed.

Under an oil lease requiring commencement of one well within 6 months, and which provided lessee might terminate the lease by delivering to lessors a quitclaim deed, or that it might be terminated at lessors' option by notice after a failure of lessee for 30 days to perform any of the covenants, and an extension agreement requiring lessee to pay a monthly rental in lieu of commencing operations, as provided, where lessee, after failure to make certain rental payments, terminated the lease by delivering a quitclaim deed to the lessors, lessors are not entitled to recover the rental charges for the unpaid months preceding termination of the lease.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Frank F. Pellissier and another against the Pan-American Petroleum Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Geo. J. Denis, of Los Angeles, for appellants.

Olin Wellborn, Jr., and Stephen Monteleone, both of Los Angeles, for respondent.

CRAIG, J. The appellants, Frank F. Pellissier and his wife, leased certain lands belonging to them to one E. L. Doheny, as lessee, for the exploration of oil and gas. The lease was executed on the 10th day of October, 1917, and was subsequently assigned by the lessee to the Pan-American Petroleum Company, a corporation, the respondent herein. Neither the lessee nor his assignee, the Pan-American Petroleum Company, ever commenced operations for the drilling of a well upon said land. Extensions of time for commencing said drilling operations were granted to the lessee by the lessors up to the 10th day of October, 1919. On November 24, 1919, plaintiffs executed to respondent's assignor a certain indenture in writing, under which four payments were made to the lessors, being for the months of October, November, December, and January. The fourth payment was made on January 12, 1920. No payments were made for the months of February and March, 1920. On the 21st or 22d day of April, 1920, the respondent, Pan-American Petroleum Company, tendered to the appellants a quitclaim deed to the land. This action was brought to recover the rent alleged to be due for said months of February and March, during which months the lessee retained possession of the land.

The case was tried by the court sitting without a jury. The court, among other things, found as follows:

"That, after the execution and delivery of said indenture, dated November 24, 1919 defendant made four monthly payments of \$833.33 each under and pursuant to said indenture, and thereby exercised its right to extend the time in which to commence drilling operations up to the 18th day of February, 1920; that thereafter defendant retained all rights and privileges granted by said lease up to the 10th day of April, 1920, but did not retain, nor did it elect to retain, any rights or privileges granted by said indenture dated November 24, 1919, beyond the 10th day of February, 1920, and accordingly failed and refused to make any further payments thereunder; that there did not become due or payable from defendant to plaintiffs, or either of them, on the 10th day of April, 1920, or at any other time, the sum of \$1,666.66, or any other sum, nor any interest whatever, and there is not due or owing from defendant to plaintiffs, or either of them, the sum of \$1,666.66, or any part thereof, or any interest whatever thereon."

Judgment was thereupon rendered in favor of defendant that plaintiffs take nothing by their action, from which judgment plaintiffs

appeal. Appellants' contention is that the court erred in its construction of the terms and effect of the last extension agreement or instrument of November 24, 1919, and also of the lease itself.

The following provisions of the lease and extension are essential to the determination of the appeal. The following is quoted from the lease:

"The lessee shall, subject to the exceptions hereinafter contained, commence operations preparatory to the work of drilling one well upon said land within six months from the date thereof, and thereafter prosecute, with reasonable diligence, the work of drilling such well for the production of petroleum therefrom until petroleum in paying quantities, as hereinafter defined, is found, or such well is abandoned as hereinafter provided."

Also:

"That in the event that the lessee shall, at any time during the term hereof, fail to perform any of his covenants and agreements contained in subdivisions 1, 11, and 111, of the lessee's covenants herein, and such failure shall continue for a period of thirty days after the personal service of a written notice thereof upon the lessee, or his heirs or assigns, specifying the particulars in which such failure has occurred, this indenture of lease shall, at the option of the lessors, become immediately null and void, and the lessors shall thereupon have the right (subject, however, to the provisions in paragraph 4 of the lessors' covenants herein) to re-enter upon the land hereby leased, and remove all persons therefrom, provided, however, that such re-entry, if made, shall be the sole and exclusive remedy of the lessors for the breach on the part of the lessee of his said covenants or agreements in said paragraphs contained; that, in the event the lessee shall desire to abandon this lease and terminate all of his obligations hereunder, he shall have the right so to do by serving written notice of such abandonment upon the lessors, and delivering and yielding up to the lessors the possession of all of the land hereby leased, except so much thereof as the lessee may be entitled to retain under the provisions of paragraph fourth of the lessee's covenants herein, and delivering to the lessors a quitclaim deed executed and acknowledged by the lessee, releasing, remising and quitclaiming unto the lessors all the land hereby leased, except so much thereof as the lessee may be entitled to retain under the provisions of said paragraph fourth."

The last extension agreement provides:

"Now, therefore, the lessors hereby agree that, in lieu of commencing and prosecuting operations for the drilling of a well upon said land described in and leased by said indenture of lease, the lessee may, if he shall so elect, pay to the lessor on the 10th day of each and every calendar month, for an additional period of six (6) months, commencing on the 10th day of October, 1919, as and for rental for said land, the sum of eight hundred and thirty-three dollars and thirty-three cents (\$833.33) per month, and such payment so made from month to month shall relieve the lessee of and from

all obligations to commence or prosecute any drilling or other operations upon said land during such month."

An analysis of this lease and the subsequent extension agreement indicates that the property was leased for a period of 20 years from October 10, 1917, and that the lessee bound himself to commence operations preparatory to drilling for oil within six months from the execution of the original agreement. It will not be disputed that this provision was intended to be for the benefit of the lessors, and might be waived by them. If the lessee failed to prepare to drill as agreed, no other or additional obligation rested upon him because of such failure. The lessees might terminate the lease by serving the notice stipulated, but if they did not do so the lease would remain unimpaired. The lessee might abandon at any time by giving up possession and executing the quitclaim deed, etc., mentioned in the lease, yet, unless such action was taken, mere lapse of time could in no way affect its life. Doubtless, if neither party did anything the lessee might at any time during the 20 year period of the lease have begun to drill for oil, and would then have been protected as still within the lease, provided he thereafter continued operations with reasonable diligence, and did not permit himself to become otherwise delinquent.

We now proceed to the next consideration, namely, what effect did the parties intend the last extension agreement to have upon the obligations and rights of the parties in respect to the matters here involved? Other extension agreements had been executed by which the lessors had given consent to the lessee's failure to begin operations. Under these, payments in the nature of rent had been made monthly by the respondent, beginning with April 3, 1918, and continuing until November 26, 1920. The last extension stipulates that the result of the payments under its terms so made "from month to month" shall be to "relieve the lessee of and from all obligations to commence and prosecute any drilling or other operations upon the land *during such month.*" (Italics ours.) One outstanding fact resulting from this provision is that under it each month is considered as a single period. The same stipulations apply to all six of the months included in the term covered by this last extension, but each one is segregated from the others, so that, if the lessor were to make one monthly payment of \$833.33, his time to begin operations would only be extended for the particular month for which such payment was made. Another thing which the language clearly indicates is that the purpose which actuated the parties to sign this agreement was to preserve the lessee's right to drill in the land in question. This was the only result accomplished. The lessors acquired no new rights except to the rental money received by them. Again,

the lessee, and not the lessors, had the right to decide whether or not the last extension agreement should have any application. It is provided that certain things shall be done "if he shall so elect," reference being made to the lessee; and, lastly, his election is to be made monthly, and not for the entire period of six months treated as a single term. This conclusion logically follows from the recital, "such payments so made from month to month," and it necessarily results from the closing stipulation to the effect that each payment shall relieve the lessee from all obligations to drill "during such months." As the lessee had the right to elect each month during the period of six months whether or not he would keep his right to begin drilling alive, the only question remaining for determination is as to the manner in which his election was to be made. One way, and but one, is mentioned; that is, by the payment of \$833.33 to the lessors on the 10th day of the month for which the lessee should desire to be relieved from the obligation to commence drilling.

We do not regard *McMillan v. Philadelphia Co.*, 159 Pa. 142, 28 Atl. 220, as a precedent in this case, because the lease there involved contained an express covenant requiring the lessee to pay a definite rental if it failed to do certain development work stipulated. The type of a lease which appellant refers to as the "or lease" is one in which the lessee agrees to drill, or in lieu of drilling to pay a rental. The lease before us contains no covenant to that effect. The language used expressly makes it optional with the lessee to neither drill nor pay rent, pursuing which course he would, of course, forfeit all right under the lease should the lessors so elect. Courts have no right to alter the contract made by the parties to it by adding an agreement not incorporated therein. This the case of *Scott v. LaFayette*, 42 Ind. App. 614, 86 N. E. 495, does, if by the statement contained in the decision it is meant that the clause construed, although making it optional with the lessee to allow the lease to lapse through failure to drill or pay rent, will, regardless of the language used, be held to stipulate that the lessee must either drill or pay rent. No other case cited or known to us holds that such an obligation will be read into a lease which has made no provision for it. The case of *Jackson v. O'Hara*, 183 Pa. 233, 38 Atl. 624, cited in *Scott v. LaFayette*, does not so decide. In that suit the lessee definitely promised to "complete one well on the premises from the date thereof," and, in case of failure so to do, he covenanted to "pay as rental to the party of the first part for such delay the sum of \$50 per month, payable in advance." The opinion in *Scott v. LaFayette* is quite unsatisfactory, in that no clear reason is given for the conclusion reached concerning the point here involved. The proposition is emphasized that no forfeiture clause

on behalf of the lessor was contained in the lease. The court may have regarded it as inequitable that the rights provided in that regard were unequal and lacked reciprocity. The lease in the case at bar is not subject to this criticism. A court of equity has no occasion to apply a strained construction on this account, for the lessors are amply protected by a clause authorizing the termination of the lease by them in case the lessee failed to prepare to drill as agreed.

The judgment is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

62 Cal. App. 316

COPELAND v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (Civ. 4139.)

(District Court of Appeal, Second District, Division 2, California. May 28, 1923. Hearing Denied by Supreme Court July 26, 1923.)

1. Indictment and information ☞ 15(4)—Grand jury may return more than one indictment on same facts.

A grand jury having found one indictment is not disqualified to return a second upon the same facts, the proper procedure being taken.

2. Indictment and information ☞ 15(1)—Legislature has power to remove restrictions on indictment procedure before grand jury.

The Legislature may prescribe the mode of procedure in prosecuting crimes, hence remove any restrictions on the grand jury's right to reindict.

3. Indictment and information ☞ 15(4)—Superior court may delegate to district attorney choice of any one mode of procedure to reindict under statute.

Under Pen. Code, § 1008, authorizing the court to direct resubmission of case to same or another grand jury on sustaining demurrer to indictment, an order, "Demurrer to indictment sustained and case ordered resubmitted to the grand jury," authorizes resubmission to the same grand jury which was still in session, since the theory of the provision of the Code is to vest the court and not the district attorney with discretion as to mode of procedure, and the order will be construed as delegating to the district attorney discretion as to mode of procedure which is permissible.

In the matter of the application of J. L. Copeland against the Superior Court of Los Angeles County, Sidney N. Reeve, Judge thereof, for a writ of prohibition. Writ denied.

Black, Hammack & Black and J. L. Copeland, all of Los Angeles, for petitioner.

Thomas Lee Woolwine, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for respondents.

CRAIG, J. On the 17th day of August, 1921, the petitioner was indicted by the grand

jury of Los Angeles county for the crime of perjury. To this indictment a demurrer was interposed on the ground that it did not state facts sufficient to constitute a public offense, and the superior court ordered the same sustained, in making of which ruling the following language was used: "Demurrer to indictment sustained and case ordered resubmitted to the grand jury." The district attorney thereupon resubmitted the case to the same grand jury, and a second indictment was returned against the petitioner also charging him with perjury. It is not denied that this charge was based upon the same subject-matter and facts as was the first. The petition alleges on information and belief that no witnesses were examined or evidence introduced before the grand jury in the time intervening between the returning by it of the first and second indictments.

In due time the petitioner moved the superior court to set aside the second indictment on the ground that it was not found, indorsed, and presented as prescribed in the Penal Code of California, and particularly section 995 thereof; and that the superior court had no jurisdiction of the subject-matter of the action. This motion was denied, the defendant pleaded not guilty, and the case set for trial, and upon application duly made an alternative writ of prohibition was issued by this court.

The petitioner insists that the grand jury finding the second indictment had no jurisdiction, because he asserts the order directing the resubmission of the cause does not comply with section 1008 of the Penal Code; and for the further reason that the grand jury had previously indicted the defendant for the same offense.

[1, 2] As to petitioner's contention that a grand jury having found one indictment is disqualified to return a second upon the same facts, we have no doubt. This is a matter entirely within the authority of the Legislature to regulate. It is one of procedure and hence does not infringe any substantial right of the defendant. *People v. Schmidt*, 33 Cal. App. 426, 165 Pac. 555. As the Legislature possesses the power to prescribe the mode of procedure in prosecuting crimes, it might remove all restrictions upon the grand jury's right to reindict; also the district attorney might be given full discretion to determine when to proceed by a second indictment after demurrer sustained to the first. But the Legislature has not seen fit to vest this discretion with the district attorney. On the contrary, it has expressly and carefully reserved the authority to determine how, if at all, further proceedings by way of prosecution shall be taken.

Section 1008 of the Penal Code, concerning the question at issue, provides:

"If a demurrer is sustained and an amendment is not allowed, or if allowed, is not made, within such reasonable time as the court may fix, the court shall give a judgment of dismissal, which shall be a bar to another prosecution for the same offense. The defendant shall thereupon be discharged, unless the court directs the case to be submitted to the same or another grand jury, or directs a new information to be filed; provided that after such order or resubmission, the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases."

The case of *Terrill v. Superior Court*, 6 Cal. Unrep. 398, 60 Pac. 38, was decided in 1899 when the statute used the phrase, "to another grand jury," instead of "to the same or another grand jury," as it now reads. Hence that decision can be of no assistance here.

[3] In other cases the Supreme Court has emphasized its construction of section 1008 of the Penal Code upon the general proposition here under discussion. We refer to the fact that the theory upon which this legislation proceeds is that the lawmakers have vested in the court and not in the district attorney the discretion of deciding whether the district attorney shall proceed further against one who has been accused of a public offense in the pleading to which a demurrer has been sustained. Trial courts and district attorneys cannot mistake the language of *Ex parte Williams*, 116 Cal. 512, 48 Pac. 499, and *Ex parte Hayter*, 16 Cal. App. 211, 116 Pac. 370, in which the authority and duty of the former has been announced and the limitations of the latter most positively stated. Indeed, the meaning of the language of the Code section is so clear that it should need no interpretation. It is equally apparent that the discretion and jurisdiction of the superior court does not end with determining whether or not there shall be any further prosecution; the mode of such further prosecution is also indisputably a matter for the court's decision.

Counsel for the people argue that the language used in this instance is sufficiently definite in directing that the case be resubmitted to the grand jury; that this language means the same grand jury. Petitioner responds as far as the record shows there may have been no grand jury in session when this order was made. We think this cannot be maintained, for both indictments were returned by the same grand jury; the second being subsequent to the making of the order in question. It follows that when the order was made the grand jury which returned the first indictment had not been discharged and was in existence.

But we think the court's action must be sustained upon another ground. It has been held that the court may delegate the choice of any one of the modes of prosecution pro-

vided in section 1008 of the Penal Code to the district attorney. *Matter of Application of June*, 30 Cal. App. 767, 159 Pac. 452. This was the effect of the order made in the present instance. By directing that the case be "resubmitted to the grand jury," the court determined that there should be further action on the part of the people by way of presentation of the matter looking toward an indictment, but permitted the district attorney to elect whether to resubmit the matter to the grand jury which had voted the first indictment or to another grand jury. This the June Case holds the trial court had a right to do.

The petition is denied.

We concur: FINLAYSON, P. J.; WORKS, J.

62 Cal. App. 571

WALLENBACK v. ARNOLD. (Civ. 4573.)

(District Court of Appeal, First District, Division 2, California. June 16, 1923.)

1. Appeal and error  1011(1) — Appellate court unconcerned with portions of record in conflict with portions supporting findings on conflicting evidence.

The appellate court is unconcerned with portions of the record in conflict with portions supporting findings by the trial court on conflicting evidence.

2. Executors and administrators  221(9) — Findings that contract to convey property in consideration of services was forged, and that claimants failed to perform, sustained.

Evidence held sufficient to support the court's findings that an alleged contract by decedents to convey property in consideration of an agreement to care for them during their lives was not executed by or with their knowledge or consent, but was forged, and that claimants did none of the things required thereby.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by L. T. Wallenback against Lottie Arnold, individually and as executrix of the will of James Beechler, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

John W. Bantz, of San Francisco, for appellant.

Maxwell McNutt, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment in favor of the defendant in an action brought against her as executrix of the last will and testament of James Beechler, deceased, to recover \$25,000 damages for the breach of an alleged con-

tract between plaintiff and defendant's testator.

James Beechler, during his lifetime, was a physician engaged in operating a sanitarium at Soquel, Santa Cruz county, Cal. The contract alleged in the complaint was one by which plaintiff and his wife agreed to take care of Dr. Beechler and his wife during their lives, and to take full charge of the sanitarium operated by the doctor, and to care for the doctor and his wife in sickness and in death, and in consideration of these services the doctor and his wife agreed to give and convey to plaintiff and his wife all the property then owned or thereafter to be acquired by them. The trial court found, upon sharply conflicting evidence, that the alleged contract was never signed by either Dr. Beechler or his wife, and that their names were not signed thereto with their knowledge, consent, or authority, and that the alleged contract set out in the complaint was not written, dictated, or executed by or with the knowledge or consent or authority of the said James Beechler and/or Jennie Beechler, but, as to them, and each of them, the same was and is a fictitious, forged, and counterfeited writing and agreement, and that the said names, James Beechler and Jennie Beechler, were signed thereto and thereon by the wife of plaintiff without the knowledge, authority, or consent of the said James Beechler and Jennie Beechler. The trial court also found that the plaintiff and his wife did not do any of the things which by the terms of the alleged contract they were required to do.

[1] The only argument made by the appellant upon the appeal is that the findings are not in harmony with any of the testimony in the record. The conclusive answer to this contention is found in the record, and it is only necessary to call attention to the portions of the record which support the findings; with the portions of the record in conflict therewith, we are unconcerned, under the familiar rule regarding the power of appellate courts to review questions of fact, upon which findings have been made by the trial court upon conflicting evidence.

[2] Years prior to the date of the alleged contract Dr. Beechler and his wife had lived at Soquel, Santa Cruz county, where he conducted the White Cross Sanitarium for the treatment of persons afflicted with asthma. He was an educated man, punctilious and exact in his business habits, rarely omitting to make entries and records of his business transactions. At the time it is alleged the contract was made Dr. Beechler was about 80 years of age. He was in possession of all his faculties, and actively engaged in his business. His wife was at that time practically blind, and hence unable to read or write, but able to go about unassisted.

In 1914 Mrs. Lottie Arnold, the defendant, became an employee of Dr. Beechler at the

sanitarium, and remained there continuously until the 8th day of March, 1919. Her relations with the Beechlers, according to her testimony and that of Mrs. Gregory, a neighbor and close friend of the Beechlers, were entirely harmonious, and she remained with them until the illness of her son necessitated her residence in San Francisco.

In the spring of 1918 plaintiff, an itinerant junk dealer, stopped at the sanitarium to be treated for an injured ankle. He remained there over night, and then left, but in the fall of that year he returned with his wife, and Dr. Beechler gave them a little cottage on the place in which to live. They were not regularly employed by Dr. Beechler, but occasionally did odd jobs, for which they were paid. In January, 1919, the plaintiff and his wife were given living quarters in the sanitarium, and the plaintiff worked as chore man and his wife assisted about the house. On or about February 3, 1919, Dr. Beechler ordered the plaintiff to leave the sanitarium. In consequence of this plaintiff and his wife both left the sanitarium and went to the home of a neighbor, Mrs. Gregory, where they remained for about a week. On February 10, 1919, a patient from the sanitarium brought to Mrs. Gregory's house a note from Dr. Beechler, stating that he wished Mrs. Wallenback to return to assist with the cooking and housework. In reply to this note Mrs. Gregory wrote to Dr. Beechler on behalf of Mrs. Wallenback, stating that Mrs. Wallenback and her husband would return if the doctor would treat Wallenback more kindly, and that Mrs. Wallenback would do the cooking if she received in compensation therefor \$1.50 a day and board for herself and husband. Mr. and Mrs. Wallenback returned to the sanitarium that afternoon, and Mrs. Wallenback was paid according to her own terms. She states she was paid under this arrangement only until March 8, 1919, the date of the alleged contract, but receipts bearing her signature and dated subsequently to March 8 were introduced in evidence. The weakness of this evidence lay in the fact that the year did not appear after the month and day. Mrs. Wallenback took advantage of this fact, and stated that she had never received money for her services after March 8, 1919, and that the receipts must have been for another year. However, from considerable testimony in the record, the trial court was justified in believing that Mrs. Wallenback was not working for Dr. Beechler in March, 1918, and, therefore, the receipts could have been for no other year than 1919.

As previously stated, Mrs. Arnold left the sanitarium on March 8, 1919, to return to San Francisco. Plaintiff and his wife testified that the alleged contract was signed on that afternoon between 4 and 5 o'clock. Mrs. Gregory, a neighbor, testified that she was with Mrs. Beechler when Mrs. Arnold left

the house; that she remained there all afternoon, and until after 5 o'clock; that she was constantly with Mrs. Beechler; that no contract was discussed or signed by Mrs. Beechler.

In the month of August, 1919, Mr. and Mrs. Wallenback left the sanitarium and went to a ranch which they owned near Boulder Creek. They testified that Mrs. Wallenback was directed by Dr. Beechler to take a vacation. Mrs. Gregory testified that they told her in July they were tired of working for others; that they had plans for making their living upon their own property, and would go to it and work for themselves. In September, 1919, while the Wallenbacks were at Boulder Creek, Dr. Beechler sold his sanitarium, and with his wife moved to San Francisco into a home which he had purchased there, and Mrs. Arnold and her son lived with them until the death of the doctor. Mrs. Beechler died in September, 1920, and Dr. Beechler in March, 1921.

The record contains numerous incidents and circumstances which are irreconcilable with the existence of the alleged contract. Said contract, offered in evidence, is as follows:

"Soquel, Santa Cruz Co.—March 8th.

"In the year of our Lord 1919. This agreement made and entered into. Between Dr. James Beechler M. D. and Jennie Beechler his wife the Partys of the first part, and L. T. Wallenback and Carrie Wallenback the Partys of the second Part. Agreement to take care of the Partys of the first part during their lifetime; and take full charge of the white cross Sanitorium; and the Partys of the second part farther agrees to be good and kind and take care of both in sickness, and in death. The partys of the first Part agrees to give and convey to the Partys of the second Part all the property he now owns or may hereafter own., all drugs and fermuals included, for their care. All wills or contracts shall be Null and void if made through undue influence, without this contract is canceled by the Partys of the Second Part.

"The partys of the second Part farther agree to give the Partys of the first Part a good burial and Pay all debts if there be any, and they farther agree to devide the property equally with their adopted daughter Jennie Stephenson if the Partys of the first Part die within one year. If the Partys of the first Part live longer than one year the Partys of the second Part shall be the legal and lawful heirs of all the Estate of the first Partys.

"James Beechler, M. D.

"Jennie Beechler.

"L. T. Wallenback.

"Carrie Wallenback."

It is asserted by the plaintiff and his wife that the foregoing document was prepared by the doctor, a man of education and business experience, and that at the doctor's request plaintiff took it to a stenographer to be typewritten. The original draft was not pro-

duced, but the signatures were added to the typewritten copy. The errors in spelling are attributed by the appellants to the stenographer, whose name or place of business could not be recalled by Wallenback. Wallenback testified that he was unable to read or write, except to the extent of writing his name. Specimens of Mrs. Wallenback's handwriting were offered in evidence. She was asked on the witness stand to write certain extracts read to her from the contract, and she displayed the same peculiarity in the spelling of the word "parties" as is apparent in the alleged contract. This and many other illuminating similarities between the specimens of her handwriting and the signatures of Dr. Beechler and his wife to the alleged contract were pointed out by the expert witness called on behalf of defendant.

Shortly before the death of Dr. Beechler plaintiff consulted an attorney, and as a result of that conference the attorney wrote the following letter to Dr. Beechler:

"An old gentleman by the name of Wallenback has requested me to take up with you for settlement a claim for services rendered by him to you at Santa Cruz, all the circumstances of which I am advised you are perfectly familiar with. He advises me that you promised to pay him at said time, but that you left the locality without seeing him. This matter must be adjusted. I assume that you are aware that this matter can be taken up not only through the courts, but through the office of the labor commissioner of the state of California, so give this matter your prompt attention."

True, the writer of this letter stated upon the witness stand that this letter was entirely his own idea—was not suggested by his client, and did not really state the claim of his client, but was sent merely to see what sort of a reply would be received from Dr. Beechler. However, we think the letter is of some significance despite this testimony. There is also evidence that some time after the date of the alleged contract Wallenback told Mrs. Gregory that he had a contract with Dr. Beechler by which he had been given an option to purchase the sanitarium for \$7,000. Wallenback also stated upon the witness stand that he had obtained such a contract. Just why he should be interested in paying \$7,000 for property which the doctor was already under contract to convey to him for his services is not made clear to us. After the Beechlers moved to San Francisco, in September, 1919, no attempt was made by plaintiff and his wife to communicate with them, nor to care for them, nor to render any service whatsoever. Mrs. Wallenback stated that they learned of the death of Mrs. Beechler from a friend in Oakland, and that notice of the death of the doctor came to her and to her husband through the newspapers.

It seems to us that the findings of the trial court are the natural and proper ones deduci-

ble from the evidence, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

62 Cal. App. 628

WEDDERIEN v. WOOD et al. (Civ. 4051.)

(District Court of Appeal, Second District, Division 2, California. June 21, 1923.)

1. Set-off and counterclaim $\S$ 29(2)—Unlawful detention and prayer for rent and judgment quieting title held properly pleaded in answer in suit for specific performance; "arose out of same transaction."

In a suit for specific performance of an alleged oral agreement to sell land wherein plaintiffs claimed ownership, it was proper under Code Civ. Proc. $\S$ 437, for the answer to allege as a defense plaintiff's unlawful possession and detention and to ask, under section 438, for affirmative relief for recovery for use and occupancy, and that defendants' title be quieted, since the claim for rent and prayer for quieting title "arose out of the same transaction" within sections 437, 438.

2. Landlord and tenant $\S$ 94(2)—Tenant denying landlord's title held not to have right to notice to quit.

A tenant who denies his landlord's title cannot claim a right to any notice to quit.

3. Appeal and error $\S$ 1011(1)—Finding on conflicting evidence not disturbed.

Evidence held sufficient to create that conflicting condition in the evidence into which an appellate court will not enter to inquire as to where the truth lies.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Suit by Albert Wedderien against Alonzo W. Wood and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Robert F. Shippee, of Los Angeles, for appellant.

Tobias R. Archer, of Los Angeles, for respondents.

CRAIG, J. [1] This is an action for specific performance of an alleged oral agreement to sell real property which the complaint states had been fully performed by the plaintiff. Judgment rendered for the defendants, quieting their title to the property involved as against the plaintiff, adjudging that defendants have possession and the value of the use and occupation of the premises. The defendants Alonzo W. Wood and Ellie Wood, answering, claim to be the owners of the property in question and asked to have their title to said property quieted as against the plaintiff. The plaintiff moved to strike the allegations of this character from the answer, which motion was denied. One of the

grounds upon which appellant relies is that this motion should have been granted. To sustain this contention he relies upon section 437 of the Code of Civil Procedure and asserts that the paragraphs of the answer sought to be stricken out are neither a general nor special denial of the material allegations of the complaint, nor a statement of new matter constituting a defense or counterclaim.

As we have said, the suit is one for specific performance of a contract for the sale of real property. The answer admits that the plaintiff has been in possession of the property; alleges facts which, if true, establish that the possession and detention thereof was unlawful; and asks affirmative relief for the recovery of rent for the use and occupancy of the premises, and also that the title of the defendants Alonzo W. Wood and Ellie Wood be quieted. We think these matters were appropriate to be litigated in the instant action and to be pleaded by way of answer. In so far as the character of the possession of the property by plaintiff was concerned, the allegations of unlawful detainer constituted a part of the defense.

The claim for rent clearly arose out of the same transaction as that which is the basis of the plaintiff's alleged cause of action, and hence was a proper matter to be pleaded by way of the answer. Sections 437, 438, Code Civ. Proc. For the same reason it was permissible to seek to quiet the title of the defendants as against the plaintiff's claim to ownership of the property in question. The mere filing of this action alleging the existence of a contract to convey was sufficient to render the defendants' title unmarketable. Had the plaintiff seen fit to have dismissed, the defendants could have secured relief only through an action to quiet title. The cloud which rested upon defendants' title grew out of the transaction which formed the subject matter of the instant suit. Defendants might have instituted a separate proceeding to quiet title, but they were not required to do so.

[2] Appellant specifies 10 particulars in which it is claimed that the evidence is insufficient to support the findings. The first three are grouped together under the assertion that the evidence does not uphold the finding of respondents' ownership of the property and the appellant's unlawful withholding of its possession on the 1st day of November, 1920. It is admitted that the respondents may be regarded as the owners from the date of recording the sheriff's deed which occurred September 30, 1920; however, the claim is made that plaintiff was at least a tenant from month to month and entitled to one month's notice to quit. Such a notice was given on October 27, 1920. The tenant who denies his landlord's title cannot claim a right to any notice. *McCarthy v. Brown*, 113

Cal. 15, 45 Pac. 14; *Abbott v. Kellogg*, 18 Cal. App. 432, 123 Pac. 227.

Therefore if the evidence supports the findings that the allegations in the complaint of the making of the oral agreement for the sale of the property are untrue, and also those findings of fact establishing defendants' ownership, the plaintiff must be held to have been in unlawful possession on November 1, 1920. The sheriff's deed was recorded before that date, and so, for the purpose of these three specifications of error, the findings are sustained.

[3] The next point which merits comment is that the evidence is insufficient to support finding No. 3, to the effect that the allegations in the complaint of an oral contract giving plaintiff the right to purchase under certain conditions, and that pursuant to said contract plaintiff paid defendants a sum in excess of \$1,000, and entered into possession of the property are untrue. The trial court found that no such contract as that alleged was ever made. The evidence is susceptible of this construction, and hence the judgment will not be disturbed upon this ground. The complaint alleges the agreement to have been made on February 14, 1918. Plaintiff's testimony was that the arrangement was oral. Alonzo W. Wood testified concerning the same conversation that he made the remark that if Wedderien could get the money within three months he would throw \$150 off from the principal sum of \$2,531.10, then owing to the defendants. The witness was then asked: "Did he make any further offer of payment of that sum or any other sum?" To which he replied, "No, sir," thus denying the agreement as alleged in the complaint and testified to by the plaintiff. Although there is other evidence in the record to sustain the court's findings here under consideration, the testimony above quoted is alone sufficient to create that conflicting condition in the evidence into which an appellate court will not enter for the purpose of inquiry as to where lies the truth. It may be added that if the contract of sale was not made, the delay upon the part of defendants in asserting their rights which occurred could not create such an agreement.

Paragraph III of the complaint states that pursuant to the verbal agreement to which reference has been made, plaintiff entered into possession of the premises, and paid certain interest to the defendants and taxes upon the property and paid out more than one thousand dollars for its upkeep and repair. This the findings hold to be untrue, and appellant insists that there is no evidence in support thereof. If no agreement such as that alleged was ever made, it necessarily follows that the plaintiff did none of the acts related in pursuance thereof.

The other specifications of insufficiency of

the evidence, as well as of error in admitting it, become immaterial by reason of the upholding of the findings already discussed. For example, the sufficiency of the attempted tender need not be considered, since the alleged contract whose provisions were intended to be availed of never existed.

The judgment is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

62 Cal. App. 615

CHAIN v. KATZE et al. (Civ. 3829.)

(District Court of Appeal, Second District, Division 2, California. June 20, 1923.)

Brokers $\Leftrightarrow$ 65(2)—Broker guilty of fraud in execution of agency forfeits right to compensation.

If a broker is guilty of fraud in the execution of his agency, or is not faithful to his trust, his right to compensation is lost.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Suit by Joseph Chain against H. C. Katze and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Emmons & Aldrich, of Bakersfield, for appellants.

Kaye & Siemon, of Bakersfield, and L. E. Nathan, of Los Angeles, for respondent.

FINLAYSON, P. J. Plaintiff brought this action for an accounting, alleging that defendants, whom he had employed as brokers to represent him in the purchase of certain real property, had been guilty of fraud in the execution of their agency and that they had wrongfully converted to their own use certain moneys with which he had intrusted them. Plaintiff recovered judgment, and defendants have appealed.

Substantially the following facts are shown by the evidence or were found by the trial court: Defendants, who are real estate brokers, were employed by plaintiff as his agents to negotiate for the sale to him of certain real property in the city of Bakersfield owned by one Chin Yen, and upon which was situated a hotel. After accepting the employment defendants, for the purpose of cheating and defrauding plaintiff, denied that they had been employed as the latter's agents to negotiate for the sale of the property to him, and claimed that they themselves had bought the property from Chin Yen, and that they were reselling it to plaintiff as his vendors, and in furtherance of their purpose to defraud they falsely and fraudulently represented to plaintiff that the purchase price of the property was \$34,000, when as a matter of fact it could be and was purchased

from the owner, Chin Yen, for \$31,000, as defendants well knew. By reason of this treacherous conduct on the part of his trusted agents plaintiff was induced to and did pay to them certain sums of money aggregating \$3,159.10. The sums expended by defendants in their negotiations with Chin Yen, including their personal expenses, amounted to \$2,928.50, which amount, when deducted from the \$3,159.10 so paid by plaintiff to defendants, left a balance of \$230.60, for which plaintiff recovered judgment.

Though crediting defendants with certain items of expense incurred by them in the course of their employment, such as traveling and telephone expenses, the trial court refused to allow them the commission to which they claimed they were entitled as compensation for services performed by them in negotiating for the property. There was evidence tending to show that in the community where this transaction occurred 5 per cent. of the selling price is generally considered to be a reasonable compensation for services honestly and faithfully performed by a broker in successfully negotiating for the sale of real property to his principal. Had the court allowed such compensation in this case the defendants would have received an additional credit of \$1,550, which would have left a balance in their favor of \$1,319.40, instead of a balance against them of \$230.60, as found by the court.

Appellants do not question the correctness of those findings whereby the court found that they had been guilty of fraud in the execution of their employment as respondent's agents. The sole point urged by them is that the court erred in not crediting them with a reasonable compensation for their services in negotiating for the sale of the hotel property to plaintiff. The contention lacks merit. The rule is so general as to be trite that, if a broker is guilty of fraud in the execution of his agency, or is not faithful to his trust, his right to compensation is lost. 9 C. J., p. 566; Hageman v. Colombet, 52 Cal. App. 350, 198 Pac. 842; Harrison v. Craven, 188 Mo. 590, 87 S. W. 962.

The judgment is affirmed.

We concur WORKS, J.; CRAIG, J.

62 Cal. Ap. 1

COHN v. CHAIN et al. (Civ. 3830.)

(District Court of Appeal, Second District, Division 2, California. June 20, 1923.)

Brokers — 65(2)—Brokers held to have forfeited all rights to compensation because of faithlessness to client in execution of agency.

Where brokers employed by defendant to purchase property misrepresented the purchase price, and repudiated their agency, and represented to defendant that they purchased the

property and were reselling it to him, and by reason of such fraud defendant executed a note to the brokers in the belief that such sum was necessary to facilitate the sale, brokers held to have forfeited all rights to compensation.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by Charles Cohn against Joseph Chain and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Emmons & Aldrich, of Bakersfield, for appellant.

Kaye & Siemon, of Bakersfield, and L. E. Nathan, of Los Angeles, for respondents.

FINLAYSON, P. J. Plaintiff, as the assignee of H. C. Katze and L. G. Helm, brought this action on a nonnegotiable promissory note for the principal sum of \$1,660, and to foreclose a mortgage given to secure its payment. The note and mortgage were executed by defendants, as makers and mortgagors, to Katze and Helm as the payees and mortgagees. Defendants' answer alleges that the note was given without any consideration therefor, and that it was fraudulently procured by the payees. Judgment passed for defendants, and plaintiff appeals.

The facts of this case are closely related to those involved in Chain v. Katze et al. (No. 3829) 217 Pac. 578, this day decided, and grow out of the same transaction. The payees, who had been employed by the defendant Joseph Chain as real estate brokers to negotiate for the purchase by him of certain hotel property in the city of Bakersfield, fraudulently represented to the latter that the purchase price was \$34,000, whereas its price was but \$31,000. Moreover, plaintiff's assignors, in furtherance of their scheme to defraud these defendants, repudiated their agency as such real estate brokers employed to negotiate for the sale of the property to their principal, and represented to him that they, themselves, had purchased the property, and were reselling it to him. By reason of this fraudulent breach of trust the defendant Joseph Chain, to complete the sum which he was led to believe would be necessary to meet the full amount of the misrepresented purchase price and to take care of certain incidental expenses, gave to Katze and Helm the promissory note in question, executed by himself and wife. The trial court, having found the facts in defendants' favor, entered a judgment canceling the note and mortgage.

Appellant urges that his assignors should have been allowed a reasonable compensation for their services as brokers in negotiating for the purchase of the hotel property. This sum, they claim, should be 5 per cent. of the actual selling price, i. e., 5 per cent. of \$31,000. Had the trial court allowed Katze and Helm this sum for their services in bringing

about the sale of the property to their principal, there would have been a balance due to them from Joseph Chain amounting to \$1,319.40; and it is claimed that to this extent, at least, there was a valuable consideration for the note. This is the sole point made on this appeal. On the authority of *Chain v. Katze et al.*, supra, it must be held that Katze and Helm, because of their faithlessness in the execution of their agency as real estate brokers employed by Joseph Chain to represent him in the purchase of the hotel property forfeited all right to compensation for their services.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

62 Cal. App. 632

WIGHTMAN v. HALL et al. (Civ. 4048.)

(District Court of Appeal, Second District, Division 2, California. June 21, 1923. Hearing Denied by Supreme Court Aug. 20, 1923.)

1. Vendor and purchaser — 78—Time of essence of option contract; courts may not extend.

Because of the nature of an option contract, time must be deemed the essence thereof, and the courts may not allow the optionee time beyond that limited in the writing in which to accept, nor is it necessary that the offeror of an option notify the optionee that the offer is no longer open when the time has expired.

2. Tenancy in common — 55(6) — Evidence held insufficient to establish ratification of extension on option given by cotenant.

Evidence that two co-owners of property, after a third had granted an extension on an option to purchase same, discussed the matter and carried on negotiations on the subject, held insufficient to establish a ratification of the unauthorized extension by the third co-owner.

3. Specific performance — 10(1)—Where unwarranted against one co-owner properly denied as to all.

Where specific performance as against one co-owner of property is unwarranted, it is properly denied as to all.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by E. J. Wightman against Della M. Hall, Cora M. Scheurer, and Genevieve B. Scheurer, personally, and against the first two named defendants as trustees under the will of Balzar W. Scheurer, deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

Swaffield & Swaffield, of Long Beach, and H. M. Barstow, of Los Angeles, for appellant.

Denio & Hart, of Long Beach, for respondents.

CRAIG, J. This is an action for specific performance of a written contract, giving

plaintiff an option to purchase property held by the defendants as equal co-owners in common. The contract was dated September 5, 1919, and expired January 15, 1920. On the last-mentioned date Della M. Hall signed her name, followed by the word "agent," executing a writing purporting to extend the plaintiff's option to February 15, 1920. On February 14th plaintiff tendered to Della M. Hall the agreed purchase price. She rejected this offer. The contract was executed by each of the defendants, but Della M. Hall was the only one to sign the extension agreement. Time was not expressly made of the essence of either writing. The trial court denied the relief sought and entered judgment for the defendant.

[1] We think it clear that, at the time of plaintiff's tender the original option had expired for all purposes unless it was kept alive by the writing signed by "Della M. Hall, agent." A number of authorities are cited by appellant to the proposition that where time is not expressly made of the essence of the contract the mere fixing of a time or date does not make it an essential factor. These cases principally deal with contracts other than option. In *Cates v. McNeil*, 169 Cal. 697, 147 Pac. 944, the contract was in creating an option. It was so construed that the offer to perform was within the time stipulated. *Vassault v. Edwards*, 43 Cal. 458, was a case where an agreement gave plaintiff 20 days in which to exercise his option to accept or reject. Later plaintiff's time was extended indefinitely, so that defendant might perfect his title. It was the court's opinion that time was of the essence of the original proposal for sale, although not expressly so stated. It is said in the opinion:

"Had no time been mentioned, the plaintiff would have been entitled to reasonable time in which to exercise his election, but, the time having been fixed, the court has no power to extend it."

This principle is applicable to the instant case. It is in accord with authority in other jurisdictions.

The rule fixing the time for the exercise of options is well stated in 21 *American & English Encyclopedia of Law*, 931, as follows:

"Where by the terms of a contract for an option the exercise thereof is limited to a specific and definite time, it is necessary that the option be exercised before the expiration of such time, otherwise the right is gone. Attempts to exercise the option after the expiration of the time limited, on the ground that in equity time is not of the essence of a contract, have been uniformly met with the answer that where the parties have seen fit to regard time as an essential element, the courts must likewise so regard it. However true in regard to executed contracts in general, the principle has generally been regarded as having no applica-

tion to an offer to make a contract which by express agreement is to remain open for a specified time. There is, moreover, a strong inclination on the part of the courts to view any delay with great strictness, on the ground that the party seeking to enforce performance was not bound, while the other party was bound."

Many English and American cases are cited supporting this statement of the law, and *Vassault v. Edwards*, supra, has not been questioned or qualified in this jurisdiction.

A full appreciation of the nature of an option precludes the idea that courts may allow the optionee time beyond that limited in the writing in which to accept the offer of the other party. With the lapse of time the right to exercise the option automatically expires. In this regard it is similar to an estate upon limitation, which terminates without any act of those claiming the estate to succeed to it. It is not necessary for the offeror of an option to notify the optionee that the offer is no longer open when the time limit has expired. It is not a case of cancellation of a right, for the right only existed up to a certain time and then ceased by the mere passing of that time.

The most that can be said for appellant's contention concerning the efficacy of the extension signed by Della M. Hall, as agent, is that the evidence was conflicting as to her authority. It is unnecessary to quote the testimony in detail, but there was direct testimony to the effect that she possessed no agency to bind her sisters in this transaction.

[2] The evidence upon which appellant predicates the claim that Genevieve B. Scheurer and Cora M. Scheurer ratified the act of Della M. Hall in that behalf is quite insufficient. It appears that Cora Scheurer was informed of the signing of the extension by Della after it had been executed; the former discussed the matter with the latter, and carried on "negotiations" on the subject, although the transcript does not indicate the nature of them. These facts would not justify the conclusion that a ratification had occurred. Nor is the rule of estoppel applicable here. Plaintiff was not led to do anything in reliance upon Cora M. Scheurer's conduct. He failed to take advantage of his option, and his right under the original agreement had expired before the acts or silence relied upon had occurred.

[3] We conclude that the trial court rightly held that the plaintiff was not entitled to specific performance against Cora M. Scheurer and Genevieve B. Scheurer. Consequently it properly denied the prayer for specific performance against all of the defendants, since they were co-owners. *Olson v. Lovell*, 91 Cal. 508, 27 Pac. 765.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

191 Cal. 551

S. L. JONES & CO. v. BOND. (S. F. 9923.)(Supreme Court of California. Aug. 1, 1923.
Rehearing Denied Aug. 30, 1923.)**1. Sales 59—Sales contract not mentioning place of production held not modified by letter of credit naming place of production; "terms to be arranged."**

Where contract for the sale of steel bars provided for the quantity, size, price, time, and place of shipment, and under the printed heading "Terms" had the words "To be arranged," and thereafter the parties orally agreed that payment should be in cash on delivery f. o. b., such payment to be secured by a letter of credit, the contract was complete, and, since the phrase "terms to be arranged" includes only the terms of payment and not the producer from whom the steel was to be obtained, the fact that the letter of credit subsequently obtained from a bank by the buyer authorized the buyer to draw on the bank for the steel to be shipped by a certain named steel works, being a contract solely between the seller and the bank, could not affect the contract between buyer and seller, and, since such contract did not name any particular steel producer, the seller's failure to deliver could not be excused by the fact that the steel works named in the letter of credit never produced steel bars.

- 2. Sales** ⚡85(1)—Contract must clearly name production concern to excuse seller from delivery because of nonproduction by such concern.

If seller desires to be free from his obligation to deliver in the event of nonproduction by a particular concern, the contract must clearly provide to that effect.

- 3. Sales** ⚡418(3)—Measure of damages for seller's failure to deliver stated.

Under Civ. Code, §§ 3308, 3354, the measure of damages for breach of contract to sell personalty is the excess, if any, of the value of the property to buyer over the amount which would have been due the seller under the contract if it had been fulfilled, and in estimating such damages the value of the property to the buyer is deemed the price for which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put in his possession.

- 4. Sales** ⚡418(2)—In computing damages for nondelivery of steel in Vancouver, market value in Vancouver held properly determined by adding cost of transportation to Pittsburgh market value.

In an action for damages for breach of contract for seller's failure to deliver steel bars in Vancouver, to compute the damages the market value of steel in Vancouver was properly determined by adding to the Pittsburgh market value the cost of transportation.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by S. L. Jones & Co., against Vincent Bond, doing business under the name of Bond Bros. & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

Lent & Humphrey, of San Francisco, for appellant.

Powell & Dow, of San Francisco, for respondent.

LENNON, J. [1] The defendant in this action appeals from a judgment awarding damages to the plaintiff for an alleged breach of contract. The conceded facts of the case which constitute the basis of plaintiff's cause of action are these: On January 27, 1920, plaintiff and defendant signed an instrument, partly printed and partly typewritten, which provided for the delivery by the defendant to the plaintiff of 1,000 long tons of steel bars of a specified size at \$3.90 per 100 pounds, f. o. b. Vancouver. Shipments were to be made in February, March, and April, subject to "Hunt's inspection, buyer's account." On the face of this instrument, under the printed heading "Terms," the parties inserted the words "To be arranged." Thereafter the parties arranged for a letter of credit, which was issued by

the Bank of California on February 11, 1920. This letter of credit authorized the defendant to draw on the bank at sight for and on account of the plaintiff "for any sum or sums not exceeding in all \$92,000 U. S. currency covering 1,000 long tons steel bars (order No. 83, to be shipped by Port Moody Steel Works, Ltd., Port Moody, B. C., on or before April 30, 1920."

No steel was ever delivered, and it is for this failure to deliver that damages were sought and recovered. Defendant contends that the instrument of January 27, 1920, is insufficient in and of itself to constitute either a formal contract between the parties or a memorandum, under the statute of frauds, for the reason that it affirmatively appears from the phrase "Terms. To be arranged" in said instrument contained, that the terms of credit or payment were not agreed upon, but were to be the subject of future negotiations between the parties.

It is to be noted that defendant does not claim that there was no contract whatever between the parties. The defendant, however, denies that any contract was established as of January 27, 1920, but claims that the terms of payment were agreed upon and settled by subsequent arrangements between the parties, and that a binding contract thereupon came into existence. One of the terms of this contract, so the defendant argues, was that payment should be made only for steel shipped by the Port Moody Steel Works. With this fact as a basis the defendant contends for the conclusion that, inasmuch as the Port Moody Steel Works never commenced operations and produced no steel, delivery by defendant under the contract was excused.

Even if it be conceded that the first portion of the defendant's contention be correct, namely, that the terms of payment subsequently agreed upon must be considered as a part of the contract ultimately consummated, and assuming that, had the parties relied exclusively upon production by a specified mill for performance, the failure of such mill to operate would have excused delivery, nevertheless we are of the opinion that the defendant's contention cannot be maintained. This must be so, we take it, for the reason that we find nothing in the contract between the seller and the buyer indicating or tending to indicate that it was the intent of the parties to limit the subject-matter of the contract to steel which was to be fabricated at and by the Port Moody mills.

The contract of January 27, 1920, between the parties was entire and complete on its face, except as to the terms of payment thereafter to be arranged. It will be noted that no mention is made in the instrument executed on that date of the Port Moody

mills or of any other place of production, nor do we find any other indicia that these mills were exclusively in the minds of the parties. The phrase "Terms. To be arranged" cannot, by even the most liberal construction, be construed to mean anything more than that the method and manner of payment was to be thereafter arranged. Obviously it was not intended to nor did it include the idea that there was open to settlement the question of where the steel should be obtained. The written instrument of January 27, 1920, therefore, contained all the details of the agreement for the purchase and sale of the steel, with the exception of the method of payment to be later agreed upon. Thereafter the parties did arrange and orally agree upon the terms of the payment, i. e., payment to be cash upon delivery of the steel f. o. b.; such payment to be secured by a bank letter of credit. That these were the terms of payment subsequently agreed upon is evidenced, not by the letter of credit, but by the fact of the issuance of the letter of credit. The letter of credit was not, therefore, a part of the contract between the parties, but is only evidence of the fact that they had reached an agreement as to the one term not definitely agreed upon in the original agreement. This oral agreement as to the manner and method of payment, together with the written instrument of January 27, 1920, constituted the contract as ultimately agreed upon between the seller and the buyer.

[2] The bank in issuing its letter of credit inserted therein, "To be shipped by Port Moody Steel Works, Ltd." Whatever may have been the purpose of the bank in inserting this phrase in the letter of credit, the letter of credit was not part of the contract between the buyer and the seller, but was an entirely separate and independent contract between the bank and the seller. *American Steel Co. v. Irving National Bank* (C. C. A.) 266 Fed. 41; *Bank of Taiwan v. Gorgas-Pierie Mfg. Co.* (C. C. A.) 273 Fed. 660; *Frey v. Sherburne*, 193 App. Div. 849, 184 N. Y. Supp. 661. And although the seller might have refused to accept a letter of credit in that form, the delivery and acceptance of the letter of credit did not constitute a modification of the contract between the seller and the buyer. In other words, the result of the dealings was that the seller remained obligated to furnish the steel contracted for from whatever source he could obtain it, and that the buyer remained obligated to pay for the steel upon delivery, since these were the obligations imposed by the contract between the seller and the buyer, as embodied in the written instrument of January 27, 1920, and the subsequent oral agreement as to the manner and method of payment. The seller, by reason of the insertion by the bank in the letter of credit of

the phrase "To be shipped by Port Moody Steel Works, Ltd.," could not claim payment from the bank unless the steel was delivered f. o. b. cars at Port Moody. This circumstance, however, did not relieve him from his obligation under his contract to furnish the steel to the buyer. If a party desires to be free from his obligation to deliver a commodity in the event of nonproduction by a particular concern, it is incumbent upon him to make a clear provision to that effect in his contract. *Law v. San Francisco Gas, etc., Co.*, 168 Cal. 112, 142 Pac. 52, Ann. Cas. 1915D, 842. Because of the absence of such a provision in the contract herein sued upon, we conclude that the defendant was not legally excused from performance of the terms of the contract by the failure of the Port Moody mills to open and operate.

[3, 4] It is further contended by the defendant that the evidence does not sustain the finding of the trial court as to the amount of damages suffered by the plaintiff. The measure of the damage caused by a breach of an agreement to sell personal property, not paid for, is deemed to be the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled, and in estimating such damages the value of the property to the buyer is to be deemed the price for which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put in his possession. Civ. Code, §§ 3308, 3354. The testimony of several witnesses for the plaintiff was that the market price of steel at Vancouver upon the final date for delivery was \$4.60 per 100 pounds. But the defendant insists that this market price was arrived at by the witnesses by adding to the Pittsburgh market price the cost of transportation, and that the actual price at Vancouver was considerably less than this price. It is, of course, a well-settled economic principle that, in order to successfully compete with other manufacturers offering the same commodity, a manufacturer must quote prices as low as his competitor, otherwise he will not get the business. If, therefore, the market price at Vancouver was lower than the total of the price quoted by eastern manufacturers of steel, plus the cost of transportation to the coast, purchasers of steel at Vancouver would not purchase the steel from the eastern mills, and these mills would be forced to lower their price or leave the field. One of the witnesses for the plaintiff, who was the Pacific coast representative for twelve eastern mills, testified that these eastern mills were competing with mills on the coast, and that because of the competition the eastern mills were forced to quote the lowest price they could. He also testified that the prices quoted by the mills he represented

were not interfered with by the offering of steel at a lower price than his mills were offering steel. It follows, therefore, that the price of \$4.60 per 100 pounds, which was the price quoted by the eastern mills at Pittsburgh, plus the cost of transportation, must have been as low as the price of steel offered by local mills on the Vancouver market. This evidence was therefore sufficient to support the award of the trial court of \$14,560 damages based upon the market price for steel of \$4.60 per 100 pounds at Vancouver.

It may be well in passing to note that, inasmuch as the market price of steel at Vancouver was quoted by witnesses for plaintiff in terms of United States money, it is, of course, clear that the Canadian rate of exchange and the value of the Canadian dollar has no bearing on the question.

Defendant was not, in our opinion, prejudiced by the trial court's refusal to allow an amendment to defendant's answer during the course of the trial for the purpose of showing an agreement to extend time for performance. The court made findings upon the matters contained in the proposed amendment. These findings are supported by the evidence.

The judgment appealed from is affirmed.

We concur: WILBUR, C. J.; WASTE, J.; MYERS, J.; SEAWELL, J.; LAWLOR, J.; KERRIGAN, J.

191 Cal. 457

Ex parte HARRON. (Cr. 2520.)

(Supreme Court of California. July 6, 1923.)

1. Habeas corpus ☞31—Ineffective to review proceedings after conviction in justice court.

After conviction on trial of issue in a justice's court and appeal taken therefrom, the writ of habeas corpus cannot be used as a writ of error to review proceedings on the ground that on a former prosecution for the same offense the complaint was dismissed without provision for amendment of the complaint, as provided by Pen. Code, § 1387.

2. Habeas corpus ☞31—Former jeopardy to be specially pleaded and not ground for release on habeas corpus.

In a criminal prosecution a former conviction or acquittal is a matter to be specially pleaded and is not ground for release on habeas corpus, since it does not go to the jurisdiction, in view of Pen. Code, § 1429.

3. Criminal law ☞165—Once in "jeopardy" defined.

To constitute once in "jeopardy," trial must be for a prescribed public offense on valid indictment, before a competent court and a jury duly impaneled, sworn, and charged, or if tried by the court it must be entered upon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jeopardy (In Criminal Law).]

4. Criminal law ☞163—Plea of once in jeopardy applies to misdemeanors.

The plea of once in jeopardy or a statutory bar applies to misdemeanors as well as felonies, under Pen. Code, § 687.

5. Criminal law ☞286—Failure to plead statutory and constitutional pleas constitutes waiver.

Statutory and constitutional pleas not specially pleaded are waived, in view of Pen. Code, §§ 1016, 1017, 1020, and 1429.

6. Habeas corpus ☞4—Failure to exhaust defense of former jeopardy through appeal constitutes waiver barring relief by habeas corpus.

In a criminal prosecution, where defendant pleads former jeopardy, but no finding is made, failure to raise the point on motion for new trial or appeal constitutes waiver precluding the right to release on habeas corpus.

In Bank.

Application of Howard Harron for a writ of habeas corpus against the Sheriff of Marin County. Writ discharged.

Eric J. Rosenstirn, of San Francisco, for petitioner.

Henry E. Greer, Dist. Atty., of San Rafael, for respondent.

LAWLOR, J. Upon the verified application of petitioner a writ of habeas corpus was ordered to issue to Hon. J. J. Keating, sheriff of the county of Marin, commanding him to produce petitioner before this court. According to the allegations of said application, petitioner was unlawfully imprisoned and restrained in the county jail of said county by respondent, the said sheriff, "under and by virtue of a pretended warrant of commitment issued on the 26th day of October, 1922, by Hon. Herbert de la Montanya, judge of the justice's court of the township of San Rafael, county of Marin, state of California"; that on or about August 12, 1922, before the justice of the said court, Josephine Leah Harron, wife of petitioner, swore to a complaint charging petitioner with the crime of misdemeanor, to wit, battery; that petitioner was taken into custody under a warrant of arrest and brought before the said court; that the said complaint purports to be filed on "August 12, 1912," and in the charging part it is alleged that on the 12th day of August (no year is stated) " * * * the said Howard Harron, on the said day, in said county did willfully and unlawfully use force and violence upon the person of complainant;" that bail was first fixed by the said court in the sum of \$1,000 but upon petitioner informing the said justice that the bail was excessive and that his home would, in consequence of his inability to furnish such bail, be broke up and he never could enter it again, the justice asked petitioner if he meant by his declaration that he would

never again enter his home, to which petitioner replied in the affirmative, whereupon the justice put this question to him, "Will you put that in writing?" that petitioner said he would, and then prepared, signed, and swore to the following declaration: "I am leaving my home at 96 Minerva Ave., Fairfax, under promise to Judge De la Montanya that I will not enter it again under any circumstances. Aug. 12, 1922. Howard Harron;" that this declaration was filed with the complaint, and petitioner was released from custody upon his own recognizance; that the justice thereupon told petitioner he could go to his home accompanied by a deputy sheriff for the purpose of packing his belongings and then to leave immediately in conformity with his sworn promise; and that the justice then declared he was unable to withdraw the complaint already filed, but that the case was dismissed; that petitioner was free to go, and that the said justice then and there dismissed the case.

It is further alleged that another complaint was filed on September 5, 1922, charging the identical offense and that upon this complaint petitioner was tried, convicted, and sentenced to serve a term in the county jail.

Appended to the petition and made a part thereof are copies of the "pretended commitment" (Exhibit A), the complaint of August 12 (Exhibit B), the complaint of September 5 (Exhibit C), Docket B, containing "What purports to be a certified copy of the said justice," referring to the proceedings of August 12 and September 5 (Exhibit D), and an abstract of the docket entry of September 5 from Docket B (Exhibit E). The only one of these papers which is certified is Exhibit D, and in this the date of the certification is not given. Exhibit D reads as follows:

"Docket B. * * * 1922. Aug. 12. Defendant duly arraigned, being, by the court, informed of all his legal rights, including the nature of the charge against him, his right to counsel at all stages of the proceedings, his right to a reasonable continuance, his right to the free services of an officer to summon witnesses on his behalf, and of his right to have a jury trial. Defendant answered that his true name is as above. Defendant released on his own recognizance Sept. 5, in open court, and in the presence of the said defendant and his counsel, the district attorney made a motion to dismiss the complaint filed herein as above, on the ground that said complaint was defective. Motion granted by the court. H. De La Montanya, J. P.

"I hereby certify that the foregoing is a full, true and correct copy of the proceedings in said case, as shown on page 202 of my Docket B in my office. H. De La Montanya, Justice of the Peace of San Rafael Township."

Referring to Docket B, the petition alleges that the first complaint was dismissed on August 12 as above alleged, denies the recital that it was dismissed on September 5, denies that the district attorney on that day or any

other day made a motion to dismiss it for any reason, and alleges that the entry of the purported order of dismissal on September 5 was entered nunc pro tunc in the docket on October 28, two days after the commitment was issued. The petition then alleges the fact to be that the justice filed a certified copy of the abstract of Docket B in the superior court (the date of the filing is not alleged), which abstract contained a full recital of all the proceedings on September 5, and that it nowhere appears in the abstract that the first complaint was on September 5, or ever, or at all, dismissed, either on the motion of the district attorney, or otherwise, or at all, and that it affirmatively appears in the abstract, "as hereinabove alleged, that a second complaint charging the identical misdemeanor that had been heretofore dismissed by the said justice on August 12, 1922, as hereinabove alleged, was sworn to by the same complaining witness, and filed with the said justice." Then follow allegations as to two felony charges, purporting to grow out of petitioner's domestic difficulties which are not material to a decision herein. The petition then alleges that when petitioner appeared before the court on September 5 it was to submit to the preliminary examination on one of the charges of felony, but that, instead of such examination being held, the second complaint was filed; he was tried thereon and found guilty, whereupon a motion for a new trial and a motion in arrest of judgment were successively interposed and denied, and he was sentenced to serve 30 days in the county jail. Upon these alleged facts it is claimed by petitioner that the court dismissed the first complaint on August 12, and that the order of dismissal was not explicitly made for the purpose of amendment, within the meaning of section 1387 of the Penal Code.

Respondent filed an unverified return to the effect that he held petitioner by virtue of the said commitment, an uncertified copy of which was attached to the return, and that petitioner had been released upon the issuance of the writ. The return was accompanied by an affidavit of the justice purporting to traverse certain allegations of the petition, and to which was attached an uncertified copy of the first complaint, also an affidavit of the district attorney, denying certain allegations of the petition relating to the said felony charges, and to which affidavit was attached a partial transcript of the purported proceedings of September 5, made and certified to by the official stenographic reporter of the superior court. The docket entries were not made a part of the return. On the first hearing in this court the return was held insufficient, and respondent was granted permission to file an amended return. At the next hearing an amended, unverified return was filed, and it was stipulated that the petition might be regarded as a traverse thereto.

After oral argument the matter was ordered submitted on the filing of additional points and authorities.

The amended return is to the effect that on October 26 respondent took petitioner into custody under and by virtue of the commitment, and that he remained in such custody until November 8, when he was released on bail. The allegations which follow are that petitioner was charged in the first complaint on August 12; that he was arraigned thereon and released on his own recognizance; that on August 23, in open court, petitioner and his counsel being present, the district attorney was directed by the court to file the second complaint because of two defects in the first—that it purported to be filed on August 12, 1912, instead of 1922, and that the year was omitted in describing the offense; that the matter was then continued until September 5 when the second complaint was filed, petitioner arraigned thereon, and the case continued until September 8, on which date petitioner was tried by the court, sitting without a jury, found guilty as charged, and on his motion the case was continued until September 11, at which time motions for a new trial and in arrest of judgment were interposed on behalf of petitioner, and on his motion the matter was continued until September 15, on which day the said motions were argued, submitted, and denied, whereupon petitioner stating he was ready for judgment was sentenced to serve 30 days in the county jail. It is further alleged that an appeal to the superior court from the said judgment and that it was affirmed, and that the commitment was issued out of the said justices' court.

Attached to the amended return are uncertified copies of the first and second complaints, an affidavit of the justice averring that he had issued the first complaint; that certain proceedings occurred on August 23 as mentioned in the amended return; that the second complaint was filed on September 5, and that the order dismissing the first complaint "was explicitly made for the purpose of amending the same, as the court was and is of the opinion" that it did not state a cause of action. Also attached to the amended return was an affidavit of the district attorney, and a certified transcript of the proceedings of September 5, more extended than the part thereof attached to the original return of the official stenographic reporter. The affidavit of the district attorney avers that on August 23 the court informed him that he would have to file a new complaint; that on September 5 he filed the second complaint "pursuant to the order of said court, as he understood, directing him to do so, and was filed for the purpose of amending the defective one then on file."

Because of the issue of facts tendered by the pleadings and the form in which the rec-

ord is presented, we have deemed it necessary thus to describe it somewhat in detail. Petitioner alleges that the first complaint was dismissed on August 12 in disregard of the provisions of section 1387, and the showing of respondent is that no action was taken looking to the dismissal of the first complaint until August 23, when the district attorney was directed to file a new complaint because of the indicated defects in the first one, and that the order of dismissal was not made until September 5, when the second complaint was filed. The showing of respondent does not include any docket entries whatever, and the return is not verified. It is apparently sought by respondent to establish the facts relied on by the affidavits of the justice and the district attorney and the reporter's transcript.

A docket is required to be kept by the justice as defined in section 93, in accordance with section 911 of the Code of Civil Procedure.

"Such entries in a justice's docket, or a transcript thereof, certified by the justice, * * * are prima facie evidence of the facts so stated." *Id.* 912.

An index must be kept. *Id.* 913. Section 1428 of the Penal Code provides:

"A docket must be kept by the justice of the peace or police justice, or by the clerk of the courts held by them, if there is one, in which must be entered each action and the proceedings of the court therein."

It was said in *Garfield v. Douglass*, 22 Ill. 100, 74 Am. Dec. 137, note:

"The record or entry of the justice is higher and more trustworthy than any parol evidence can be. If one record is opened to be questioned by parol evidence then another must be, and all security and confidence in the stability of records are gone."

See *Los Angeles v. Young*, 118 Cal. 295, 50 Pac. 534, 62 Am. St. Rep. 234.

The showing in the return is evidently not made for the purpose of explaining or supplementing the docket entries, but to take the place of them. It was suggested at the first hearing that this may not be done. On habeas corpus the burden is on the prisoner to show a lack of jurisdiction in the court upon whose process he is restrained, but defendants should be able to rely on the record of court proceedings as prescribed by law. The petition, we have pointed out, contains Docket B, and these are the only docket entries in the record. It is alleged in the petition that they are not correct, and it does not appear that any action was taken by petitioner to have them corrected. If the allegations of the verified petition are true, the entry of August 12 should have recited the order of dismissal. It does recite that petitioner was released on his own recognizance and this might indicate a halt in

the proceedings. It would, however, also tend to negative a dismissal of the case as claimed by petitioner, although there is no recital of a continuance. The petition alleges that the closing sentence in the entry of September 5 did not appear in the abstract of the docket when it was filed in the superior court by the justice, but was added later, and this is nowhere denied in the return. Respondent does not claim the docket entries were omitted from the return because Docket B was made a part of the petition nor that the entries are, in fact, correct. A docket entry of the purported proceedings of August 23 is not made a part of the record. The return alleges that the case was continued from August 12 to September 5. Moreover, according to the reporter's transcript of September 5, the answer of the justice to petitioner's statement that he understood the battery charge had been disposed of "at the last hearing here," which exchange is quoted elsewhere, would indicate the order of dismissal had been previously made, and this is at variance with other parts of the return. Nor is the allegation of the petition that the first complaint was dismissed on August 12 specifically denied in the return. In this state of the record we are not prepared to hold, whatever the actual fact may be, that when the first complaint was dismissed the order was explicitly made for the purpose of amending it. We are satisfied, however, that in view of the record, especially the docket entry of August 12, it was the complaint, and not the action, that was dismissed.

[1] Petitioner's contention is that under section 13, art. 1 of the Constitution, section 1387 of the Penal Code, and the federal guaranties, he is entitled to his discharge on habeas corpus. This is based on the reasoning that, it having been held a statutory bar arises and jurisdiction lapses, entitling a defendant to discharge on habeas corpus when an order sustaining a demurrer to an indictment or information is made without directing a resubmission (Pen. Code, § 1008; *Ex parte Williams*, 116 Cal. 512, 48 Pac. 499; *Matter of Hughes*, 160 Cal. 398, 117 Pac. 437; *Ex parte Hayter*, 16 Cal. App. 211, 116 Pac. 370); so here, by analogy, a bar arose under section 1387, and there would be no further prosecution of the offense when the first complaint was dismissed in disregard of the provisions of that section, and petitioner would be entitled to his discharge on habeas corpus. It is stated by petitioner that it was in order to bring his case within the authority of those relied upon that he deferred seeking release on habeas corpus until the judgment became final and he was taken into custody to serve the sentence.

The analogy relied upon by petitioner is lacking in one essential element—in the cases cited there had been no trial of the general

issue, while here issue was joined on the second complaint, petitioner was tried, found guilty, interposed motions for a new trial and in arrest of judgment, was sentenced to serve a term of imprisonment, took an appeal, judgment was affirmed, and submitted himself in execution of the judgment in order to have the questions now presented determined upon a writ of habeas corpus.

[2] After conviction and appeal the writ of habeas corpus cannot be used as a writ of error to review the proceedings in a justice's court. 29 C. J. § 36; *Ex parte Collins*, 151 Cal. 340, 90 Pac. 827, 91 Pac. 397, 129 Am. St. Rep. 122. It was said in the *Collins* Case, at page 350 of 151 Cal., at page 831 of 90 Pac. (129 Am. St. Rep. 122):

"It is further contended by petitioner that the perjury with which he was charged in the second indictment consisted in swearing to some of the same matters which formed the basis of the charge of perjury in the first indictment. From this it is argued that a verdict of acquittal on the first charge would be conclusive in favor of the defendant on any subsequent trial. *United States v. Butler*, 38 Fed. 498; *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. 432; *Cooper v. Commonwealth*, 106 Ky. 909, 90 Am. St. Rep. 275, 51 S. W. 789. Similarly, it is claimed, a verdict of conviction on the first charge would preclude a conviction on the other. We need not decide whether the principle invoked has any application to the facts here presented. In any event, such acquittal or conviction in one trial is *matter of defense to be relied on in the other*. It does not go to the jurisdiction, and affords no ground for release on habeas corpus." (Italics ours.)

The rule is different where habeas corpus is sought upon the claim that the prisoner has been placed in jeopardy for the identical offense within the meaning of the state and federal constitutions, for this goes to the jurisdiction of the trial court to entertain the second prosecution. *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; *Bens v. U. S. (C. C. A.)* 266 Fed. 152; *People v. Warden of City Prison*, 202 N. Y. 138, 95 N. E. 729; *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

Petitioner's contention is that under the constitutional guarantees and section 1387, already mentioned, the justice's court was without jurisdiction to entertain a second prosecution for the same offense, because it failed to make an order of resubmission when dismissing the first complaint. Respondent denies the applicability of the bar in section 1387 to cases in inferior courts, and contends that petitioner failed to interpose a special plea on the trial under the second complaint, and that, therefore, the point was waived. Petitioner insists, however, that in legal effect he pleaded specially as matter of defense at the trial.

[3,4] To constitute once in jeopardy the

party must be placed on trial for a prescribed public offense, on a valid indictment, before a competent court, with a competent jury, duly impaneled and sworn and charged with the case (*People v. Webb*, 38 Cal. 467, 479; *People v. Hill*, 146 Cal. 145, 79 Pac. 845), or, if the trial is by the court, it must be entered upon (*Haase v. State*, 8 Ind. App. 488, 36 N. E. 54; *People v. Goldfarb*, 152 App. Div. 870, 138 N. Y. Supp. 62; *Id.*, 213 N. Y. 664, 107 N. E. 1083; *Brown v. State*, 105 Ala. 117, 16 South. 929). Section 687 of the Penal Code provides as follows:

"No person can be subjected to a second prosecution for a public offense for which he has once been * * * convicted or acquitted."

The plea of once in jeopardy or a statutory bar applies to misdemeanors as well as felonies. *U. S. v. Block* (D. C.) 262 Fed. 205; *Berkowitz v. U. S.*, 93 Fed. 452, 35 C. C. A. 379; *City of St. Paul v. Stamm*, 106 Minn. 81, 118 N. W. 154; *Brink v. State*, 18 Tex. App. 344, 51 Am. Rep. 317; *Hazleton v. State*, 13 Ala. App. 243, 68 South. 715; *Noland v. People*, 33 Colo. 322, 80 Pac. 887; *People v. Miner*, 144 Ill. 308, 33 N. E. 40, 19 L. R. A. 342; *Village of Northville v. Westfall*, 75 Mich. 603, 42 N. W. 1068; *McCauley v. State*, 26 Ala. 135.

Section 1429 of the Penal Code declares in part:

"The defendant may make the same plea as upon an indictment, as provided in section ten hundred and sixteen."

Section 1016 contemplates four pleas to an indictment or information:

"(1) Guilty. (2) Not guilty. (3) A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of guilty or not guilty. (4) Once in jeopardy."

Section 1017 provides that every plea must be oral and entered upon the minutes of the court in the prescribed form. Section 1020 declares that—

"All matters of fact tending to establish a defense, other than one specified in the third and fourth subdivisions of section ten hundred and sixteen, may be given in evidence under the plea of not guilty."

[5] It has been held that the statutory procedure as to the interposition of a plea in bar must be followed in respect to once in jeopardy and any statutory bar, and that the plea is waived if not demanded, even if both trials are before the same court. *People v. Bennett*, 114 Cal. 56, 45 Pac. 1013; *People v. McFarlane*, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245; *People v. Hawkins*, 127 Cal. 372, 59 Pac. 697; *Rebstock v. Superior Court*, 146 Cal. 308, 315, 80 Pac. 65; *People v. O'Leary*, 77 Cal. 30, 18 Pac. 856, reversing *People v. O'Leary*, 2 Cal. Unrep. 843, 16 Pac.

884. A contrary view was expressed in the *Bennett Case* when it was before the United States District Court on a writ of habeas corpus (*In re Bennett* [D. C.] 84 Fed. 324), but the decision was put on the ground that habeas corpus was not the proper remedy. It was said in *Huntington v. Superior Court*, 5 Cal. App. 288, 292, 90 Pac. 141, that the dissenting opinion of Chief Justice Beatty in *People v. Bennett*, supra, became the law on this question in *People v. Smith*, 134 Cal. 454, 66 Pac. 669 (a charge of murder and conviction of manslaughter), but as pointed out in *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654, nothing in the *Smith Case* is in conflict with the earlier cases. In the *Smith Case* it was held the defendant was only entitled to 10 peremptory challenges. It appears from the decision that the court announced at the commencement of the retrial that the defendant was only to be tried for manslaughter. On appeal no allusion was made to special pleas, and neither *People v. Bennett*, supra, nor *People v. McFarlane*, supra, was cited. It must be regarded as the law of this state that the constitutional and statutory pleas must be entered specially, and if this is not done they are waived. This is the general rule. *L. R. A.*, 1917A, 1233, note, citing many authorities, including *People v. Bennett*, supra, and *People v. Strickler*, 167 Cal. 627, 140 Pac. 270.

Petitioner relies on the following portion of the reporter's transcript of September 5 to prove that he specially pleaded the dismissal of the first complaint as a bar:

"The Court (to the District Attorney): I think you had better file a new complaint. There is an error in the date, 1912 instead of 1922. (New complaint prepared by Mr. Greer.)

"The Court: Mr. Harron, here is a new complaint. (Reads complaint filed September 5, 1922.)

"Mr. Greer: Are you willing to proceed on that battery charge?

"Mr. Manning: Mr. Harron tells me he has some witnesses on the battery charge.

"Mr. Harron: I want to say this: I understood from his honor, the judge, at the last hearing here that this battery charge was disposed of.

"The Court: Simply dismissed because there was a defect in the date."

[6] It may be doubted whether this constituted the interposition of a special plea. But even if it did no finding was made thereon by the court. Whether the case is tried by jury or by the court the facts constituting the bar must be found. It has been held that, where a plea in bar was interposed in conjunction with a plea of not guilty and the jury failed to find upon the plea in bar, the defendant was entitled to a new trial. *People v. Tucker*, 115 Cal. 337, 339, 47 Pac. 111; see *People v. Kinsey*, 51 Cal. 278; *People v. Fuqua*, 61 Cal. 377; *People v. O'Leary*, 77 Cal. 30, 33, 18

Pac. 856; Id. (Cal. Sup.) 16 Pac. 884. It does not appear whether the failure to find on such plea was made a ground of motion for a new trial, nor does it appear that the question was considered on the appeal. If not, the point was waived.

According to the authorities already cited, the plea of once in jeopardy contemplates that the trial asserted as a bar must at least have been entered upon. Here there was no trial under the first complaint.

In view of these conclusions it will not be necessary to consider respondent's contentions that section 1387 of the Penal Code does not apply to proceedings in the justices' courts; nor that the first complaint did not state facts sufficient to constitute a public offense, and that therefore the dismissal thereof could not have been the basis of a plea in bar.

It follows that, since after final judgment habeas corpus cannot be used as a writ of error, and petitioner has not met the burden of showing he exhausted below the defense upon which he must rely, he is not entitled to relief.

Writ discharged, and petitioner remanded.

We concur: WILBUR, C. J.; WASTE, J.; SEAWELL, J.; MYERS, J.; KERRIGAN, J.

191 Cal. 470

MOHN v. TINGLEY et al. (L. A. 6990.)

(Supreme Court of California. July 9, 1923.
As Amended Aug. 8, 1923. Rehearing
Denied Aug. 8, 1923.)

1. Limitation of actions §127(2)—Amendment setting up no new cause relates back.

If an original complaint fails to state a cause of action and a new or different cause is not set up by the amended complaint, but new matters are added therein merely to make the original cause complete, the amendment, though made after the expiration of the period of limitations, relates back to the time of the filing of the first complaint.

2. Limitation of actions §127(5)—Complaint for alienation of affections held not to set up new cause of action and to relate back.

Where original and amended complaints were both based on plaintiff's alleged cause of action for alienation of her husband's affections the amendment merely curing the failure of the original complaint to allege that plaintiff's husband had left her stated no new cause of action and related back to the filing of the original complaint.

3. Limitation of actions §55(4)—Cause for alienation of affections accrues when husband leaves wife.

A cause of action for alienation of husband's affections, under Civ. Code, § 49, accrues

when the husband leaves the wife, and limitations run from that time only.

4. Process §96(4)—Affidavit as to nonresidence held sufficient to authorize publication.

An affidavit for service of summons by publication averring that one of the defendants was a resident of New York and not a resident of California was sufficient basis for order of publication under Code Civ. Proc. § 412, and the effect of the averments were not diminished by recital that previous copy of summons mailed such defendant in New York had been returned by him from there to attorneys for other defendant.

5. Process §98—Order for publication need not indicate that court had read verified complaint.

It was not necessary that order for publication of summons indicate that the court had read the verified complaint, the case not being controlled by Civil Practice Act, § 30, but by Code Civ. Proc. § 412, under which it is sufficient if the cause of action is shown by a verified complaint on file.

6. Process §87—Service by publication held sufficient against nonresident husband of wife sued for alienation of affections.

Service by publication was sufficient against the nonresident husband and a wife being sued for alienation of affections of plaintiff's husband; no personal judgment being sought against him and the purpose of making him a party being to permit him to assist in the defense.

7. Process §98—Default entered on publication held not to render subsequent publication nugatory.

That a default had been entered upon a publication of summons against a nonresident defendant did not render nugatory a subsequent publication, the default order having been vacated and new proceedings instituted for service.

8. Husband and wife §325—Woman married in another state before one year after divorce held entitled to maintain suit for alienation of husband's affections.

A woman who obtained a divorce and was married in another state within the year, contrary to Civ. Code, § 61, but residing within the state, could maintain a suit for alienation of her husband's affections.

9. Judgment §570(1)—Nonsuit not a bar to subsequent suit.

A judgment of nonsuit suffered for any cause is not a bar to a subsequent suit on the same cause of action.

10. Husband and wife §326—Suit for alienation held not barred by wife's contract with husband and another for separate maintenance.

A wife's action for damages for alienation of her husband's affections was not barred by contract between her husband and his debtor and the wife, whereby the debtor agreed to pay to her an indebtedness owing to the husband as consideration for her dismissal of an action for separate maintenance.

11. Appeal and error ⇨1003—Appellate court will not reverse verdict sustained by any evidence.

Appellate courts are not concerned with question of preponderance or substantial character of evidence, but only as to whether there is any evidence tending to support a verdict.

12. Appeal and error ⇨516—Counsel's argument printed in brief no part of record.

Although counsel for respondent printed his argument at trial as part of his brief, it is no part of the record and will not be considered on appeal.

13. Appeal and error ⇨207—Request for instruction to disregard argument necessary to review.

Defendant desiring to complain of argument of plaintiff's counsel should request instruction to the jury to disregard the objectionable parts.

14. Husband and wife ⇨333(5, 6)—Evidence of husband's donations to defendant's religious society and of defendant's interference in household affairs held admissible in suit for alienation of affections.

In a wife's suit for alienation of her husband's affections by defendant, who was the head of a sect or society having a homestead or location to which the husband and wife had removed at defendant's request, evidence as to donations made by the husband to such society, and of assistance of the defendant in the conduct of plaintiff's household affairs, was competent.

15. Husband and wife ⇨333(5) — Evidence held not too remote in suit for alienation of husband's affections.

In an action for alienation of plaintiff's husband's affections by the leader of a society or sect, to the homestead grounds of which the husband and wife had removed at defendant's request, evidence as to the conduct of the parties during years immediately previous to the disruption, such as the husband's changed attitude after visits to the homestead, and that before coming into possession of his property he was not permitted to live in the homestead grounds, held admissible, where it was alleged that defendant's influence extended over a long period of years.

16. Husband and wife ⇨333(6) — Evidence that defendant and plaintiff's husband held private conversations held admissible.

In suit for alienation of husband's affections by defendant who was the head of a society or sect on whose homestead grounds the husband and wife were living at defendant's request evidence that the defendant and husband held private conversations at which plaintiff was not present, without stating what occurred on those occasions, was not objectionable.

17. Husband and wife ⇨334(3)—Verdict for \$100,000 for alienation of affections held not to show passion or prejudice.

A verdict for \$100,000 for alienation of a husband's affections held not so excessive as to suggest at first blush that it was arrived at

by passion or prejudice or corruption on the part of the jury.

In Bank.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by Irene M. Mohn against Katherine Tingley and another. Judgment for plaintiff, and named defendant appeals. Affirmed.

A. J. Morganstern and Iverson L. Harris, both of San Diego, for appellant.

Charles C. Crouch, Hugh A. Sanders, and Wright & McKee, all of San Diego, for respondent.

LAWLOR, J. This action was brought by the plaintiff, Mrs. Irene M. Mohn, to recover damages from Katherine Tingley, defendant, for the alienation of the affections of her husband, Dr. George F. Mohn. Defendant Philo B. Tingley, Katherine Tingley's husband, was joined as a necessary party by amendment to the complaint, and was served with summons by publication. He having failed to appear, judgment was taken against him by default, from which he has not appealed. The jury returned a verdict against Katherine Tingley and found specially that she knowingly and intentionally enticed plaintiff's husband away from her, and that the affections of plaintiff's husband were alienated from her. Plaintiff was granted compensatory damages in the sum of \$75,000 and punitive damages in the sum of \$25,000. From judgment rendered thereon, defendant takes this appeal. Her principal contention is that the evidence is insufficient to support the verdict. Before considering that question, however, it is necessary to determine certain points which involve respondent's right to maintain the suit.

[1, 2] 1. It is contended by appellant that the action is barred by the statute of limitations. First, it is claimed that inasmuch as the asserted period of the statute of limitations ran between the filing of the original and the second amended complaint the latter cannot be held to relate back to the former, in which no cause of action was stated. It is settled in this jurisdiction that if an original complaint fails to state a cause of action and a new or different cause is not set up by the amended complaint, but new matters are added therein merely to make the original cause complete, the amendment, though made after the expiration of the period of limitations, relates back to the time of the filing of the first complaint. *Ruiz v. Santa Barbara Gas, etc., Co.*, 164 Cal. 188, 128 Pac. 330. No new or different cause of action was set up in the second amended complaint in the case at bar. As in *Oberkotter v. Woolman*, 187 Cal. 500, 202 Pac. 669, the cause of action was at all times one based on slander,

so here it was at all times one based on the alienation of the affections of the plaintiff's husband. Although the original complaint was defective in that it did not allege that Dr. Mohn actually left respondent, this is no more serious a defect than a failure to allege nonpayment of a promissory note, the addition of which allegation was held not to change the cause of action in *Rauer's Law, etc., Co. v. Leffingwell*, 11 Cal. App. 494, 105 Pac. 427.

2. The second claim is that in an action of this kind the statute begins to run, not from the time one spouse actually leaves the other, but from the time of the commission by the defendant of the act which ultimately causes the spouse to leave. Supporting this contention are cited *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88, and other cases of a similar nature which it is insisted are fairly analogous to the case at bar. In *Hecht v. Slaney*, supra, it was held that the statute runs in favor of one chargeable as the trustee of an implied trust, and that it is not necessary for him to have denied or repudiated the trust in order to set the statute in motion; that "in such a case the statute begins to run when the wrong complained of is done." These cases are not authority for appellant's contention. They hold in each instance that the statute runs from the time the particular wrongful act was committed; that is, from the time the cause of action accrued.

[3] In the action before us the wrong complained of consists of the "abduction" of the husband (Civ. Code, § 49), and his being actually taken away from the wife constitutes a part of the wrongful act. *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847. Until that occurs, the statute of limitations cannot begin to run. This action was commenced within one year of the date respondent's husband is alleged to have left her and consequently within the period of the statute, whether the period of limitations is one year under section 340, subdivision 3, of the Code of Civil Procedure, or two years under section 339, subdivision 1, as contended by respondent.

3. Appellant's third contention is that, as she is a married woman, her husband was a necessary party to the action; that the court never acquired jurisdiction of the person of her husband, defendant Philo B. Tingley, and therefore could not lawfully proceed against her. Defendant Philo B. Tingley was served with summons by publication, and it is contended such service was invalid because the action is one in personam and because the affidavit and order upon which publication was made were for various reasons insufficient.

[4] The main point made is that the facts stated in the affidavit for the publication are insufficient to justify the order for publication. It is averred in the affidavit that Philo B. Tingley is a resident of the state of New York and not a resident of the state of Cal-

ifornia. This statement is a sufficient basis for an order of publication of summons. *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; section 412, C. C. P. The affiant also sets forth the basis of this direct statement by showing that the previous copy of the summons and complaint mailed to Philo B. Tingley at New York City had been returned by him from there to one of the attorneys for the defendant Katherine Tingley. There was nothing in this or other statements to diminish the effect of the direct averment in the affidavit that the defendant resided in the city of New York, outside of the state of California.

[5] It is claimed that the order for the publication of summons is insufficient because it fails to indicate that the court had read the verified complaint, and appellant cites in support of that claim the case of *Forbes v. Hyde*, 31 Cal. 342, 355. That case, however, was based upon section 30 of the Civil Practice Act (St. 1851, p. 55) which required the affidavit to state facts from which it appears that a cause of action exists against the defendant. What was said in the case of *Forbes v. Hyde*, supra, with relation to the affidavits upon which the order for publication was based in that case was for the purpose of showing that the complaint in that case was not treated as an affidavit within the meaning of the Practice Act even though it might have been verified. The decision in *Forbes v. Hyde*, supra, has no application to the case at bar, which is controlled by section 412, C. C. P., under the terms of which it is sufficient if a cause of action is shown by a verified complaint on file. It fully appears by the verified complaint on file herein, referred to in the affidavit for publication, that a cause of action existed in favor of the plaintiff and against the defendants. It follows that the order for the publication of summons was properly made, and that by the publication thereof service was made upon Philo B. Tingley in the manner required by our statutes.

[6] The appellant suggests that the substituted service in this action was insufficient, citing *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *First National Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95; and *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165. It is true that the trial court would have no jurisdiction to render a personal judgment against Philo B. Tingley in the action. The purpose of making him a party was in order that he might assist his wife in making her defense. He was made a defendant and served in the manner provided by our law, and the question of extra-territorial jurisdiction is not involved in the case. The only party bound by the judgment was present in court in California and made her defense.

[7] It is also claimed that, as Philo B. Tingley's default had been entered upon the

previous publication, he was thus put out of court and the subsequent publication was void. The default order had been vacated and entirely new proceedings were instituted for service upon the defendant Philo B. Tingley. This defendant had the right to appear within the time limited in the summons, notwithstanding the previous entry and vacation of default based upon a previous service of summons upon him.

[8] 4. It is contended on behalf of appellant that respondent cannot be heard in the courts of this state to assert a claim growing out of her marriage to Dr. Mohn, for the reason that their marriage was consummated in contravention of the laws of this state. The facts are these: Respondent was first married to William Farley Neill at St. Paul, Minn., in 1890. She brought an action against him for divorce in this state, and in October, 1900, she obtained a decree and the custody of their only child, Isabel Neill. On November 28, 1900, respondent was married to Dr. Mohn at Yuma, Ariz. Both parties were domiciled in Los Angeles at the time, and they went to Yuma solely for the purpose of being joined in wedlock. At that time there was no provision for an interlocutory decree of divorce; section 61 of the Civil Code provided only that a subsequent marriage contracted by a divorced person during the life of the former spouse should be illegal and void unless the decree of divorce was rendered at least one year prior to such subsequent marriage.

This contention is groundless for it is well settled that section 61, Civil Code, did not operate upon or affect a decree of divorce; that it was simply a prohibition upon persons after they were divorced, and, inasmuch as such prohibition could have no extraterritorial effect, a marriage performed outside of the state in defiance of its terms was valid and binding and would be recognized in this jurisdiction. *Estate of Wood*, 137 Cal. 129, 69 Pac. 900; *Buelna v. Ryan*, 139 Cal. 630, 73 Pac. 466; *Deyoe v. Superior Court*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73; *Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23; *Pereira v. Pereira*, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; *Estate of Elliott*, 165 Cal. 339, 132 Pac. 439. Appellant relies on *Wood v. Estate of Wood*, 137 Cal. 148, 69 Pac. 981, wherein a widow who had married the decedent within one year of her divorce sought to enforce against her deceased husband's estate an antenuptial contract settling property rights. Plaintiff based her right to compel performance of the contract upon the proposition that she had executed it by marrying the decedent, but it was held that the consideration for the contract rested in a violation of the law of California, and that the court would not lend itself to the enforcement of such an agree-

ment. However, that case dealt only with the contract for a property settlement, and the court expressly stated that the marriage itself was valid. Such a marriage being recognized in this state, it is entitled as well as any other to the benefit of all the safeguards which the law has established for the protection of the relationship, including the one invoked herein.

[9] 5. It is insisted the trial court erred in striking from appellant's answer, upon respondent's motion, that portion in which she set up a former adjudication of the action as an affirmative defense. A prior action had been instituted between the same parties upon the same cause of action, in which respondent was nonsuited upon the grounds that the evidence was not sufficient to prove the cause of action, and that it showed she was not the wife of Dr. Mohn, and that if she was his wife she was entitled to no relief from the courts of this state, because the marriage was in evasion of its law. Appellant claims that, so far as the motion for a nonsuit was granted with respect to the marriage, the judgment of the lower court became final when the time to appeal therefrom expired and became available to appellant as a defense in this case. This contention is without merit, for it is thoroughly settled that a nonsuit suffered for any cause is not a bar to a subsequent suit on the same cause of action. *Gates v. McLean*, 2 Cal. Unrep. 636, 9 Pac. 938; *Merritt v. Campbell*, 47 Cal. 542; *Fleming v. Hawley*, 65 Cal. 492; *City and County v. Brown*, 153 Cal. 644, 96 Pac. 281.

[10] 6. The next contention of appellant is that respondent's right to recover is barred by a contract between Dr. Mohn and a certain "School of Antiquity," as parties of the first part, and respondent, as party of the second part, dated December 21, 1918, wherein it was provided in effect that an indebtedness of \$131.58 per month owed by the "School of Antiquity" to Dr. Mohn should thereafter be paid to respondent, in consideration of which respondent agreed to dismiss a pending action for separate maintenance she had brought against Dr. Mohn, and whereby she in effect waived all claim to Dr. Mohn's property and to support and maintenance. Appellant claims that this contract amounted to a surrender of all the rights to which respondent was entitled as a wife and that she could not compel any one to pay damages for an injury to a right which she had renounced. It requires but a statement of the agreement to demonstrate that it does not in any way affect the cause of action here sued upon. The contract was simply a provision to insure respondent her support and maintenance in return for which she relinquished certain rights in his property. It in no way affected her right to Dr. Mohn's affection, comfort, society, and pro-

tection, and did not release appellant from liability for depriving her of them.

[11] 7. The next point presented is as to the sufficiency of the evidence to support the verdict, and to justify the court in denying appellant's motions for a nonsuit and a directed verdict. We may remark at the outset that the record is voluminous; that upon the trial counsel for the respective parties brought out in detail countless events which might bear upon the relationship between appellant, respondent, and Dr. Mohn, and that upon appeal they have argued the question of the sufficiency of the evidence minutely and at great length. This has been done notwithstanding it is not the province of appellate courts to weigh the evidence or determine the credibility of witnesses, but simply to decide whether there is evidence sufficient, as a matter of law, to support the verdict.

"It is only when the question is presented to this court as one of law under the contention that the evidence is insufficient to support the verdict or finding that this court will examine the evidence to this sole end, and when it is satisfied that substantial evidence exists to support the verdict or finding, its examination ceases at once." *Estate of Moore*, 162 Cal. 324, 122 Pac. 844.

Appellate courts are—

"not concerned * * * with the question of the preponderance of the evidence or as to the substantial character of the showing made by the defendants, but the single inquiry is, Does the record contain any evidence tending to support said findings?" *Davies v. Angelo*, 8 Cal. App. 305, 96 Pac. 909.

See, also, *Larco v. Roeding*, 1 Cal. Unrep. 438.

This well-established rule is stated because appellant repeatedly directs attention to such testimony; for instance, as that of witnesses whose statements under the rule of conflict we must assume were accepted by the jury.

According to the evidence, appellant was the "Leader and Official Head" of the International Theosophical Society. As already stated, respondent and Dr. Mohn were married on November 28, 1900. They had both been interested in theosophy for some time, but shortly before their marriage Dr. Mohn was expelled from the Los Angeles lodge. When that happened, Mrs. Mohn, then Mrs. Neill, withdrew from the organization, and there followed a period during which they dropped the study entirely. About that time appellant sent for respondent through a Dr. Beach, asking her to come to Point Loma, the headquarters of the society, and to bring her little girl with her. In their interview appellant asked respondent about Dr. Mohn's finances, how much money he had, and how much property he was likely to inherit. Appellant told her that she disapproved of the

marriage, that Dr. Mohn would not marry her anyway "because he is not truthful," and further that Dr. Mohn had children that were not legitimate. Appellant argued with respondent and tried to prevent her from leaving, stating that if she remained her daughter would have unusual advantages in appellant's educational institution. Despite these representations, respondent left. Just prior to that time Dr. Mohn had been to Point Loma and upon his return he avoided respondent. Later he told her the conversations he had with appellant were responsible for his ignoring her the way he did. But notwithstanding appellant's opposition respondent and Dr. Mohn were married. According to respondent this relationship was characterized by mutual admiration and love; they were congenial, had similar tastes, and their life together was happy.

Shortly after her marriage respondent was subpoenaed as a witness in a libel suit which appellant brought against the *Los Angeles Times*. *Tingley v. Times-Mirror Co.*, 144 Cal. 205, 77 Pac. 918. Her deposition was taken in which she indicated that conditions were not of the best of Point Loma. Dr. Mohn was absent at the time the deposition was taken. Upon his return he stated to respondent that he considered the incident unfortunate, but did not accuse her of falsifying. They had no trouble over the deposition, and it was not discussed again by them until 1906.

In the latter part of 1905 Dr. Mohn, unknown to respondent, made two or three trips to Point Loma at appellant's invitation. In December of that year he made a trip to Lower California and stopped off at Point Loma for the holidays, following which respondent noticed a change in his conduct toward her. He urged a change of attitude on her part toward theosophy; he said he must go to Point Loma to live; and expressed the view that they should save money in order to go there. He declared that he could not leave without her, but that with her attitude toward the work she could not go. He was unhappy and morose and talked to respondent about the matter all the time, urging her to do something so that they could go. He began to criticize Isabel Neill, although previously he had spoken of her as "about perfect."

Respondent finally wrote appellant a letter which Dr. Mohn suggested, saying she desired to do something to straighten the matter out. The negotiations which followed culminated in appellant directing respondent to go to the office of her former attorney and make a statement retracting the testimony she had given in her deposition. Respondent's letters were written in a tone of complete submission to the wishes of appellant and with an apparent anxiety to do all she

could to adjust the matter, but appellant's letters indicated an unyielding attitude on her part. Respondent told Dr. Mohn she could not retract absolutely all the statements in her deposition, but he said the only way to make it acceptable to appellant was to cover everything in a general way.

Respondent signed a statement in which she stated, in substance, that when she gave her deposition she might have drawn wrong conclusions from the facts as she saw them, and that she was then in sympathy with the Theosophical Society. Further correspondence ensued; the Mohns made a trip to Point Loma and later moved to the "Tent Village," a place conducted by the society, but which was outside the homestead proper. Dr. Mohn expressed himself as feeling more kindly toward respondent after these endeavors in his behalf. He was reinstated in the society, and they lived very happily in their home outside the grounds until 1911.

In that year Dr. Mohn received about \$300,000 from his mother's estate. Before then the Mohns were prevented from living inside the homestead grounds; appellant had told them it was not advisable. In that year, after he received the money, appellant opened the way and at her request the Mohns moved into the homestead, occupying a place called "North House." When they were partially settled appellant asked if she could at times entertain her friends there to have them in a homelike atmosphere. Respondent willingly acceded to the request, and appellant exercised the privilege. Upon one occasion she informed respondent that two married couples would be there. They arrived and stayed almost four months. At another time appellant came to "North House" with several people and informed respondent she would have to leave, as they wished to hold a private conference and did not want her there. Respondent immediately left and was kept out from 1 o'clock in the afternoon until 7 in the evening.

Appellant exercised an extensive control over the Mohn household. When Dr. Mohn's sister came to visit them, she told respondent to have her sleep on a window seat so she would not stay very long, knowing they had no place for her. The Mohns having put up some draperies while she was away, upon her return she said they were not suitable, and over respondent's protest Dr. Mohn insisted they be changed because "when she makes a request we have to carry it out." There was a similar occurrence with reference to the rugs. Dr. Mohn felt himself unable to keep an appointment with respondent in San Diego, because appellant would not give him permission to leave; and for the same reason he refused to go to see a sick grandniece, and at another time a sick sister. Dr. Mohn and respondent in 1911 had agreed that they

would go separately to appellant with their troubles.

Before 1911 all the parties got along agreeably with Isabel Neill, who attended the "Raja Yoga" school at the homestead. It may be said with reference to Mrs. Mohn that the evidence would justify an inference that she felt a true mother's affection for her daughter, and that everything she did was in an effort to insure her welfare and happiness. Appellant insisted that Isabel resume the name of Neill, saying it would be better, for there could be no trouble over Dr. Mohn's estate with his relations if she did that. In 1911 appellant wrote a letter to respondent in which she referred to inherited "irritated conditions" and "seeds of disease" in Isabel's system. She referred to this matter again on other occasions, notably when she told Dr. Mohn of it and said the disease was syphilis. Mrs. Mohn had a blood test of Isabel taken, which showed her to be absolutely free from this disease. Appellant told respondent that for her own protection she must keep Isabel and Dr. Mohn apart, as Isabel was growing up, and that respondent should write a letter to Dr. Mohn for Isabel to sign to the effect that she wished Dr. Mohn would not show so much affection for her. Appellant refused to let Isabel come to the Mohn's when respondent was sick, saying it was a scheme for her to be near Dr. Mohn; she also refused for the same reason to let Dr. Mohn go to San Francisco at one time when Isabel was sick there, and intercepted a letter Isabel wrote to Dr. Mohn asking him to buy respondent a watch for her birthday. Appellant at one time said that Isabel was unbalanced. When Isabel was about eighteen years old appellant broke up a love affair between her and a young man, because she said if they were married they would not be of use in her work. One day appellant informed respondent Isabel was going away, which was the first respondent or Dr. Mohn knew of it. Dr. Mohn as well as respondent felt badly, but nothing was done, and Isabel went to Chicago to train for nursing. While she was there, appellant told respondent Isabel was probably deceiving her and to have her watched by detectives, insisting that she was not conducting herself properly. The report showed Isabel was living with two other girls in a rooming house approved by the Y. W. C. A., and that her conduct was above reproach. Although she did have some trouble which caused her to leave the hospital, it turned out not to be anything which would injure her name. Appellant wrote letters for respondent to send to Isabel, which respondent did not send because "they did not express her sentiments."

Isabel had been ill in Chicago, and appellant told respondent in 1916 to make arrangements to have her come west. She went to

San Francisco, where respondent met her and tried to arrange for her to take a business course. While in San Francisco respondent received a communication from Dr. Mohn which indicated to her that, although appellant had a great deal to do with the plan for her to go to San Francisco, Dr. Mohn was upset about it now that she was away. It became necessary for Isabel to have an operation after respondent returned to Point Loma. The expense of this, together with the way Isabel and respondent handled it, dissatisfied Dr. Mohn. It also appears that appellant was somewhat provoked because of the treatment accorded the homestead doctor in the matter. He and appellant also appear to have felt some animosity toward the doctor who performed the operation. In August, 1917, Dr. Mohn signed a letter to Isabel in which he stated he did not approve of her conduct; that she was being entertained too much, and offered her an opportunity to come to Los Angeles, go to a mountain resort and rest up, after which he would help her get a position. He said if she did not do this he could not promise to support her in the future. Appellant's secretary said that appellant dictated this letter, saying that she was doing it at Dr. Mohn's request. Isabel declined to return to Point Loma. Subsequently appellant tried to get respondent to have a detective shadow Isabel in San Francisco, which respondent refused to do. Respondent stated that she did not get disquieting reports about Isabel other than from Dr. Mohn and appellant.

Dr. Mohn contributed most of his \$300,000 to the various branches of the Theosophical Society, reserving an annual income of \$4,000 for life. This income he subsequently consented to have reduced. Respondent received an allowance of \$30 a month, part of which she apparently sent to Isabel. Dr. Mohn's mother had made a proposition to respondent before 1906 that if the latter would not go to Point Loma, but would stay in Los Angeles, she would leave her all her property. This offer respondent declined in order to go with Dr. Mohn. Respondent said she did not know the exact extent of his contributions to the society; that while she did not oppose them she did not encourage him to make them. Dr. Mohn became worried over finances, because, though he had put in his requisition, he had not been given his money by the manager of the homestead. He accused respondent of running up bills and of being extravagant when he had not yet secured his money to pay his taxes. Respondent went to appellant, told her of this, and also that she would like to go to San Francisco. Appellant agreed to arrange this with Dr. Mohn saying, "He is very easy to manage; I know just how to do it;" and say-

ing she would get Dr. Mohn to give her an allowance to meet her small bills. From his subsequent treatment of her respondent learned that appellant had given Dr. Mohn opposite instructions. Two days after the conference between respondent and appellant, appellant wrote respondent a letter, ostensibly about the matter under consideration, but containing many statements of events which had never happened, and referring to respondent's feeling that she was unjustly treated by her husband. Respondent testified she had not said anything about such a matter to appellant, and that this letter opened her eyes to the fact that appellant was not treating her fairly. Appellant apparently did not settle the matter of respondent's trip to San Francisco, for Dr. Mohn said nothing about it, and when in January, 1917, respondent mentioned it to him he accused her of not co-operating with him financially, and said all she wanted of him was money for herself and Isabel. During 1916 respondent received from Dr. Mohn \$254, \$142.25 of which was spent in going to San Francisco when Isabel was sick in the month of May; of the balance, \$58.38 was spent on herself.

By this time disagreements were arising in the Mohn household and between respondent and appellant. In the latter affairs Dr. Mohn was solicitous lest respondent offend appellant. One incident may be mentioned: The doctor who operated on Isabel in 1916 sent a bill for \$400. Dr. Mohn said it was exorbitant and refused to pay it. Respondent wrote to the doctor explaining this, and saying that what Mr. Mohn wrote would be dictated by "the one who tries to control every one's affairs here and is averse to seeing any money go out," and by the homestead physician. Dr. Mohn compelled respondent to show this to appellant. The latter declared that this was the worst thing that had happened to her; that respondent was entering a wedge in her family; she told Dr. Mohn she had anonymous letters telling how respondent angled to get him before they were married; that respondent was an unreliable person; that she had perjured herself at a trial in the past; that she was untruthful; and that he could not believe what she said. Respondent became frightened. The Mohn troubles became a chief subject of conversation at the homestead. Appellant sent a message to one woman by her secretary to the effect that respondent was out of tune, and that it would not be well to be too friendly with her. When respondent refused to send a letter suggested by appellant to Isabel, Dr. Mohn became angry; said that he proposed to get into the work deeper than ever; that appellant was the best friend they had; that he did not propose to listen to any one

slander her. He also told respondent she was mighty common truck compared to appellant.

Mrs. Davidson, appellant's secretary, testified she had heard appellant discuss respondent's character with Dr. Mohn; that appellant sent her to one of the students to tell her that respondent was out of tune with conditions and not to be too intimate with her; that on occasions when Dr. Mohn was present appellant discussed the inharmony in the Mohn family, and that in the way she told the story she left the impression that Mrs. Mohn was to blame for it and Dr. Mohn to be excused for his mistakes.

The financial situation continued to bother Dr. Mohn, and he told respondent that if she had \$10,000 she probably would have left long ago. During three months in 1917 she received from him \$90.35. Respondent stated that all the discord was caused by stories Dr. Mohn heard elsewhere and brought home. She stated that she was at Point Loma because he was there, and that statements he heard about her wishing to go elsewhere and live with Isabel were false.

On September 21, 1917, respondent wrote a letter which she read to Dr. Mohn in order that her statements could not be misquoted later, which frankly expressed her sentiments on the subject of their domestic affairs. The tenor of the letter was one of submission and regret. She expressed a kindly feeling toward and sympathy for Dr. Mohn, a deep humiliation at having their private affairs dominated by appellant, and stated that she had no grievance against Dr. Mohn; that any misunderstanding was due to the meddlesome interference of appellant. She further suggested to Dr. Mohn that she was not being treated fairly, and that for the sake of their future domestic harmony and mutual understanding it would perhaps be well for her to go away for a short time. On October 11, 1917, Dr. Mohn suggested that each get an attorney and that they should settle the matter, but he refused to go away from the homestead to conclude the arrangements.

The next day respondent consulted an attorney, and on October 13th she received a letter signed by Dr. Mohn in which he dwelt upon the many kindnesses he had shown respondent and Isabel and the money he had given them, and rebuked her for saying unkind things about appellant and for circulating false statements in her own defense. The burden of the letter was that respondent was trying to threaten him until he did for her and Isabel the things she wanted done. He offered to let her go and live with Isabel and proposed to give them money enough to live comfortably, not extravagantly; said that they might board, or hire an apartment with a kitchenette. Appellant's secretary said that this letter was dictated by appel-

lant, who explained that she was writing it because Dr. Mohn was unable to express himself clearly. Respondent insisted that appellant wrote the letter, and it does appear that in the following January Dr. Mohn asked for a copy of it, saying that he had lost his and had forgotten what was in it; that she refused to give him a copy; and that when her deposition was taken some months later appellant's attorneys produced a copy of the letter.

Dr. Mohn told respondent that either he or she would have to leave. On February 3, 1918, he told her that he was going to get out. On the following day Dr. Mohn told respondent that he was going to Los Angeles for four or five days. When she begged him to let her accompany him he declared that it was only a matter of dollars and cents with her; that if she had money she probably would have left before; that he was going to get a copy of his letter of October 13th; that their troubles were going to be settled because he was going away. When she asked to go with him he refused to answer her; he put a few things in a grip and left, saying he would send her his address. Because of statements he had made she believed he was leaving for good.

On February 20th respondent caused all the furnishings of "North House" to be moved to a house in San Diego, where she established a home and fitted up a room for Dr. Mohn. She endeavored to communicate with him through his attorney, but was unsuccessful, and he thereafter refused to communicate directly or return to her. A provision for her maintenance was effected by the contract heretofore alluded to.

Respondent explained that her attitude toward the Theosophical Society and her conduct in becoming reinstated was due to a desire to make her husband happy and to be with him. She stated this accounted for her retracting her affidavit, which she said she did acting wholly upon the feeling that she might have been mistaken, which retraction she signed with misgivings and only upon the insistence of Dr. Mohn. She stated she tried to be in sympathy with the work; that many of its phases were agreeable to her; that she tried to do her best to make Dr. Mohn happy; that there were months when things went smoothly; that she was determined to try to get along with appellant, and to try to see things as Dr. Mohn did, up to a point where it was no longer possible. This feeling for a long time caused her to overlook things which were being done, which things she subsequently refused to endure.

A very important feature of the evidence consists of letters which passed between the various parties. Many of them refer to Dr. Mohn's donations. In some of them respond-

ent expresses the warmest regard for the society and for appellant. In certain others she expresses different sentiments. Taken alone, respondent's letters might indicate that she had undergone a change of feeling after the suit against the Los Angeles Times; that she had entered willingly into the work; that her feeling of animosity toward appellant arose wholly after the trouble with her husband began. But viewed in the light of her explanations—that they were nearly all written at the dictation or instigation of Dr. Mohn, and that she wrote them to keep the peace—they well could have assumed a different aspect to the jury and have entirely borne out her story of the causes of her troubles. The letters which appellant wrote to respondent were full of advice and apparent good will, but they contained frequent references to respondent's having "perjured" herself in the Times trial, appellant's magnanimity in not having prosecuted her for it, statements regarding Isabel which well might have alarmed respondent, and references in a most aggrieved tone to things which respondent did which did not please appellant. Respondent insists the letters referred many times to events which had never happened; that they were written merely as records for appellant, and points out that on February 8, 1918, four days after Dr. Mohn left, appellant had four copies made of each of these letters referring to the Mohn affairs. Appellant insists that each of these letters shows that respondent lived happily for 10 years at Point Loma and then proceeded to disrupt her home. The letters, however, for a considerable period refer to some "trouble." Respondent contends this was caused by appellant and the society; appellant that it was caused by Isabel. The jury indicated by its verdict that it accepted respondent's version. It would be a hopeless task to attempt to answer seriatim the arguments appellant advances in this connection. Suffice it to say that respondent's testimony and explanation of these matters cannot be said to be inherently improbable nor irreconcilable with the rest of her story.

From the foregoing evidence we are of the opinion the jury was entirely justified in its verdict. It could have been reasonably deduced from the evidence that appellant was trying to bind Dr. Mohn to the society; that she wanted him to be interested in it; that she wished him to continue his donations; that she was hostile to respondent because the latter married Dr. Mohn and because of her testimony in the "Times" trial; that she deliberately set about to prejudice Dr. Mohn against Isabel, which, in view of respondent's devotion to her, would create discord in the Mohn family; that she interfered in the Mohn household until it caused friction;

that she took Dr. Mohn's part in all their domestic differences and by her actions increased them; and that she disparaged respondent to Dr. Mohn in order to prejudice him against her. This is clearly sufficient to indicate to the jury appellant's connection with Dr. Mohn's leaving home.

We are also convinced that there was evidence that Dr. Mohn actually left respondent. The only evidence that he was not leaving for good on February 4, 1918, was his own declaration that he would be in Los Angeles for four or five days and would write respondent, and his later statement that he would be home about April 1. But opposed to this is respondent's testimony that from his conduct and other statements he gave her the impression that he was leaving for good; his own statement that he was going to "get out"; his previous statement that one or the other must leave; that he could not go on that way; the question put by him as to when "it would all end"; the several conversations they had had with reference to one or the other leaving; his suggestion that they hire lawyers to settle the matter; her suspicions that he was not telling the truth at the time he left, evidenced by his failure to write her, as he had said he would; the fact that he refused to communicate with her after she began her suit against appellant, and finally the circumstance that he did not come back to her, refused to do so, and went instead to the Point Loma homestead without making any effort to reunite the family. From all the circumstances we must assume the jury did not believe Dr. Mohn's testimony that he did not leave respondent.

Counsel for appellant have devoted a brief of considerable size to the subject of "Instances in which counsel for respondent have grossly misrepresented the record, drawn unreasonable and unwarrantable conclusions, and spoken with impropriety and indecency." Portions of respondent's brief on appeal are quoted as showing wherein the testimony has been misstated. Much of the testimony so referred to we have deemed it unnecessary to incorporate into this opinion at all. As to the remainder, assuming counsel for respondent has misstated it, in arriving at our conclusion we have been careful to distinguish between argument and the testimony contained in the record.

[12, 13] Portions of the argument delivered to the jury by respondent's counsel are objected to as being untrue, unreasonable, unsupported by the evidence, and indecent. Although counsel for respondent has printed his argument as part of his brief, it is no part of the record, and we have not considered it on this appeal. Moreover, if appellant felt her cause was prejudiced by

this argument, the trial court should have been requested to instruct the jury to disregard the objectionable matter, and it does not appear this was done.

[14] Some 70 specifications of error are made to the rulings of the court on the admission of evidence. Manifestly, it is impracticable to discuss each objection separately. First, it is claimed that much of the testimony concerning the donations made by Dr. Mohn to the Theosophical Society in 1911, and that relating to the assistance of appellant in the conduct of the Mohn household affairs, was incompetent to prove an alienation of Dr. Mohn's affections, but did furnish a foundation for the creation of a prejudice against appellant. We are unable to agree with this contention. The evidence as a whole shows indisputably that appellant, as the head of the Theosophical Society, exercised an extensive control over the members, and that she was the dominating influence in the society. The theory of respondent is that appellant's interference in the Mohn domestic affairs was the result of her activity as the head of the society. In this situation, it being impossible to distinguish between appellant's official acts and those done in her private capacity, the evidence was properly admitted.

[15] The next class of testimony objected to is that showing the course of conduct of the parties during the years immediately previous to the disruption of the Mohn household, such as Dr Mohn's changed attitude after his visit to Point Loma in 1905, and the fact that before he came into possession of his property he was not permitted to live in the homestead grounds. Such matters are objected to on the ground that they are too remote in point of time. But as the influence of appellant, which is asserted to have caused Dr. Mohn to leave his wife, extended over a long period of years, and as one motive for animosity on her part toward respondent grew out of events happening long before he left, this evidence was clearly relevant.

It is asserted that much evidence, among it that indicating Dr. Mohn had shown little attention to his wife while making liberal donations to the society, was relevant "only to throw light upon the attitude of the witness' mind toward his wife and toward the defendant." Such an inquiry is permissible in actions of this kind. *Adkins v. Brett*, 184 Cal. 252, 193 Pac. 251. Much of the testimony concerning Dr. Mohn's financial affairs was relevant as bearing on this question, as was also respondent's testimony concerning the circumstances under which she wrote many of the letters received in evidence and many of the statements made by the various parties which otherwise would have been hearsay.

[16] Appellant objected to respondent's testimony that Dr. Mohn and appellant had private conversations at which respondent was not present. As respondent was testifying of her own knowledge merely as to the fact, and was not stating what occurred on those occasions, the evidence was not objectionable.

It is claimed the court erred in permitting evidence of the "alleged views, entertained or statements made" by appellant concerning Isabel, because it was irrelevant. In view of what we have said on this subject concerning the sufficiency of the evidence, it clearly appears this was relevant.

The chief objection to all the evidence of which complaint is made is that it served to stir up the prejudice of the jury and arouse sympathy in respondent's favor. But, the evidence being admissible, its effect upon the jury would furnish no reason for its rejection.

[17] 8. Appellant earnestly urges that the verdict is based on passion and prejudice. Respondent objects to any consideration of this question for the reason that no motion for a new trial was interposed by appellant. In support of the contention that no such motion was necessary, it is urged that this court has jurisdiction to consider upon appeal from the judgment every question which might have been raised on a motion for a new trial; that since sections 956 and 963 of the Code of Civil Procedure were amended in 1915 (St. 1915, pp. 328, 209), and the remedy of appeal from an order denying a new trial abolished, an appellant would have no remedy, except in the trial court, if it were held necessary to interpose such a motion before raising on appeal a question which might have been considered on the hearing of the motion. Section 956 provides, in effect, that upon an appeal from a judgment the court may review the verdict or decision and any intermediate order which involves the merits or necessarily affects the judgment, and from which an appeal could have been taken.

It is clear that the question of whether or not a verdict is arrived at because of passion or prejudice, in cases where the amount of the judgment is in the sound discretion of the jury, is primarily one for the trial court upon a motion for a new trial based upon that ground. *Hayne on New Trial and Appeal*, vol. 1, p. 446; *Hale v. San Bernardino, etc., Co.*, 156 Cal. 713, 106 Pac. 83. If a motion for a new trial upon this ground is denied by the trial court, we cannot reverse the judgment unless the amount thereof is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." *Hale v. San Bernardino, etc., Co.*, *supra*. Whether or not

we can review the evidence upon the subject of damages upon an appeal from the judgment without the interposition of the motion for a new trial, where the claim is that the verdict is excessive upon the authority of *Smith v. Lightston*, 182 Cal. 41, 186 Pac. 769, because such an attack upon the judgment is based fundamentally upon the insufficiency of the evidence to justify the judgment, is a point which we need not decide; for it is clear that upon such an appeal the appellant is in no more favorable position than she would have been if she had made the motion for a new trial upon the ground that the verdict was excessive, indicating passion and prejudice, and such motion had been denied. Assuming that the rule controlling this court upon an appeal after denial of a motion for a new trial upon this ground is applicable upon an appeal from the judgment where no motion is made for a new trial, while the verdict in this case is very large, we cannot say un-

der the evidence that it is so excessive as to suggest, "at the first blush, passion or prejudice or corruption on the part of the jury" within the rule as heretofore announced. *Hale v. San Bernardino, etc., Co.*, supra. We would feel very much better satisfied with the matter, however, if the motion had been submitted to the trial judge, who had the opportunity of seeing the witnesses and the parties and forming his own estimate as to the damage inflicted upon the plaintiff by the defendant.

9. Finally, appellant assigns error to the giving of certain instructions to the jury, and to the refusal to give certain others. We have examined these assignments carefully and find in the instructions no error which would warrant a reversal of the judgment.

The judgment is affirmed.

We concur: WILBUR, C. J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.; MYERS, J.

191 Cal. 557

**ASSOCIATED OIL CO. v. INDUSTRIAL
ACC. COMMISSION et al.
(S. F. 10574.)**

(Supreme Court of California. Aug. 1, 1923.)

Master and servant — 375(1)—Injury to employee at employer's bunkhouse held not compensable as injury "arising out of employment."

Where an employee, living at employer's bunkhouse, was free to live in town about a mile and a half distant, an injury received, on Sunday afternoon, from falling off a defective porch where he had gone "to keep cool" was not one "arising out of the employment" within the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

In Bank.

Proceedings under the Workmen's Compensation Act (St. 1917, p. 831), by Charles C. Jones, opposed by the Associated Oil Company, employer. An order of the Industrial Accident Commission awarded compensation, and the employer brings certiorari. Award annulled.

Daniel W. Hone, of San Francisco, and William F. Kiessig, of Berkeley, for petitioner. A. E. Graupner and Warren H. Pillsbury, both of San Francisco, for respondents.

WASTE, J. Petitioner in this proceeding seeks annulment of an award made by the Industrial Accident Commission in favor of the applicant, Charles C. Jones, and against it as employer and carrier of its own insurance. The facts of the case are as follows: The applicant was employed as a machinist by the petitioner, Associated Oil Company, at its Camp C, near the town of Fellows. The company conducted a rooming house at the plant for its employees. The men were not required to stay there, and it was no part of the contract of employment that they should do so. Similar accommodations were available at the town of Fellows, a distance of about a mile and a half from the camp. The applicant worked six days a week, his hours being from 7 o'clock until noon, and from 1 to 4 in the afternoon. On the morning of Sunday, July 9, 1922, he worked a couple of hours overtime. That finished his task for the day. He was not required to return to his work until the next morning. A little after 5 o'clock in the afternoon, after supper time, with others, he repaired to the rooming house, but it was so hot that the men went out on the veranda "to keep cool." Jones placed a seat for himself on the edge of the porch. There were many cracks in the floor, and the leg of the chair went through one of them. There being no protecting railing, Jones was precipitated to

the ground, a distance of from four to six feet. He sustained injuries to his right hip, on the basis of which, and on a finding that the injury arose out of and in the course of his employment, the Commission made the award.

Petitioner contends that the injury for which compensation was awarded did not arise out of or in the course of the applicant's employment, in that the latter "was engaged in pursuing a purely personal service, for his own convenience, pleasure, and benefit"; that he was performing no service for his employer, owed no duty to the latter at the time of his injury, and was not required to be upon his employer's premises at that time. The respondent Commission argues that the injuries were due to the unsafe condition of the "bunkhouse" premises provided by the employer, and, under the circumstances, are compensable. The question presented for decision, according to respondents, is "whether injuries occurring about the employer's bunkhouse situated on the employer's working premises, sustained by employees during their leisure hours while reasonably using the bunkhouse in a proper manner during intermissions from work, the injury being due to unsafe conditions of the premises provided by the employer, are within the protection of the Workmen's Compensation Act."

The general rule appears to be that, when the contract of employment contemplates that the employees shall sleep upon the premises of the employer, the employee, under such circumstances, is considered to be performing services growing out of and incidental to such employment during the time he is on the premises of the employer. 1 Schneider's Workmen's Compensation Law, p. 608, par. 279. The test is whether or not the workman is given a choice in the matter and is free as possible to come or go as he pleases. *Philbin v. Hayes*, 119 L. T. R. (Eng.) 133; note to 17 N. & C. C. A. 948. In some jurisdictions compensation has been awarded under situations somewhat similar to that here. A sort of legal fiction has been invoked to the effect that a servant, though "waiting," is still "serving." Those cases, however, have distinguishing features which serve to clearly differentiate them from the case here. In some instances, also, the statutes are different from ours.

It does not appear whether or not respondent Jones was living at the rooming house at the time he was injured. We think it may be correctly assumed that he was. The time was July. He testified there was "no other place to stay at, only the Associated Oil Company's place. It ain't a matter of choice. Unless you want to walk a matter of a mile and a half in the hot sun at 115 or 120, you got to stay there." It does appear that he was at the rooming house and

fell from the porch on a Sunday afternoon at a time when not at work, and was neither required to work nor to be on the premises. He had a choice of going to the town of Fellows, but preferred quarters provided for his convenience by the employer, for the reason that he thus avoided walking one or one and a half miles in the hot sun. These facts do not present a case in which "the employer places the employee in such circumstances that his time is never his own, where he has no discretion as to where he shall sleep and where he shall eat; that the workman must be considered in the employ of the employer all of the time, or, at least, performing a service which is incidental to the employment he is engaged in," as was the case in *Holt Lumber Co. v. Ind. Comm.*, 168 Wis. 381, 170 N. W. 366, so strongly relied on by respondent. The facts in that case show that the employees in the particular camp at which the injury occurred could not select their own sleeping quarters, but were compelled to sleep where the employer instructed them to sleep. It was part of the contract of employment that the employees should sleep on the premises in the bunk furnished by the lumber company.

Other cases relied on by respondent are as easily distinguished. The facts in *In re Bollman*, 73 Ind. App. 46, 126 N. E. 639, were that the employee was not employed for a definite number of hours of each day with no obligation to his employer for the remaining of the 24. By the terms of his agreement he was required to leave his own domicile and travel from farm to farm with a threshing outfit, to stay nights on the premises where the machine happened to be, and as watchman to guard and protect it from fire and trespassers. In *Southern Surety Co. v. Stubbs* (Tex. Civ. App.) 199 S. W. 343, the deceased was living upon a dredger and at all times under and subject to the orders of its captain. The storm which caused the loss of the dredger and the death of the employee "not only created an emergency which required the efforts of all employees to keep it afloat, but produced a situation which permitted of nothing else." In *Taylor v. Saunders*, 71 Colo. 160, 204 Pac. 608, the court

held that the deceased, in remaining at the car barn after a late run, in order to take out a car at an early hour, did not assume "a position of peril merely for his own pleasure or convenience." The time for making the next run was so near at hand, the employee was acting within the scope of his employment by waiting at the car barn.

The foregoing cases serve to emphasize the conditions which must exist to entitle the employee to compensation under circumstances similar to the facts of the proceeding now under review. There is wanting in this case

an essential element needed to confer jurisdiction on the Industrial Accident Commission. The injury did not arise out of the employment. *Griffith v. Cole Bros.*, 183 Iowa, 415, 429, 165 N. W. 577, L. R. A. 1918F, 923. In that case the deceased, under regular and continuous employment by a bridge contractor, was, at the close of the day's work on the bridge and preparatory to retiring for the night, sitting in a tent specially furnished by the employer for the housing of his men, and situated near the bridge under construction. The tent was on the ground, saturated with water, and had no floor and was without lightning arresters. It was higher than surrounding objects, was adjacent to a wire fence and a pile of steel rods, and had a wire clothesline stretched inside and below the ridge pole. The tent was struck by lightning and the employee was killed. The court held that the deceased was in the course of his employment at the time of the injury, but reversed an award of the Industrial Commission upon the ground that the injury did not arise out of the employment. Subdivision 7 of section 3 of the Workmen's Compensation Law of New York, (Consol. Laws, c. 67) limits compensation to "accidental injuries arising out of and in the course of employment." Construing this language, the court of that state said:

"The statute does not provide an insurance against every accident happening to the workman while he is engaged in the employment. The words 'arising out of and in the course of employment' are conjunctive, and relief can be had under the act only when the accident arose both 'out of' and 'in the course of' employment. The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work." *Daly v. Bates & Roberts*, 224 N. Y. 126, 127, 120 N. E. 118. The law in this state is the same. *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 684, 685; 158 Pac. 212, L. R. A. 1916F, 1164; *Ocean Acc. & Guarantee Co. v. I. A. C.*, 173 Cal. 313, 317, 159 Pac. 1041, L. R. A. 1917B, 336; *Casualty Co. of America v. I. A. C.*, 176 Cal. 530, 533, 169 Pac. 76; *California Casualty Ind. Exchange v. I. A. C.* (Cal. Sup.) 213 Pac. 257.

Of persuasive force, also, are two decisions of the respondent Industrial Accident Commission, the facts in which are analogous to those in the present proceeding, and in both of which compensation was denied. *Webster v. C. B. Steddom*, 3 Dec. of I. A. C. of Cal. 265; *Mahoney v. Sterling Borax Co.*, 2 Dec. of I. A. C. of Cal. 700.

The award is annulled.

We concur: WILBUR, C. J.; MYERS, J.; LENNON, J.; KERRIGAN, J.

191 Cal. 600

In re FRANCIS' ESTATE. (S. F. 10519.)

(Supreme Court of California. Aug. 16, 1923.)

Wills ⚡132—Will in which part of date was printed not olographic, though envelope containing it bore date in testator's handwriting.

A will in which the first two figures of the year in which made were printed held not entitled to probate as an olographic will, though the envelope containing it bore on its face, in testator's handwriting, the figures "10/22/19"; the printed matter, though unnecessary to sufficiently date the will, having been made a part of it by testator along with the written matter,

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding for the probate of the will of F. W. Francis, deceased. From an order denying probate, proponents appeal. Affirmed.

Arthur A. Chazel, of San Francisco (W. A. Breen, of San Francisco, of counsel), for appellants.

WILBUR, C. J. This is an appeal from an order denying probate to an olographic will. The order was based upon the fact that the first two figures of the date in the year "1919" were printed. If the date had contained the last two figures only it would have been sufficient (Estate of Lakemeyer, 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96; Estate of Chevallier, 159 Cal. 161, 113 Pac. 130), but the printed figures were adopted by the testator as a part of his will, and, although the printed figures were unnecessary to sufficiently date the will, they were a part of the date, and the will was consequently not entirely dated in the handwriting of the testator. The rule announced in Estate of Thorn, 183 Cal. 512, 192 Pac. 19, is controlling. The envelope containing the will has a date on its face in the handwriting of the testator as follows: "10/22/19," and it is urged that this is a part of the will and a sufficient dating of the will. Assuming, without deciding, that the date on the envelope is a part of the will, the rule announced in Estate of Thorn, supra, nevertheless controls, for it was held in that case that, although all essential portions of the document were in the handwriting of the testator, and the printed matter constituted a mere repetition of what was already written in the handwriting of the decedent, the testator having made the printed matter as well as the written matter a part of the will, the will for that reason is not entirely in his handwriting. Hence the fact that the testator twice dated the will would not constitute an olographic will,

where one date was not in the testator's handwriting.

Order affirmed.

We concur: **WASTE, J.; KERRIGAN, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.**

MYERS, J. I concur solely because I must agree that this case is ruled by the decision in Estate of Thorn, and if a change is to be made in the rule as there announced it should be by legislative enactment.

191 Cal. 542

SOMERS v. UNITED STATES FIDELITY & GUARANTY CO. (S. F. 10260.)

(Supreme Court of California. July 31, 1923. Rehearing Denied Aug. 30, 1923.)

1. Assignments for benefit of creditors ⚡407 —Common-law bond as assignee construed like contract in connection with assignment.

A common-law bond for performance of duties as assignee for benefit of creditors is to be construed in accordance with the rules governing interpretation of contracts, and must be read in connection with the contract of assignment referred to and the nature of the obligations secured.

2. Assignments for benefit of creditors ⚡407—Bond by assignee held contract of guaranty or suretyship on which assignors' lessor could have sued assignee, surety, or both, immediately on default in rent; "contract of guaranty or suretyship;" "indemnity contract."

A bond conditioned on faithful performance of the principal's duties as assignee for benefit of creditors under a contract obligating him to pay the expenses of carrying on the debtor's business, including rent, held not a contract of indemnity within Civ. Code, § 2772, but one of guaranty or suretyship (section 2787), on which an action could have been commenced by lessor under section 2807, against the principal, surety, or both, immediately on default in payment of rent, assignee's obligation, if conditional, becoming absolute on fulfillment of the condition, while the surety's obligation is deemed unconditional, where the terms import no condition precedent (section 2806).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guaranty.]

3. Guaranty ⚡4—Indemnity ⚡1—Principal and surety ⚡5, 6—"Indemnity contract" and "contract of guaranty or suretyship" distinguished.

Promisor, in an indemnity contract, undertakes to protect promisee against loss or damage through liability to a third person, while a guarantor or surety undertakes to protect him against loss or damage from a third person's failure to carry out his obligations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indemnity.]

4. Guaranty ⚡4—Indemnity ⚡1—"Indemnity contract" and "contract of guaranty" distinguished.

The promise in an indemnity contract is an original, not a collateral, undertaking, while a contract of guaranty is a secondary obligation existing only where there is some principal or substantive liability to which it is collateral.

5. Limitation of actions ⚡47(3)—Action on bond of assignee for benefit of lessee's creditors held barred after five years from assignee's default in payment of rent.

An action brought by a lessor against the surety on a bond of assignee, for the benefit of lessee's creditors, more than five years after assignee's default in payment of rent, held barred by the statute, though brought within the statutory period after return of an unsatisfied execution on a judgment for the rent, even if the bond were a contract of indemnity, the loss accruing and the amount being definitely fixed when the default occurred.

6. Indemnity ⚡1—Bond not construed as contract of indemnity unless language, applied to obligation, may be so construed.

The rule that courts incline strongly to construe bonds as contracts of indemnity cannot apply, unless the language thereof, applied to the obligation sought to be enforced, is susceptible of such construction.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by George B. Somers against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals. Reversed.

Thomas, Beedy & Lanagan, of San Francisco, for appellant.

McNair & Stoker, of San Francisco, for respondent.

MYERS, J. The defendant appeals from a judgment against it by default, it having declined to answer after the overruling of its demurrer to the complaint. It is alleged in the complaint that on or about the 22d day of November, 1912, plaintiff's assignor, the W. J. Somers Company, entered into a written contract of lease with Force-Hewitt Company, of certain premises in San Francisco, for a term of three years, and that the latter occupied said premises under said lease up to the time of the assignment hereinafter referred to; that on or about the 14th day of July, 1915, the said Force-Hewitt Company, by an instrument in writing assigned to one J. L. Smith, for the benefit of its creditors, all of its property, including the said lease, in trust, to sell and dispose of the same, to collect the proceeds therefrom, to carry on said business, and to pay from the proceeds thereof all expenses connected with the carrying on of said business and the administra-

tion of said trust, together with such other debts as are made preferences by law, and then the claims of said Force-Hewitt Company in full, and then to reconvey and deliver the remainder to said Force-Hewitt Company; that the said Smith accepted the said trust, and that on or about the 14th day of July, 1915, said Force-Hewitt Company delivered to him all of its property, together with an assignment of said lease, and he entered upon the performance of his trust, and carried on said business, and elected to accept said lease and to hold and use said premises for the benefit of the creditors of his assignor, and as such trustee he occupied and used said premises as a tenant of said W. J. Somers Company, under the terms and conditions of said lease up to the 28th day of March, 1916; that on or about the 22d day of July, 1915, the said Smith, as principal, and this defendant, as surety, executed and delivered to the creditors of said Force-Hewitt Company a written undertaking whereby they covenanted with said creditors that, if the said Smith, as such trustee, should not faithfully and truly account for all moneys, assets, and effects of said Force-Hewitt Company which should come into his hands, or should not in all respects faithfully perform all his duties as said trustee, they would pay to said creditors whatever loss they might sustain by reason thereof, not exceeding the sum of \$5,000; that said Smith as such trustee did not faithfully perform his said duties and did not faithfully and truly account for the assets of said estate, in that he failed, neglected, and refused to pay the rent that accrued under said lease for the period from December 28, 1915, to March 28, 1916, notwithstanding that he, as trustee, had sufficient funds belonging to said estate for such purpose; that thereafter said W. J. Somers Company commenced an action against said Smith as trustee to recover said unpaid rent, in which said action it recovered judgment against him, which became final on the 16th day of December, 1920, and that execution issued thereon and was returned unsatisfied, whereupon this action was brought by plaintiff herein, as assignee of said W. J. Somers Company, against the defendant, as surety on said bond, to recover the amount due upon said judgment, including the costs and interest accrued thereon. Defendant's demurrer was both general and special, but it relies herein upon two principal contentions: (1) That said W. J. Somers Company was not a creditor of Force-Hewitt Company at the time of the execution of the bond sued upon, and therefore was not an obligee thereunder. (2) That if it was such obligee, and if the obligation of Smith to pay rent under the lease was an obligation secured by the bond, the cause of action thereon arose immediately upon his

default in the payment of the rent, and that therefore this action, having been commenced more than five years thereafter, is barred by the statute of limitations.

Respondent's contentions are: (1) That the provisions of the lease gave rise to an existing obligation which constituted his assignor a creditor of the Force-Hewitt Company, and that the obligation of Smith to pay rent thereunder was one of the obligations secured by the bond. (2) That the bond sued on is an indemnity bond, as distinguished from one conditioned to pay a certain sum of money or to do a certain act; that no right of action arose thereon, and the statute of limitations did not begin to run until the aggrieved obligee suffered damages, and that damage could not be shown until judgment had been obtained against the assignee and the judgment proven to be valueless. For the purposes of this decision the validity of respondent's first contention will be conceded.

[1] The assignment herein is not a statutory assignment, but is concededly valid as a common-law assignment. The bond is not a statutory bond, but its validity as a "common-law bond" is not questioned; that is to say, it is a contractual obligation which is to be measured and construed in accordance with the ordinary rules of law governing the interpretation of contracts. It is in the following terms:

"Know all men by these presents, that we, J. L. Smith of San Francisco, California, as principal, and the United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound unto the creditors of Force-Hewitt Company, a corporation, in the sum of five thousand and 00/100 dollars (\$5,000.00) in lawful money of the United States, to be paid to the said creditors of Force-Hewitt Company, a corporation, for which payment, well and truly to be made, we bind ourselves, and our heirs, executors, administrators, successors, and assigns, jointly and severally, by these presents.

"The condition of this obligation is such, that, whereas the above J. L. Smith was on the _____ day of July, A. D. 1915, appointed as assignee for the benefit of creditors of Force-Hewitt Company, a corporation, and has accepted said trust with all the duties and obligations pertaining thereto:

"Now therefore, if the said J. L. Smith as said assignee shall faithfully and truly account for all the moneys, assets, and effects of the estate of said Force-Hewitt Company, a corporation, which shall come into his hands and possession, and shall in all respects faithfully perform all his duties as said assignee, then this obligation to be void; otherwise to remain in full force and virtue."

[2] For the purpose of arriving at its meaning and effect it is, of course, to be read in connection with the provisions of the contract of assignment to which it refers, and consideration must be given to the nature of the

obligations for which it stands as security. The condition of the bond here invoked is that said Smith "shall in all respects faithfully perform all his duties as said assignee." The particular duty here claimed to have been violated is the duty arising from the contract of assignment "to pay from the proceeds of said business and property all expenses connected with the carrying on of said business and the administration of said trust;" the rent accruing during his occupancy being one of those expenses. If respondent has any right of action upon the bond, it must be upon the theory that the same stands as security for the performance by the assignee of his direct obligation to pay rent to respondent's assignor in the amounts and at the times specified in the lease. In other words, in order to show that he has a cause of action upon the bond the respondent is compelled to so construe it that its condition is, in effect, that the assignee shall well and truly pay the rent to fall due under said lease during the time he retains possession of said premises. So regarded, it is a plain contract of guaranty which is "A promise to answer for the debt, default, or miscarriage of another." Civ. Code, § 2787. The obligation of the bond is joint and several, and there seems no reason to doubt that an action could have been commenced against the principal or the surety named therein, or both of them, immediately upon the default in payment of the rent. The Code expressly provides that "a guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice." Civ. Code, § 2807. In this aspect of the bond it is immaterial whether the obligation of the assignee was absolute or conditional. If it was conditional it became absolute when the condition was fulfilled, and if it was not fulfilled the bond did not become an actionable obligation. If it was an actionable obligation at all, it was a direct obligation from the assignee to the lessor. Let us concede that the assignee's obligation to pay rent was conditioned upon his possession of trust funds available therefor. Then, if he did not possess such funds, the obligation to pay rent never arose, but if he did possess them the obligation arose and was breached when the rent fell due, as an obligation owing directly to the lessor. The surety's obligation was breached thereby at the same time, and the lessor could then have sued both the assignee and his surety, jointly or severally. The foregoing relates to the obligation of the assignee, not to that of the surety. The latter "is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor" (Civ. Code, § 2806), and we find no such import in the terms used herein.

[3, 4] "Indemnity" is defined by our Code as:

"A contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." Civ. Code, § 2772.

"Contracts of indemnity are distinguishable from those of guaranty and suretyship, in that in indemnity contracts the engagement is to make good and save another from loss upon some obligation which he has incurred or is about to incur to a third person, and is not, as in guaranty and suretyship, a promise to one to whom another is answerable." 22 Cyc. 80.

Viewing the bond herein as security against loss resulting from default in the payment of rent, it is clear that it must be regarded, not as a contract of indemnity, but as a contract of guaranty or suretyship.

"The essential distinction between an indemnity contract and a contract of guaranty or suretyship is that the promisor in any indemnity contract undertakes to protect his promisee against loss or damage through a liability on the part of the latter to a third person, while the undertaking of a guarantor or surety is to protect the promisee against loss or damage through the failure of a third person to carry out his obligations to the promisee." 16 Am. & Eng. Ency. of Law, 168.

Another distinction between the two is that the promise in an indemnity contract is an original and not a collateral undertaking (22 Cyc. 80), while a contract of guaranty is a secondary and not a primary obligation, and can exist only where there is some principal or substantive liability to which it is collateral.

"If there is no primary liability on the part of the third person, either express or implied, that is, if there is no debt, default, or miscarriage, present or prospective, there is nothing to guarantee, and hence there can be no contract of guaranty." 28 C. J. 887.

The bond herein is clearly collateral to the contract of assignment. The cases relied upon as authority for the conclusion that the bond herein, considered in conjunction with the assignment, is a contract of indemnity do not support this conclusion. *Hormel v. American Bonding Co.*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513, does not hold that a bond such as the one herein is a contract of indemnity. It holds that where such a bond is furnished by a compensated surety engaged in that business it is to be construed under the rule applying to insurance contracts, most favorably to the insured, and not under the general rule applying to contracts of guaranty and suretyship, most favorably to the surety. The cases of *Union Central Life Ins. Co. v. U. S. Fidelity & Guaranty Co.*, 99 Md. 423, 58 Atl. 437, 105 Am. St. Rep. 313, *U. S. Fire Ins. Co. v. American Bonding Co.*, 146 Wis. 573, 131 N. W. 994, 40 L. R. A. (N. S.) 661, and *Bank, etc., Co. v. Fidelity & Deposit Co.*, 128 N. C. 336, 38 S. E. 808, 83 Am. St.

Rep. 682, are to the same effect. Each of these cases holds that, for the purpose of construing such bonds, they will be regarded as in the same category with contracts of insurance. But in every one of those cases the action was brought directly against the surety, without first having prosecuted to judgment an action against his principal.

[5] It may be conceded, however, for the purposes hereof, that the Code definition is not exclusive, and that a contract may be in fact and in law one of indemnity, though not coming within the limits thereof. But if we assume that the bond herein may be regarded as a contract of indemnity against loss to result from default in the payment of rent, it is yet true that the loss had fully accrued and the amount thereof was definitely fixed and ascertained as soon as the default occurred. Nothing then remained to be done, to perfect, complete, or make certain the right of action against the bondsman.

Even in the case of a bond which is strictly a contract of indemnity against loss to result from default on the part of the principal, no case has been cited which is authority for the conclusion that, where the loss has fully accrued, and the amount thereof fixed as soon as the default occurs, it is necessary to first prosecute an action to judgment against the principal before proceeding against the surety, except the case of *Gilbert v. Henck*, 30 Pa. 205. This case, which was decided in 1858, goes still further and holds that, upon a contract of strict guaranty, guaranteeing the payment of rent under a written lease, it is necessary to first secure judgment against the lessee and have execution returned unsatisfied before proceeding against the guarantor. In this it is out of line with all the California cases and is not to be followed here. *Stone v. Hart* (Ky.) 66 S. W. 191, held merely that in the case of a statutory assignment for the benefit of creditors and a faithful performance bond in connection therewith, no cause of action arose thereon against the surety in favor of a creditor whose claim was disputed by the assignee until the same had been allowed and ordered paid by the court. It did not hold that the creditor was required to prosecute a separate action to judgment against the assignee. The cases of *Seattle v. Northern Pac. R. R. Co.*, 63 Wash. 129, 114 Pac. 1038, and *Norris v. Reynolds*, 131 App. Div. 818, 116 N. Y. Supp. 106, are not in point at all upon the question here under consideration. *Yarbrough v. Colley*, 6 Ky. Law Rep. 121, was an action by a creditor against the surety upon the bond of a statutory assignee for the benefit of creditors, upon the claim that the assignee had wasted the assets. The court held that this action could not be maintained until the creditor had first prosecuted an action against the assignee in which the assets could be marshaled and the priority of claims determined.

Speaking of the liability of the sureties upon the bond, the court said:

"Their liability is measured by the interest the creditor has in the assets of the assigning debtor, and this is the measure of damages for a breach of the bond. If the estate proves insolvent, paying only a certain per cent. upon its settlement, the sureties, in the case of the default of the trustee, could only be held for that portion of the assets that the creditor would be entitled to under distribution."

Priet v. De la Montanya, 3 Cal. Unrep. 122, 22 Pac. 171, in so far as it is upon the point at all, holds by implication that such an action may be maintained directly against the surety as soon as the loss is sustained. *Northern Assurance Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226, makes it clear that when a bond is conditioned to indemnify, the cause of action thereon accrues as soon as pecuniary loss ensues therefrom. Cases are of frequent occurrence in the reports wherein action has been brought directly against both the principal and sureties upon faithful performance bonds similar to the one at bar, without first exhausting the remedy against the principal, and in which the propriety of such an action was not questioned. See, for example, *Evans v. Gerken*, 105 Cal. 311, 38 Pac. 725; *Ventura County v. Clay*, 114 Cal. 242, 46 Pac. 9; *People v. Smith*, 123 Cal. 70, 55 Pac. 765; *County of Sonoma v. Hall*, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459; *People's Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576; *Wolf v. Aetna Indemnity Co.*, 163 Cal. 597, 126 Pac. 470; *Callan v. Empire State Surety Co.*, 20 Cal. App. 483, 129 Pac. 978, 981.

It may be conceded that if the default of the assignee had consisted of a failure to account for the funds passing through his hands, or of a misappropriation thereof, it would be necessary, before any creditor could maintain an action upon the bond, to first prosecute to judgment an action against the assignee, in order to liquidate the liability of the latter and to determine the ratable proportion thereof accruing to the creditor plaintiff. That was the situation in *Yarbrough v. Colley*, supra. Or if, because of the default in the payment of rent, the assignee had been evicted from the premises with a resulting injury to the business, then, before any creditor could maintain an action upon the bond for such loss, it would, for like reasons, be necessary for him to first prosecute his action to judgment against the assignee.

[6] It may be conceded, as stated in *Northern Assurance Co. v. Borgelt*, supra, that courts incline strongly to construe bonds as contracts of indemnity, but this rule cannot apply unless the language of the bond, in its application to the obligation sought to be enforced, is susceptible of such construction. As the court said in that case:

"A clear distinction is made between bonds conditioned to pay a certain sum of money or to do a certain act, and bonds conditioned to indemnify. A cause of action accrues upon a bond conditioned to do a certain act as soon as there is a default in performance."

The bond here sued upon was conditioned to do a certain act, namely, to pay the rent. If it was not so conditioned, the respondent has no right of action thereon. If it was so conditioned his right of action against the surety arose as soon as there was a default in performance, and is therefore barred.

The judgment is reversed.

We concur: WILBUR, C. J.; LAWLOR, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.

On Petition for Rehearing.

PER CURIAM. One of the grounds urged upon the petition for rehearing is that we have failed to determine the question whether respondent was a creditor of the assignor and an obligee included in the bond. In the former opinion filed herein we determined that question in the affirmative. Appellant, in its petition for rehearing, did not ask for a reconsideration of the former decision as to this point, but expressly stated that it was content to be bound thereby. For this reason we did not reconsider the questions involved in the former decision upon this point, and that question is to be considered, for the purposes of this case, as decided in the affirmative.

The application for rehearing is denied.

191 Cal. 562

HULEN v. STUART. (S. F. 10146.)

(Supreme Court of California. Aug. 2, 1923.
Rehearing Denied Aug. 30, 1923.)

1. Corporations ⇐82—Contract of president with purchaser of stock to buy it back on demand enforceable.

A written agreement by the president of a corporation with a prospective purchaser of stock to buy it back at the end of a year on demand, in case no dividend was paid, is enforceable by such purchaser against him.

2. Corporations ⇐82—In an action on an agreement to buy back stock at certain price, buyer need not allege damages equalled such sum.

Where an officer, as an inducement to a prospective purchaser of stock, agreed to repurchase the stock for \$100 per share at the end of the year on demand, if no dividends were paid, in an action on the agreement, the purchaser having alleged that the stock had no value at the end of the year when demand was made, it was unnecessary, under Civ. Code, §

3311, providing that the detriment caused by the breach of buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be the excess, if any, of the amount due from the buyer under the contract, over the value to the seller, to allege that he had been damaged in such sum.

3. Damages $\S$ 141—Election to sue for wrong measure of damages does not preclude recovery, according to correct measure.

Though it is possible for a party to a contract, broken by the other party to it, to make such election of remedies as to preclude him from thereafter seeking and obtaining damages, if he has not made such an election and is entitled to recovery, the fact that he seeks damages according to a wrong measure does not preclude the court from according him the damages to which he is entitled.

4. Corporations $\S$ 82—Recovery on agreement to buy back stock held not to be defective, because technical tender of stock not made.

Where plaintiff was induced to purchase stock in a corporation by a written agreement to buy back the stock at the end of the year on demand, if no dividends were paid, but, on the plaintiff's demand for performance, defendant induced plaintiff not to make tender of the stock, by promising to buy the stock in another year if no dividends were paid, *held* that, under Civ. Code, $\S$ 1440, and section 1511, subd. 3, providing that tender is excused when the party is induced not to make it by act of the other party, plaintiff's tender of performance was excused, and defendant cannot defeat plaintiff on the ground that a technical tender was not made within the year.

5. Corporations $\S$ 82—Under agreement to buy back stock "in one year from date," tender should be made after year expires; "offer of performance after specified time."

Where, to induce a prospective purchaser to buy stock, a written agreement was made to buy back the stock "in one year from date," on demand, if no dividends were paid, the purchaser had no cause of action until after the expiration of the year, and was not required to make demand and tender of stock before that time, and a demand, after defendant was in default, was not ineffective as an offer of performance after a specified time fixed therefor within Civ. Code, $\S$ 1490.

6. Appeal and error $\S$ 101(1)—Weight given to conflicting evidence for trial court.

The weight to be given to conflicting evidence is for the trial court.

. Appeal and error $\S$ 931(4)—Supreme Court may draw necessary inferences from findings to support judgment.

In an action by a buyer of stock in a corporation, under a written agreement to buy back the stock at the end of a year if no dividends were paid, though evidence was insufficient to support a finding of tender, and though there was no finding of facts excusing tender, the Supreme Court is entitled to draw necessary inferences from the findings to support the judgment, and hence, since from the entire record it is evident that, if more complete find-

ings had been made, they would support the judgment, the judgment will not be reversed.

8. Contracts $\S$ 322(1)—Burden on party, who notified other that he would not perform, to show that prior to time of performance he notified of willingness and ability to perform.

Under Civ. Code, $\S$ 1440, declaring when performance of a contract is excused, if a party to a contract notified the other that he will not or cannot perform, the burden is on him to show that prior to the time of performance he notified the other party of his willingness and ability to perform.

Kerrigan and Myers, JJ., dissenting.

In Bank.

Appeal from Superior Court, Santa Cruz County; Benjamin K. Knight, Judge.

Action by Bethana Esther Hulen, executrix of the estate of William Yancey Hulen, deceased, against A. V. Stuart. Judgment for plaintiff, and defendant appeals. Affirmed.

Rehearing denied; MYERS, J., dissenting.

Lucas F. Smith, of Santa Cruz, Lucas F. Smith, of Los Angeles, and Stanford G. Smith, of Santa Cruz, for appellant.

Ralph H. Smith, of Santa Cruz, for respondent.

WASTE, J. The plaintiff, as executrix of her deceased husband's estate, brought this action to recover from defendant the sum of two thousand dollars and interest, alleged to be due by reason of an unfulfilled agreement to repurchase certain corporation stocks sold by the defendant to the decedent in his lifetime.

As a cause of action, the plaintiff alleged that on or about the 15th day of September, 1915, William Yancey Hulen, the decedent, purchased from defendant 20 shares of the capital stock of the Santa Cruz Fruit & Olive Canning Company, and paid therefor the sum of \$2,000; that at the time of the purchase, and as part of the consideration and inducement offered by defendant to her husband to purchase the stock, the defendant agreed in writing to repurchase the same if Hulen wished to sell in one year, and to pay therefor the sum of \$100 per share, and, in addition, interest at the rate of 12 per cent. per annum from the date of the purchase, provided no dividend had been paid on the stock; that within one year, and immediately upon the expiration of that period from the date of sale, Hulen demanded that defendant repurchase the stock at the agreed price, and that plaintiff, as executrix, after the death of Hulen, made like demand and tendered such stock to defendant, but that defendant refused at all times to repurchase the same. There is an allegation that no dividend has ever been paid upon the stock, which has no value, and plaintiff has been unable to sell the same. The prayer of the

complaint is for judgment against the defendant in the sum of \$2,000, together with interest at 12 per cent. and costs of suit. The defendant answered, specifically denying the allegations of the complaint. The finding of the court was in favor of plaintiff, and judgment followed as prayed for. The defendant has appealed.

From the record it appears that prior to September, 1915, there had been formed a corporation known as the Santa Cruz Fruit & Olive Canning Company. The defendant Stuart owned the controlling interest in the company at that time and was its president. The company being in need of money with which to pay its help during the canning season of 1915, the defendant entered into an arrangement with Hulen, plaintiff's testate, that if Hulen would purchase 20 shares of the capital stock of the corporation at the par value of \$100 per share, he [defendant] would buy the stock back in one year. Hulen accepted the arrangement and paid \$2,000 to the defendant. At the time, and as part of the transaction, the defendant executed and delivered to Hulen an agreement reading as follows:

"Santa Cruz, California, Sept. 15, 1915.

"This is to certify that W. Y. Hulen has bought twenty (20) shares of the capital stock of the Santa Cruz Fruit & Olive Canning Company at \$100 a share, the total amount paid being two thousand dollars (\$2,000). And I, A. V. Stuart, agree to buy said stock from Mr. W. Y. Hulen, in one (1) year from this date, including 12 per cent. interest per annum, in case there be no dividend paid on said stock by the end of one year, and providing Mr. W. Y. Hulen wishes to sell said stock at the date above named at par value, \$100 a share. And furthermore, will say this agreement is made in good faith in duplicate. A. V. Stuart, President Santa Cruz Fruit & Olive Canning Co. Witness: Daniel F. Gallivan.

"This is to certify that I further agree to pay all or any assessments that may be made on said above capital stock of the Santa Cruz Fruit & Olive Canning Co. during the life of this contract, being one year from this 15th day of September, 1915. [Signed] A. V. Stuart, Pres. of the Santa Cruz Fruit & Olive Canning Co."

No dividends were paid within the year, and upon the expiration of that period Hulen demanded of the defendant that he repurchase the stock. Stuart refused. There is a flat contradiction in the record as to what occurred in this connection. The plaintiff testified she was present when demand was made by her husband upon Stuart that he repurchase the stock. The defendant replied, "Oh, no; you got the stocks there; I can't buy them." "He said for us to hold them, and then, if we didn't get no dividends at the end of the next year, he would buy them, for he was very bad off for money." Defendant denied that any demand was

made upon him and testified that at the expiration of the year Hulen signified his willingness to keep the stock. On October 7, 1916, shortly after the expiration of the year, the defendant gave to Hulen a check of the Santa Cruz Fruit & Olive Canning Company, signed by the secretary and by himself, as president, for \$240. Mrs. Hulen testified that this check was for the interest at 12 per cent., according to the terms of the agreement. Defendant's testimony is that at the end of the first year Hulen came to him—

"about getting a dividend or something. * * * He did not say he wanted him [Stuart] to take the stock back. * * * He was perfectly satisfied, and so he says, 'Our year is up on that contract for that interest or the dividend.' * * * I said, 'What do you want to do about it?' and he said, 'All I want is the \$240, or whatever dividend they are making; if it is that much, I want that.' I said, 'How about keeping in the company; are you satisfied?' 'Perfectly satisfied, Mr. Stuart,' he said; 'I am willing to go on.'"

The contention of the defendant however, was not, in the opinion of the trial court, supported by sufficient evidence upon which to base a finding, and it found that a demand for the repurchase was in fact made by Hulen.

[1, 2] The complaint clearly states a cause of action for the return of the purchase price of the stock, with interest, in accordance with the terms of the agreement executed by the defendant to Hulen. *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 471, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013; *Dickinson v. Zubiato Min. Co.*, 11 Cal. App. 656, 662, 106 Pac. 123; *Williamson v. Marshall*, 54 Cal. App. 24, 28, 200 Pac. 1058. On still another theory the complaint states a cause of action, under section 3311 of the Civil Code, which provides:

"The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be * * * the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller. * * *"

Having alleged that the stock had no value, and that the defendant promised to pay a specified amount, for which judgment is prayed, it was unnecessary to allege that plaintiff had been damaged in such sum. An allegation and proof under the first theory, of the value of the stock was also immaterial for the reason that plaintiff's right to repayment did not depend upon its value; and, as to the statement of a cause of action, it is likewise immaterial whether or not defendant accepted plaintiff's tender of a return of the stock. *Dickinson v. Zubiato Min. Co.*, supra, 11 Cal. App. at page 663, 106 Pac. 123; *Schulte v. Boulevard Gardens Land*

Co., supra, 164 Cal. at page 471, 129 Pac. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013.

[3] Even though the plaintiff in stating her cause of action had mistaken the measure of the recovery which she sought, it would have made no difference. It is possible for a party to a contract, broken by the other party to it, to make such an election of remedies as to preclude him from thereafter seeking and obtaining the remedy of damages; but if he has not made such an election, and is entitled to recover, the fact that he seeks damages according to a wrong measure is almost wholly inconsequential, and does not preclude the court from according him the damages to which he is entitled according to their true measure. *Phillips v. Stark*, 186 Cal. 369, 371, 199 Pac. 509; *Bartlett v. Odd Fellows' Sav. Bank*, 79 Cal. 218, 223, 21 Pac. 743, 12 Am. St. Rep. 139.

[4] The title to the stock passed at once to Hulen when issued subject to his right to rescind and return the property under the terms of the agreement. *Guss v. Nelson*, 200 U. S. 298, 302, 26 Sup. Ct. 260, 50 L. Ed. 489; *Sturm v. Boker*, 150 U. S. 312, 328, 14 Sup. Ct. 99, 37 L. Ed. 1093. The duty of redelivery of the stock by Hulen to Stuart, and the payment for the same by Stuart, became concurrent, mutually dependent, and to be performed simultaneously. This being true, Hulen, before he could require the performance of the duty devolving upon Stuart to repurchase the stock should have offered and have been able to fulfill all conditions concurrent so imposed upon him, upon like fulfillment by Stuart. *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 360, 74 Pac. 938, 101 Am. St. Rep. 569; *Hellings v. Heydenfeldt*, 107 Cal. 577, 585, 40 Pac. 1026. There is an allegation in the complaint that the stock was tendered to the defendant, and the trial court has found that it was; but the evidence does not support the finding. It does appear, however, that the defendant, in response to the demand made by Hulen, immediately admitted his inability to comply with it, thus rendering a tender unnecessary. *Tatum v. Ackerman*, 148 Cal. 357, 360, 83 Pac. 151, 3 L. R. A. (N. S.) 908, 113 Am. St. Rep. 276; *Civ. Code*, § 1440. Performance was excused when Hulen was induced not to make the tender or offer of performance by the act of Stuart in promising to buy the stock in another year if no dividends were paid. *Civ. Code*, § 1511, subd. 3; *Pierce v. Lukens*, 144 Cal. 397, 77 Pac. 996. Having induced Hulen to act upon that belief, it is too late now for defendant to change his position, and defeat the plaintiff on the ground that a complete technical tender was not made. *Herberger v. Husman*, 90 Cal. 583, 585, 27 Pac. 428.

[5] The appellant contends that the evidence fails to establish that a tender and demand for the repurchase of the stock was

made during the life of the agreement. Assuming that the testimony of plaintiff is conflicting as to whether or not a first demand was made within one year from September 15, 1915, it clearly appears that a demand was made at the expiration of the year. The defendant testified that "at the end of the first year—that is, along about September 15 or 16, 1916—Mr. Hulen came to [him] about getting a dividend or something." Defendant's obligation was not to buy the stock from Hulen "within" one year, but "in one year from date," implying that the repurchase would occur at the end of the period mentioned. *Standard Dictionary*. Viewed in the light of the entire transaction, including the conduct of the parties, according to the testimony of both plaintiff and defendant, the decedent Hulen had no cause of action against defendant until he waited the passage of the year, and then notified defendant that he desired to sell. Assuming a demand was made before the expiration of the year, Hulen preserved his cause of action by renewing his demand and notifying defendant that he desired to sell, when he received the check for the interest in October following. The renewal of the notice and demand was not an offer of performance after a specified time fixed therefor, within the meaning of section 1490 of the Civil Code, but a further (possibly the first) notice and demand, after defendant was in default. *Howard v. Galbraith*, 13 Cal. App. 373, 377, 378, 109 Pac. 889.

[6] There is evidence in the record from which appellant argues that Hulen did not intend to vest title to the stock in Stuart at the time he made the demand for the repurchase. It is apparent that the trial court was not impressed with the weight of such testimony. It has accepted as true the testimony of the plaintiff that neither her husband nor she ever attempted to sell the stock. As executrix of her husband's estate, she has it in her possession. The claim of the defendant that the \$240 paid to Hulen was in the nature of a dividend is met by the testimony of the plaintiff that it was paid and accepted as, and was in fact, interest paid in accordance with the terms of the agreement. There is no satisfactory proof that any dividends were ever paid by the corporation. Stuart, and stockholders to whom he had given agreements to repurchase similar to the one entered into by him with Hulen, sold their stock upon reorganization of the Canning Company. Hulen did not. Appellant advances this fact as an argument in further support of his contention that Hulen was satisfied with owning stock in the concern, and desired to retain his connection with the business. The weight and effect to be given to this circumstance, and to the testimony by which it was established, were matters for the consideration of the court below. Acts of a party, after breach of a

contract by another in dealing with the property which is the subject of the transaction, do not necessarily deprive him of his right to maintain his action for damages. *Philips v. Stark*, supra.

[7, 8] There remains to be considered the question of the sufficiency or insufficiency of the findings to support the judgment under either theory of the case. The court found a tender, but there is no evidence to support the finding. It did not find any facts excusing a tender. The findings in other respects are as comprehensive as the pleadings. The court found that, when demand was made by Hulen, the defendant refused, and at all times since has refused, to repurchase the stock. The evidence is that he said he could not. After one party to a contract has notified the other that he will not or cannot perform, the burden is upon him to show that prior to the time of performance he notified the other party of his willingness and ability to perform. *Howard v. Galbraith*, supra; *Tatum v. Ackerman*, supra; Civ. Code, § 1440. The ultimate fact was the amount, if anything, due plaintiff from defendant by reason of his refusal to repurchase the stock. This the court ascertained and found from the evidence, and necessarily included the whole controversy. *Tower v. Wilson*, 45 Cal. App. 123, 133, 188 Pac. 87. We are entitled to draw necessary inferences from findings in order to support a judgment. *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 49, 97 Pac. 10, 18 L. R. A. (N. S.) 1106. From the facts found, and from the judgment ordered, it is evident, in the light of the entire record, that if more complete findings had been made they would have been adverse to the contentions of the appellant. If that be so, the failure to find further is not a ground for the reversal of the judgment. *Krasky v. Wollpert*, 134 Cal. 338, 342, 66 Pac. 309.

The plaintiff, as executrix, still retains possession of the stock. The certificates were produced in court, and can be indorsed and delivered to the defendant, upon payment of the amount of the judgment, as was contemplated in *Williamson v. Marshall*, supra.

The judgment is affirmed.

We concur: LENNON, J.; LAWLOR, J.; SEAWELL, J.

KERRIGAN, J. I dissent. The judgment in this case awards to the plaintiff, as the executrix of the estate of her deceased husband, William X. Hulen, the sum of \$2,000, being the amount of the agreed purchase price of 20 shares of the capital stock in a corporation, upon the mere breach on the part of the defendant of his agreement to purchase said stock, with nothing in the record to show either that title to the stock had passed to and vested in the defendant, or that the said sum of \$2,000 was the dif-

ference between the contract price of the stock and the amount realized upon a sale thereof pursuant to the provisions of section 3049 of the Civil Code, or between such contract price and its market value at or within a reasonable time after the breach.

In this state, the measure of damages for the breach of a buyer's agreement to pay for personal property is laid down in sections 3310 and 3311 of the Civil Code, and the provisions of those sections make no distinction between shares of stock in a corporation and goods or commodities forming the subject of general commerce. The first of those sections reads as follows:

"The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him, is deemed to be the contract price."

As above stated, there is no evidence in the record that the title to the stock in question ever vested in the defendant. On the contrary, an actual tender being excused by the announced inability or refusal of the defendant to take and pay the price thereof, the stock was retained by Hulen for some two years, when he died, and by his executrix for another two years, when this action was brought. During that period Hulen was elected a director of the corporation; a change of control occurred by the coming in of new stockholders, who purchased a large majority of the stock, paying its full par value. At that time the defendant, if by any act or suggestion on the part of Hulen he had been apprised that Hulen regarded the title to these 20 shares as having passed to and vested in him, could have disposed of the same at an advantageous price. Thereafter the corporation became involved in financial difficulties, and its stock became practically worthless. Then, for the first time and some two years after the breach by the defendant, Hulen attempted by private sale to dispose of the stock, but without success. Another two years passed, and the plaintiff, as the executrix of Mr. Hulen, now deceased, renewed the attempt, with a similar result. These attempts to dispose of the stock at private sale may be taken as conclusive that the plaintiff or her predecessor did not consider that title thereto had vested in defendant, since in that event such a sale would have constituted a conversion of the stock. *Bennett v. Potter*, 16 Cal. App. 183, 116 Pac. 681. It seems clear, therefore, that the plaintiff was not entitled to recover from the defendant the contract price of the stock upon the theory that the title hereto had vested in said defendant.

This brings us to the measure of damages prescribed by section 3311 of said Code. That section provides:

"The detriment caused by the breach of a buyer's agreement to accept and pay for per-

sonal property, the title to which is not vested in him, is deemed to be:

"1. If the property has been resold, pursuant to section 3049, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale; or

"2. If the property has not been resold in the manner prescribed by section 3049, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller.
* * *

It is apparent that Hulen or the plaintiff, being still in possession of the stock, could have proceeded under the first subdivision of this section and have sold the stock in the manner provided for the sale of a pledge, and have brought suit for the difference, between the amount realized at such sale and the contract price. This neither of them attempts to do. The plaintiff is therefore relegated to the second subdivision of said section for her measure of damages, which is "the excess, if any, of the amount due from the buyer under the contract over the value to the seller"; and this "value to the seller" is defined by section 3353 of the Civil Code to be:

"The price which he could have obtained in the market nearest to the place at which it should have been accepted by the buyer and at such time after the breach of the contract as would have sufficed with reasonable diligence for the seller to effect a resale."

As a matter of fact the plaintiff seems to have adopted as her measure of damages the one prescribed in said subdivision 2, since, in praying for judgment for \$2,000, she alleges in her complaint that the stock has, and at the time of the breach of the contract had, no value—an allegation which would be entirely superfluous in a complaint for the recovery of the contract price. Moreover, at the trial she introduced evidence of the market value of the stock, attempting to show that it had no value. It may be conceded that, had she established the worthlessness of the stock at the time indicated in said section 3353, Civil Code, namely, "at such time after the breach of the contract as would have sufficed with reasonable diligence, for the seller to effect a resale," the amount of the judgment given in her favor could not be questioned; but the fact is that the only evidence of market value offered by the plaintiff referred to a time two years and four years after the breach. On the other hand, as already indicated, the record contains evidence introduced by the defendant that a few months after the breach of the contract many shares of this stock changed hands at a price of \$100 per share, that such sum was its market value, and that the assets of the corporation would have warranted even a higher price. This evidence was competent to establish market value. *Moffitt v. Hereford*, 132 Mo. 513, 34 S. W. 252. It was un-

contradicted and unimpeached, and the finding of the trial court that the stock was valueless at that time is in plain disregard of such evidence and demands a reversal of the judgment.

The prevailing opinion seems to proceed upon the theory either that title to this stock passed to the defendant by the mere demand of Hulen that defendant take the stock as agreed, or that the plaintiff was entitled in any event to recover the contract price.

That in this state a person making a tender in performance of an obligation must by some act indicate to the person to whom performance is due that he intends to pass title to the thing offered necessarily results from the terms of section 1502 of the Civil Code, which provides:

"The title to the thing duly offered in performance of an obligation passes to the creditor, if the debtor at the time signifies his intention to that effect."

The intent of the seller with respect to passing title when he makes a tender is a question of fact. *Clark v. Rush*, 19 Cal. 393; *Todd v. Lyon*, 55 Cal. App. 67, 202 Pac. 899. The intent of the seller to pass title to the buyer does not inevitably, or at all, follow from a mere tender. A tender, without more, indicates that the seller offers to pass title pursuant to the terms of the contract. If the contract provides that payment is to be made upon delivery, then the tender implies that the title is to pass concurrently with the payment of the purchase price by the buyer, but not otherwise. *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853; *Katzenbach v. Breslauer*, 51 Cal. App. 756, 197 Pac. 967. In the case at bar the necessity of some action on the part of Hulen to signify his intention that title to the stock should pass to the defendant is emphasized by the fact that there was in fact no tender. Even if an actual tender had been made, it was still incumbent upon Hulen, in order to comply with the section of the Civil Code last quoted, to signify at that time his intention to pass title.

The prevailing opinion disposes of the question of the passage of title, upon which turns the all-important question of the measure of damages, by the statement that—

"The ultimate fact was the amount, if anything, due plaintiff from defendant by reason of his refusal to repurchase the stock. This the court ascertained and found from the evidence, and necessarily included the whole controversy."

But the court's determination of the amount due from the defendant to the plaintiff was based upon its finding that the stock from the inception to the end of the transaction was valueless, and this finding is not only unsupported by the evidence, but is directly opposed to it. In fact,

it appears to me have been inadvertently made, since it is not confined to the time to which the evidence of the worthlessness of the stock was addressed, namely, two and four years after the breach of the contract, but includes the time at which the original purchase was made by plaintiff's testator, and other times when the stock was changing hands for its par value, as to which times not even the plaintiff introduced any evidence that it was not worth the price at which it was being bought and sold; and it is not necessary to say that this court is not concluded by a finding which is entirely unsupported by the evidence.

Nor is the question of rescission involved in the case, as seems to be suggested in the prevailing opinion. The defendant's obligation was to purchase from the plaintiff's testator stock which the latter had acquired directly from the corporation. In a case where a party to a contract is entitled to rescind, all parties, when the rescission is duly effected, are restored to their former status, which includes their relation to the title to the property, so that in a case where a formal tender is excused the title would pass without it; otherwise in a case, such as the present, of the breach of an executory contract for the sale and purchase of personal property.

I conclude, therefore, that there being no evidence in the record of any act on the part of the plaintiff or her testator vesting title to the stock in question in the defendant, and the finding of the trial court that the said stock was without value being based exclusively upon evidence relating to a period too remote from the breach of the contract, and the record containing ample evidence upon which to base a finding that said stock had a market value of \$100 per share at a time material to the controversy, the finding in plaintiff's favor is against the evidence, and cannot support the judgment.

I concur: MYERS, J.

191 Cal. 615

COHN et al. v. GOODDAY et al. (Sac. 3437.)

(Supreme Court of California. Aug. 17, 1923.
Rehearing Denied Sept. 13, 1923.)

1. Trusts ⚡92½—Conveyance of property by trustee to one with knowledge of trust, with no consideration except oral promise to fulfill trust, is valid.

Where the holder retaining legal title to property is himself a trustee thereof under either a valid, express, or constructive trust, and he conveys the same to a grantee having full knowledge of the existence of the trust, and fakes the deed absolute in form to the property, but with no other consideration than his

oral promise to fulfill the trust, the burden of a constructive trust is cast on the grantee of such a conveyance; such trust not being void under Civ. Code, § 852, and Code Civ. Proc. § 1973.

2. Trusts ⚡52—Voluntary constructive trust held not affected by assumption of additional burden.

Where the voluntary constructive trust assumed by A. was primarily a trust to administer and distribute the residue of property among brothers and sisters when their mother should die, such trust was not affected by A.'s assumption of an additional burden, after the mother's death and with the consent of all beneficiaries, to continue the trust in favor and during the life of an ill sister, assuming that the additional burden was not legally imposed, but merely postponed the final distribution of the trust property to the beneficiaries under the original trust agreement.

3. Limitation of actions ⚡19(3)—Action to establish trust held governed by five-year statute.

A suit to establish and enforce a voluntary constructive trust held not governed by the limitation period of four years of Code Civ. Proc. § 343, but by section 318, requiring actions for the recovery of real property to be brought within five years.

4. Limitation of actions ⚡103(2)—Limitation does not run against enforcement of voluntary trust until repudiation by trustee.

The statute of limitations does not commence to run against the enforcement of a voluntary constructive trust until there has been a repudiation by the trustee.

5. Trusts ⚡365(2)—Failure to assert division of trust property for years held not laches, defeating suit by beneficiaries to enforce voluntary constructive trust.

Where plaintiffs had a right to rely on their brother's acceptance and faithful administration of a voluntary constructive trust he had assumed, their failure to insist on a division of the trust property during the long years of his devotion of its proceeds to the care of their ill and indigent sister, was not laches, which would defeat their suit to establish and enforce the trust.

6. Trusts ⚡282—Estate of beneficiary, who received more than others by consent of all beneficiaries, held entitled to same share as other beneficiaries.

Where beneficiaries of trust property were entitled to equal shares on their mother's death, but agreed that one of their sisters should stand in the shoes of their mother in receiving monthly payments, and that when they ceased, by reason of the sister's death or the cessation of her necessities, the residue of the trust property was to be divided according to the terms of the original trust, a denial to the estate of that sister of her original share of the trust property would violate the terms of the trust.

7. Appeal and error  882(19)—Defendant held not entitled to complain of limited scope of action, where he could have broadened it by answer or cross-complaint.

In a suit to establish and enforce a voluntary constructive trust, defendant held not entitled to urge on appeal that the trial court should have ordered and had a full accounting of all trust property, where defendants could have broadened the suit into one for a final accounting by affirmative matter in their answer, or by way of cross-complaint.

In Bank.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Suit by Levi Cohn and others against Lena Goodday, as administratrix, and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Norman A. Eisner, of San Francisco, for appellants.

Bond & Dierup, of Chico, for respondents.

RICHARDS, Justice pro tem. This appeal is by the defendants from a judgment in plaintiffs' favor in an action to establish a trust in certain real estate and compel conveyances of certain interests therein to the plaintiffs. The facts of the case are in the main undisputed and may be summarized as follows:

In the year 1895 one Hirsch Cohn was the owner of the real estate involved in this action. He was the father of Levi Cohn, Edith Fisher, Charles Cohn, Harry Cohn, D. S. Cohn, Amelia Cohn, Sarah Schwartz, Lena Goodday, and Abe Cohn, and was the husband of Henrietta Cohn, who was the stepmother of his aforesaid children. On April 19, 1895, Hirsch Cohn and his wife, Henrietta Cohn, joined in a deed to Levi Cohn and Charles Cohn, two of the former's said sons, conveying the said real estate to them, and also executed a bill of sale transferring to his said two sons certain personal property, which is not involved in this action. The said two sons of Hirsch Cohn thereupon, and of even date with said instruments, executed a declaration of trust affecting both forms of said property, whereby they obligated themselves to pay to Hirsch Cohn during his lifetime the sum of \$125 a month, and also to pay to their stepmother, Henrietta Cohn, if she survived their father, the sum of \$75 monthly during her lifetime; and to deliver the residue of said property after the death of said Henrietta Cohn to the aforesaid nine children of Hirsch Cohn by his first wife, share and share alike. The said trustees were empowered by said instruments to administer, sell and convey said property. In January, 1896, a further agreement was executed between the parties to the express trust thus created, by which it was agreed that Charles Cohn should be-

come and be the sole trustee thereunder, and that Levi Cohn should be released from the duties and obligations of said trust. A conveyance was thereupon made of an undivided one-half of said real estate by Levi Cohn to Charles Cohn, pursuant to such latter agreement, and thereafter Charles Cohn proceeded to perform the conditions of said trust by the payment to his father of the monthly sum specified therein until the latter's death in May, 1899, and thereafter by the payment to Henrietta Cohn, his widow, of the monthly sum of \$75 until her death in September, 1902. Upon the death of Henrietta Cohn the said nine children of Hirsch Cohn became entitled to the residue of the trust property in equal shares according to the terms of the trust. It appeared, however, that Sarah Schwartz, one of the beneficiaries of said trust and a sister of the remaining beneficiaries thereof, was then in ill health, in danger of becoming blind, and was without adequate means of support, and that her share in the property derivable from said trust would not be sufficient for her maintenance. In consequence of these conditions, all of her sisters and brothers, the other beneficiaries of said trust, orally agreed between themselves and with her, and also with said trustee, that the property should not be distributed at said time, but should remain in the hands of said trustee, and that he should pay out of the funds derived from the further administration thereof to Sarah Schwartz the sum of \$75 per month, or more, if necessary, for her support as long as she lived, or until such time as she should no longer be in need of the same, and that the property should await distribution under the terms of said trust until said time.

In July, 1903, it was deemed advisable by all of the parties concerned that the real property affected by said trust should be transferred by Charles Cohn to Harry Cohn, and that he should assume the obligations of said original trust, and also the superadded oral obligation with regard to Sarah Schwartz. All of the parties having orally agreed to this transfer, Charles Cohn conveyed the said real estate to his brother, Harry Cohn, by a grant deed absolute in form, and thereafter Harry Cohn administered the same according to the terms of the written trust and oral understanding of the parties, until April 5, 1906, when it again seemed advisable to all of the interested parties that Harry Cohn should transfer said real estate to his brother, Abe Cohn, and that he, in turn, should assume to carry into effect the obligations of the trust. In accordance with the oral agreement of the parties to that effect, Harry Cohn conveyed to Abe Cohn the said real estate by a grant deed absolute in form, and thereupon Abe Cohn

undertook and thereafter continued to carry into effect the terms of the original trust and the oral understandings of its beneficiaries with respect to the monthly payments to be made to Sarah Schwartz, up to the time of her death in the year 1918. Abe Cohn himself died a little more than a year after the death of his sister, Sarah Schwartz, and never during his lifetime denied that he held said real estate subject to whatever trust existed or continued by virtue of the original agreement between his father, Hirsch Cohn, and his elder brother, Charles Cohn, and also subject to whatever obligation was created by the oral understandings of his brothers and sisters as to the payment of the proceeds of said property to the extent of \$75 monthly to Sarah Schwartz during her lifetime.

After the death of Abe Cohn, his sister, Lena Goodday, who had become the executrix of his will, by the terms of which he had bequeathed to her daughters the residue of his estate, denied the existence of any trust in Abe Cohn to convey the residue of said real estate to the plaintiffs herein, and thereupon plaintiffs herein commenced this action against said Lena Goodday, as executrix of the last will and testament of Abe Cohn, and also against herself and her said husband, M. Goodday, individually to establish and enforce the provisions of said original trust to have themselves declared to be the owners of an undivided seven-ninths of said real estate and to compel a conveyance thereof to that extent to them. To the complaint of said plaintiffs, setting forth, in substance and with somewhat more of detail, the foregoing facts, the said defendants interposed a general and special demurrer, among the several grounds of which was a plea that the cause of action was barred by the provisions of section 343 of the Code of Civil Procedure. The demurrer being overruled, the defendants answered, denying most of the averments of said complaint for want of information or belief, and particularly denying that Abe Cohn during his lifetime held the title to said real estate subject to the trusts set forth therein, and affirmatively averred that any such trust as was alleged therein was void under the provisions of section 852 of the Civil Code and section 1973 of the Code of Civil Procedure. The defendants also averred that the plaintiffs' cause of action was barred by the provisions of section 343 of the Code of Civil Procedure. They further pleaded the defense of laches on the part of plaintiffs in the institution of the action.

Upon the trial and submission of the cause upon the issues thus framed the trial court made its findings of fact and conclusion of law wherein it found seriatim that all of the allegations of the 25 paragraphs of the plaintiffs' amended complaint were true, and also that each of the 27 paragraphs of the de-

fendants' answer were untrue, and as a conclusion of law from the foregoing findings of fact the trial court found that the cause of action set forth in the plaintiffs' amended complaint was not barred by the plaintiffs' laches or delay in the institution of said action nor by the statute of limitations, and that the trust as averred in said complaint was not void under the provisions of section 852 of the Civil Code, or of section 1973 of the Code of Civil Procedure, but in all respects a valid and existing trust enforceable against the estate of Abe Cohn, deceased. Judgment was accordingly ordered and entered in the plaintiffs' favor for the relief demanded in their said complaint, together with costs. From such judgment the defendants have taken and prosecuted this appeal.

[1] The first contention of the appellants is that the plaintiffs' amended complaint is insufficient to allege, and that the evidence in the case is insufficient to establish, that the defendants' deceased testator, Abe Cohn, was the trustee of an express trust. This contention, which is based upon the provisions of section 852 of the Civil Code defining express trusts in real estate, may be conceded to be well founded, and is in fact not very seriously disputed by the respondents herein. The appellants, having thus established this contention, proceed to argue that the plaintiffs' amended complaint is insufficient to aver, and that the proofs are insufficient to show, that Abe Cohn, their deceased testator, was the trustee of a constructive trust affecting the said real estate. The defect in said complaint, according to the appellants' contention, is that it fails to allege the existence of such a confidential relation between Abe Cohn and his brothers and sisters, the children of Hirsch Cohn, as would suffice to give rise to a constructive trust based upon the grant to him of the property in question and upon his oral agreement of even date with such grant to hold the said property subject to the trust of devoting a definite portion of its proceeds to the care and maintenance of Sarah Schwartz during her lifetime and of delivering over the residue of the property to the rest of his brothers and sisters upon the death of Sarah Schwartz. This contention on the part of the appellants is based upon the proposition that the relation existing between brothers and sisters is not in itself, and merely because of their blood ties, sufficient to create the presumption or sustain the finding that a constructive trust was or could be created by oral understandings between them at the time of the execution of a deed absolute in form to the one of them sought to be charged with the relations and duties of a trustee and the others affecting the property so conveyed and in the absence of the allegation and proof of fraud. It is true the District Court of Appeal so held in

the case of *Bacon v. Soule*, 19 Cal. App. 428, 434, 126 Pac. 384, and that it was justified in so holding by what was said by this court in *Odell v. Moss*, 130 Cal. 352, 356, 62 Pac. 555, and appellants argue that, this being so and the complaint herein having alleged no actual fraud on the part of Abe Cohn in taking the deed absolute in form to the property in question, and the evidence having shown no such fraud, the plaintiffs' pleadings and proof are sufficient to sustain the finding of the trial court to the effect that Abe Cohn held the property in question in trust for the purposes set forth in said complaint.

The difficulty with the appellants' contention in this regard consists in the fact that this is not one of those constructive trusts which depend upon the existence of confidential relations between the grantor and grantee of the conveyance or between the grantee thereof and others who might be the beneficiaries of such a trust; nor is this a case which comes within the rule laid down in *Smith v. Mason*, 122 Cal. 426, 55 Pac. 143, or *Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 543, or the other cases cited by the appellants as sustaining their contention. This is not the case of the owner in fee simple of a tract of land conveying it by deed of gift absolute in form to a grantee or grantees upon an oral understanding as to the creation of a trust in the real estate conveyed. This is a case wherein the holder of the legal title to the property is himself a trustee thereof under either a valid express or constructive trust, and who conveys the same to a grantee having full knowledge of the existence of said trust, and who with such knowledge takes a deed absolute in form to the property, but with no other consideration than his oral promise to undertake the fulfillment of the trust. In such a transaction the burden of a constructive trust is cast upon the grantee of such a conveyance. The rule upon this subject is thus stated in *Perry on Trusts and Trustees* (6th Ed.), § 217, wherein the learned author says:

"Another large class of constructive trusts arises from purchases or conveyances from trustees or other persons holding a fiduciary relation to property. It is a universal rule that, if a man purchases property of a trustee with knowledge of the trust, he shall be charged with the same trust in respect to the property as the trustee from whom he purchased"—citing a long line of authorities.

The Supreme Court of this state early recognized this to be the rule in this class of cases, and applied it in *Eversdon v. Mayhew*, 65 Cal. 163, 3 Pac. 641; *Scrivner v. Dietz*, 84 Cal. 295, 24 Pac. 171, and in the quite recent case of *Lamb v. Lamb*, 171 Cal. 577, 580, 153 Pac. 913. This salutary rule has the fullest application to the facts of the case at bar. The appellants do not question

the validity of the original trust created by Hirsch Cohn, and of which his son Charles Cohn was the trustee of an express trust. Charles Cohn, as trustee, conveyed the property to his brother, Harry Cohn, by grant deed, having no other consideration than that the latter would accept and faithfully perform the terms and conditions of the trust of which he was himself one of the beneficiaries, and of the nature and burdens of which he was fully aware. Harry Cohn thus became the voluntary trustee of a constructive trust, and faithfully fulfilled its conditions for a season, and then transferred the property by grant deed absolute in form to his brother, Abe Cohn, who, like himself, was a beneficiary of the original trust and was familiar with its terms, and who took over the property upon no other consideration than that of his promise to carry said trust into effect. He thus also became and continued during his lifetime to be the voluntary trustee of a constructive trust under the rule above laid down. The fact that he occupied at the time of the conveyance to him a confidential relation to his brothers and sisters, arising out of his fraternal tie, while it furnishes a reason for his assumption and fulfillment of the terms of the original trust, was not essential either to its creation or validity, since his trusteeship arose, not out of those relations, but out of the fact that he had taken over the trust property with full knowledge of the trust by which it was burdened, and with no other consideration than his agreement to fulfill the conditions of the trust. He thus assumed and thereafter continued to bear the burden with the benefit of the grant. The cases relied upon by the appellants touching the origin and validity of involuntary constructive trusts have no application to the facts of the case at bar.

[2] The voluntary constructive trust which the appellants' testator, Abe Cohn, assumed in taking over the trust property from his brother, Harry Cohn, on April 5, 1906, was primarily the trust to administer and to distribute the residue of the trust property among his brothers and sisters in accordance with the terms of the original express trust created by the transaction between Hirsch Cohn and his two sons, Levi Cohn and Charles Cohn, the obligations of which the latter expressly assumed upon the retirement of Levi Cohn from the trusteeship, and which obligations were cast upon Harry Cohn by the conveyance to him of said property, and which he, in turn, cast upon Abe Cohn by the like transfer of the trust property to him. In the meantime the stepmother, Henrietta Cohn, had died, and the portion of said trust requiring the monthly payment of \$75 to her had ceased to be effective, but a new condition had arisen out of the needs of Sarah Schwartz, the sister of both the trustee and the beneficiaries of the trust, which

seemed to her brothers and sisters to justify the continuance of the trust in being, and the payment to her of the sum formerly paid monthly to their stepmother. This was orally agreed to by all of the parties, and was accepted and carried into effect by the then trustee, Harry Cohn, up to the time of his transfer of the trust property to his brother, Abe Cohn, and by the latter thereafter. In taking over the said property Abe Cohn not only accepted the obligation of the original trust still in full force and effect, but accepted also orally the additional burden of the payment of the said monthly sum to said Sarah Schwartz according to the oral agreement of all of the parties concerned. This latter burden may not have been legally imposed under the strict rule relating to the creating of trusts in real estate as laid down in the cases of *Smith v. Mason*, 122 Cal. 426, 55 Pac. 143; *Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 543; *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; *Barr v. O'Donnell*, 76 Cal. 469, 18 Pac. 429, 9 Am. St. Rep. 242; *Brisson v. Brisson*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189, and the other cases cited by the appellants. But the fact that it may or may not have been a valid trust under these authorities is, as to this branch of the case, immaterial, since the only effect of this added oral attempt to change the direction of the fund theretofore paid monthly to Henrietta Cohn, so as to render the same payable to Sarah Schwartz, was merely to postpone the final distribution of the trust property to the beneficiaries thereof under the original trust until such a time as Sarah Schwartz should die or as her necessities should cease. Whether this diversion of this portion of the trust fund was legal or not cannot affect the legality of the portion of the original trust remaining in effect after the death of Henrietta Cohn, and which is the only portion thereof which the plaintiffs herein are seeking to enforce in this action.

[3] The appellants' next contention is that this action is barred by the statute of limitations. The only section of the Code of Civil Procedure which the defendants pleaded in their demurrer and also by their answer as constituting a bar to the maintenance of this action was section 343 thereof, which section provides that "an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." The present action is in form an action to have it declared that Abe Cohn during his lifetime held, and that the defendants herein as his successors in interest hold, the legal title to the real estate in question in trust to convey the same to the plaintiffs herein, and that said plaintiffs be adjudged the owners of an undivided seven-ninths thereof, and that said defend-

ants be by the judgment of the court required to execute and deliver a deed or deeds conveying to said plaintiffs their respective shares in said real estate. It is thus in no material respect to be distinguished from the case of *Bradley Bros. v. Bradley*, 20 Cal. App. 1, 127 Pac. 1044, which was an action to have it adjudged that the defendant held the title to certain real estate as a trustee for the plaintiff and that the legal title thereto be conveyed to him. Section 343 of the Code of Civil Procedure was pleaded in bar of that action, but that court held that said action was one to determine the ownership of the property in dispute and to compel a conveyance of the title thereto to the rightful owners thereof, and was therefore an action for the recovery of real property within the meaning of section 318 of the Code of Civil Procedure, and hence that section 343 of the Code of Civil Procedure had no application to that form of action. A petition for a rehearing of said cause was denied by this court.

The present case is also indistinguishable from the case of *Hillyer v. Hynes*, 33 Cal. App. 506, 165 Pac. 718, which was an action to enforce a constructive trust and to compel a conveyance of the legal title to the beneficiary thereof, and which the court held to be in effect an action for the recovery of real property, to which the provisions of section 318 of the Code of Civil Procedure had application, and to which the provisions of section 343 of said Code could not be applied. The court cited in support of its said conclusion the case of *Bradley Bros. v. Bradley*, supra, and also the case of *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820. In this latter case the action was one wherein it was sought to have the defendant declared a trustee for the plaintiff as to certain real estate and to quiet the plaintiff's title thereto, and this court, after a very full review of the authorities, held it to be an action for the recovery of real property, which was not barred by the provisions of section 318 of the Code of Civil Procedure. The defendants herein have not pleaded the bar of section 318 of the Code of Civil Procedure, and hence upon these authorities have not sufficiently pleaded the defense of the statute of limitations in bar of the present action.

[4] But even had they done so, or if section 343 of the Code of Civil Procedure could be given application to this form of action, we are satisfied that upon the facts of this case the trust sought to be established and enforced in this action was a voluntary constructive trust, against the enforcement of which the statute of limitations would not commence to run until there had been a repudiation thereof by the trustee. *Lamb v. Lamb*, 171 Cal. 577, 581, 153 Pac. 913; *Cooney v. Glynn*, 157 Cal. 583, 108 Pac. 506; *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555;

Butler v. Hyland, 89 Cal. 575, 20 Pac. 1108; Roach v. Caraffa, 85 Cal. 436, 25 Pac. 22. There was no such repudiation. On the contrary, Abe Cohn as such trustee was faithful to the trust during his life. Its attempted repudiation by the appellants, Lena Goodday, as executrix of his last will and testament, and by Lena Goodday and M. Goodday, as devisees under said will, occurred only a short while before the commencement of this action.

[5] The defense of laches is wholly without merit. The plaintiffs had a right to rely upon their brother's acceptance and faithful administration of the trust he had assumed, and their failure to insist upon a division of the trust property during the long years of his devotion of its proceeds to the care of their ill and indigent sister cannot be attributed as a fault, or held to defeat their present cause of action.

[6] The appellants further urge that the estate of Sarah Schwartz is not entitled to receive the equal share of the trust property assigned to it by the judgment of the trial court, for the reason that during her lifetime she received in the monthly sums paid her by the trustee much more than her said share would have amounted to. In making this contention the appellants concede the validity of the oral agreement between the beneficiaries of the original trust as to these payments to Sarah Schwartz. The undisputed evidence as to the terms of such oral agreement shows, and the trial court has found, that the understanding of all of the parties concerned was that Sarah Schwartz should stand in the shoes of her stepmother in the matter of receiving these monthly payments, and that when they ceased by reason of her death, or the cessation of her necessities, the residue of the trust property was to be divided according to the wishes of Hirsch Cohn as expressed in the terms of the original trust. This being the agreement, the validity of which the appellants concede, it follows that their contention in this regard is devoid of merit, since to deny to the estate of Sarah Schwartz her original one-ninth share of the trust property sought to be distributed in this action would be to violate the terms of said agreement.

[7] The appellants finally insist that the trial court should have ordered and had a full accounting of all of the trust property both real and personal, from the inception of the original trust to date before attempting to distribute that portion thereof which consists of real estate and which is the subject of this action. But the parties to this action have presented no such issue in their pleadings, but have been content to confine the relief sought to the residue of the real estate which was the subject of the original trust. Had the defendants and appellants

herein desired that the action as thus limited by the plaintiffs' complaint should be broadened into an action for a final accounting they should have presented that matter affirmatively in their answer or by way of cross-complaint. Not having done so, they cannot be heard to urge this contention for the first time upon appeal.

The judgment is affirmed.

We concur: WILBUR, C. J.; WASTE, J.; MYERS, J.; KERRIGAN, J.; LAWLOR, J.; SEAWELL, J.

(62 Cal. App. 664)

CLENDENIN v. WHITE et al. (Civ. 2621.)

(District Court of Appeal, Third District, California. June 25, 1923.)

1. Waters and water courses ☞157—One maintaining ditch over another's land held licensee with right to enter and make repairs.

Where one for more than 20 years has maintained a ditch over another's land, pursuant to an agreement between the parties, has entered each year for the purpose of removing obstructions, *held*, that his rights were at least those of a licensee and irrevocable.

2. Husband and wife ☞25(6)—Wife held to have ratified agreement of husband as agent for her permitting construction of ditch.

Testimony by a wife, the owner of property, as to an agreement by her husband to permit the construction of a drainage ditch across her land, *held* sufficient to establish a ratification of such agreement by her.

3. Waters and water courses ☞158½(1)—Damage for injuries from stoppage of drainage ditch maintained under license held recoverable.

Where persons across whose land a drainage ditch had been maintained for more than 20 years, pursuant to an agreement between them, refused to permit the upper landowner to clear the ditch of obstructions, with the result that water backed up and killed 368 pear trees, *held*, that damages were recoverable.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by L. P. Clendenin against Josephine White and Chester White, her husband. Judgment for plaintiff, and defendants appeal. Affirmed.

C. M. Crawford, of Lake Port, for appellants.

Tindall & Davis, of Lake Port, and Lovett K. Fraser, of San Francisco, for respondent.

FINCH, P. J. The complaint alleges that the plaintiff and defendants are adjoining

landowners, plaintiff's land being higher in elevation than that of defendants; that there are certain springs on plaintiff's land from which water flows over and across plaintiff's and defendants' lands through a ditch constructed "in a well-defined depression where the water from said springs formerly flowed before the construction of said ditch"; that, more than 20 years ago, "plaintiff and defendants by mutual consent and with the express understanding and agreement that said ditch should be used jointly across the lands of plaintiff and defendants for the purpose and use of carrying the water from said springs off from and over the lands of plaintiff and defendants * * * constructed said ditch * * * along and over the lands which the water was accustomed to flow from said springs"; that the water from such springs has been conducted through the ditch for more than 20 years, and that the ditch is necessary for the drainage of plaintiff's land; that each year since the construction of the ditch it has become filled with sediment and that plaintiff and his agents have gone upon defendants' land and "with the acquiescence and assistance of said defendants have cleaned out said ditch to the depth of about two feet and to its natural condition when first built"; that in the year 1921 the defendants for the first time forbade plaintiff's repair or use of the ditch; and that plaintiff has been damaged thereby in the sum of \$1,000 by reason of the consequent accumulation of water on his land. The prayer is for a judgment establishing plaintiff's right to repair and use the ditch, restraining defendants from interfering therewith and for damages in the sum of \$1,000. The answer denies the alleged facts upon which plaintiff's right to the use of the ditch is based. The court found that the land alleged to belong to defendants is the property of defendant Josephine White and that Chester White is her husband and her manager and agent. The other facts are found in accordance with the allegations of the complaint. Judgment was rendered awarding plaintiff damages in the sum of \$368 and granting other relief as prayed for.

[1] The evidence shows that from the year 1877 to 1899 there was a ditch running through the lands of the parties for the purpose of carrying away water from the springs mentioned in the complaint. This ditch followed a different course through defendants' land from that of the ditch here in controversy. It seems not to have served its purpose effectively. Plaintiff testified that up to the year 1899 the water spread out over the defendants' land, and that the ditch constructed in that year "took all the water into one channel." Defendant Chester White testified that the water ran "all over the field" on defendants' land, and that the new ditch "confined it." In the year 1899 the

plaintiff and Chester White agreed upon the location of the present ditch through defendants' land, and that the ditch should be used jointly by the parties. White plowed furrows to mark the course of the ditch, and plaintiff constructed it along the line so marked. The old ditch was thereupon abandoned and the new one seems to have successfully carried off the water and prevented it from spreading out over the lands of the parties. Plaintiff went upon defendants' land and cleaned out the ditch every year but one, which was a dry year, from 1899 to 1921, without objection on the part of defendants, and water was drained through it continuously during that time. The ditch in controversy was constructed by plaintiff for the benefit of both parties pursuant to the oral agreement between him and White. Putting the case most strongly against plaintiff, his rights are at least those of a licensee. "Where a licensee has entered under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures, or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for. * * * In the case of irrigating ditches, drains, and the like, the license becomes in all essentials an easement, continuing for such length of time under the indicated conditions as the use itself may continue." *Stoner v. Zucker*, 148 Cal. 516, 520, 83 Pac. 808, 810 (113 Am. St. Rep. 301, 7 Ann. Cas. 704); *Gravelly Ford Co. v. Pope-Talbot Co.*, 36 Cal. App. 717, 178 Pac. 155; *Irrigated Valleys Land Co. v. Altman* (Cal. App.) 207 Pac. 401; *Cairns v. Haddock* (Cal. App.) 212 Pac. 222.

[2] Appellant contends that Josephine White is not bound by her husband's parol agreement with plaintiff. Plaintiff testified that Chester White has resided on the White property for 30 or 35 years, and during all of that time has had charge of the White property. This testimony was not contradicted. Mrs. White testified as follows:

"Q. Mr. Chester White is your husband? A. He is. Q. Does he manage your place there for you? A. I think I help. I don't think he has entire management of it; no. Q. Well, you leave it to him to look after the fences, do you? A. Yes. Q. He also looks after the ditches on the property; you leave that to him? A. He usually talks those matters over with me. Q. And you know of this ditch being constructed there in the year 1899? A. I don't remember the year. Q. Well, about that time? A. I suppose so. Q. Do you remember the construction of it, whenever it was? A. Yes; I do. * * * Q. You acquiesced in the construction of it? A. I really had nothing much to do with it. I was busy with the family and the house. Q. Mrs. White, do you approve of any contract that your hus-

band made with Mr. Clendenin at that time about the ditch, or do you disapprove? A. I don't know as there was any question. I never interfered very much. Q. Well, you approved of anything your husband did? A. I have just let it go, a good many times. Q. You never objected? A. Some things I have objected to. Q. You didn't object to Mr. Clendenin? A. Not at that time. Q. Did you at any time within the year? A. No; not about the ditches."

The foregoing testimony justifies the inference that Mrs. White had knowledge of the agreement between her husband and the plaintiff and of the construction and use of the ditch by the latter. The operation of the ditch was of benefit to her own land. She accepted such benefit for a period of more than 20 years, during which time she must have known of plaintiff's annual expenditures upon that part of the ditch which was upon her own land. Having received the benefits of her husband's agreement with plaintiff during all that time she must be held to have ratified it, even if he was unauthorized to make it. "Ratification of a contract made by an agent need not be in express terms in order to bind the principal." *Ford v. Lou Kum Shu*, 26 Cal. App. 203, 210, 146 Pac. 199, 202. "If it is fairly inferable from the words or conduct of the party it is sufficient. Like the act of conferring antecedent authority upon an agent it may be either express or implied." *Pope v. Armsby Co.*, 111 Cal. 159, 163, 43 Pac. 589, 590. Under a state of facts somewhat similar in principle to those of the instant case, where a son, acting for his father without express authority, had given a parol license to construct a sewer through the father's land, it was said: "The authority of the son to fully represent the father in what he proposed, either originally or by ratification, is too apparent to admit of question." *Alderman v. City of New Haven*, 81 Conn. 137, 70 Atl. 626, 18 L. R. A. (N. S.) 74. The facts of this case warrant a like observation as to the authority of Chester White to represent his wife.

[3] The drainage ditch carried off the water from certain parts of plaintiff's land which had theretofore been too wet for the growing of fruit trees. After the construction of the ditch, plaintiff planted pear trees upon the land so drained. Defendants' interference with plaintiff's use of the ditch caused the water to back up and kill 368 of these trees. There is no doubt that the plaintiff suffered damage to the extent found by the court.

The judgment is affirmed.

We concur: BURNETT, J.; JONES, Justice pro tem.

62 Cal. App. 536

CRISAFULLI BROS. v. CUCAMONGA VINTAGE CO. (Civ. 3691.)

(District Court of Appeal, Second District, Division 2, California. June 16, 1923.)

1. Brokers $\S$ 86(1)—Evidence held to sustain finding that commissions had been paid by application on customer's indebtedness as agreed.

In an action by a broker to collect commissions under a written contract of employment, evidence as to whether plaintiff authorized defendant company's president to apply his commissions on contract indebtedness of other customers held sufficient to support the finding for defendant.

2. Appeal and error $\S$ 1011(1) — Findings based on conflicting evidence not reviewable.

Where the evidence is conflicting, the finding of the trial court is sustained.

3. Frauds, statute of $\S$ 139(3)—Statute held not to apply to broker's direction to apply commissions as payment on contracts of others, since he actually answered for debt of others.

Where a broker, under a written contract to secure contracts for purchase of wines, earned commissions and later made contracts for other buyers with his company, authorizing the company's president to apply his earned commissions as payment on the later contracts, the statute does not apply, since he actually answered for the debt or default of others instead of agreeing to, and the possibility that the exact amount due the broker was not ascertained when the application was made is immaterial.

4. Brokers $\S$ 86(1)—Production of corporate books not essential to prove acceptance of broker's application.

In a broker's action for commissions earned under a written contract to secure contract buyers of wine, where defendant corporation contends that plaintiff authorized application of his earnings to payments on other contracts, production of the corporate books to show acceptance of plaintiff's application was not essential, since it is the fact of payment and not the condition of the books that matters.

5. Trial $\S$ 51—Counsel's assurance that conversations will prove cancellation of claim sufficient to admit them.

In an action for broker's commissions under a written employment contract, the trial court properly admitted evidence of conversations on counsel's assurance that they would establish a cancellation of plaintiff's claim by application of his commissions at plaintiff's request to contracts of others with the company.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Crisafulli Bros. against the Cucamonga Vintage Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Adams, Adams & Binford, of Los Angeles, for appellant.

Leonard, Surr & Hellyer, of San Bernardino, for respondent.

CRAIG, J. Plaintiff's assignor, G. Crisafulli, and the Cucamonga Vintage Company entered into a contract in writing, dated November 7, 1918. Under this agreement G. Crisafulli became entitled to commissions amounting to \$1,950.06. These sums were earned through his services rendered as a broker in procuring for the defendant two contracts to purchase wine, referred to as the Mariani Bros. and Bellanca & Co. contracts, and which were dated October 31 and November 7, 1918, respectively. The contract between G. Crisafulli and the defendant was executed just after the other contracts mentioned, and stipulated that the broker should receive a commission of 2 cents per gallon for one sale and 3 cents per gallon for the other.

On November 21, 1918, Crisafulli, acting as agent and broker for Joe Finelli and one E. Penna, executed contracts for each of these parties by which they agreed to buy Cicerian wine from the company. The contracts contained this provision:

"The buyer agrees to pay ten dollars (\$10) per barrel within five days from this date, balance to be paid by sight draft attached to bill of lading."

Under these two contracts the plaintiff was entitled to receive \$3,000 on or before November 26, 1918. Neither Penna nor Finelli ever made any payment to the defendant, but the trial court found that Crisafulli directed the application of his commissions earned under the Mariani Bros. and Bellanca & Co. contracts to payment upon the \$3,000 due defendant under the Finelli and Penna contracts; and that in this way the plaintiff's claim had been paid.

[1] Appellant contends that the evidence is insufficient to support this finding. It is true that the testimony is conflicting, but we think that it justifies the construction placed upon it by the superior court. Three witnesses testified that Crisafulli authorized the president of the defendant company to make the application of the commissions which he sues to collect upon the \$3,000 owing the company. Referring to a conversation in January, 1919, the witness Thomas, president of the Cucamonga Vintage Company, testified that Crisafulli said "to apply these commissions against these contracts" and further, "and we made some annotations that we were doing that, at the time." Another witness gave his recollection of the same conversation. This was H. I. DeBerard, the vice president of the Cucamonga Vintage Company, and who also acted as bookkeeper. He testified that Crisafulli said,

"That is all right, you have your commission applied on those contracts, and that is sufficient funds, and it will be all right."

He said:

"I'll fix the cars in case they don't take them. Q. He agreed to stand behind them in the event they didn't take them? A. Yes. Q. Then it wasn't at this conversation that Mr. Crisafulli first said to apply it; it had already been said by Mr. Crisafulli before this and also in your presence? A. Yes, sir. Q. You knew all about understanding that this sum was to be applied, this commission was to be applied on those contracts, didn't you? A. Yes, sir."

Another witness, A. J. Perelli-Minetti, recounted a conversation with Crisafulli carried on over the telephone. The witness, who represented the company, informed Crisafulli that the amount called for under the Finelli and Penna contracts had not been paid. Then, according to the witness, Crisafulli replied:

"That is all right, you just apply the money that is due me on this commission on the Mariani and Bellanca contracts."

Mr. Perelli-Minetti also testified to another conversation, at which were present beside the witness, Crisafulli, Thomas DeBerard, and Carlo Perelli-Minetti. This was apparently the same occasion referred to by the witnesses Thomas and DeBerard. Perelli-Minetti states that Crisafulli said in Italian:

"What you people are afraid of? You have more money on account of this contract than you ever had in any other contract," and he turned to me after I told him to say in English, and he told me we could apply the money due him on commissions of Mariani and Bellanca contracts."

The witness was then asked:

"When that remark was made, what did you and the other gentlemen present say with reference to that instruction; did you accede and agree to it?"

To which he replied:

"Yes, we said we were satisfied."

[2, 3] Appellant contends that from these and other parts of the transcript the true arrangement between the parties was that Crisafulli agreed to answer for the debt or default of Finelli and Penna on their contracts, but that such agreement, not being in writing, was void under the statute of frauds. There is other evidence to support this theory, but since we are satisfied that the testimony which we have quoted is sufficient to support the findings of the trial court, it would serve no useful purpose to include all of the testimony given in this opinion. The most that can be said is that there is a conflict in the evidence. It is unnecessary to say that under such circumstances the findings will be sustained. As the trial court interpreted the transaction,

Crisafulli did not merely agree to answer for the debt or default of others, but he actually answered for the same and paid the sum of his commission upon the amount owing the defendant by Finelli and Penna. The fact is immaterial, if it be one, that the exact amount due Crisafulli was unascertained when the application was made. The number of gallons sold was known, but one witness testified that sometimes a barrel of wine was lost in shipment, which, of course, might reduce the amount of the broker's commission slightly.

[4] Nor was it necessary that the defendant prove its acceptance of Crisafulli's offer by the production of books showing an entry to that effect. It is the fact of payment and acceptance, and not the condition of the defendant's books, which is important. *Anaheim v. Parker*, 101 Cal. 483, 35 Pac. 1048. Books are competent, but not conclusive or essential, evidence to prove such transactions.

[5] What we have said disposes of the contention that the evidence of the conversations to which reference has been made was improperly received. The trial court pursued the proper course in admitting the evidence upon the assurance of counsel that it would establish a cancellation of plaintiff's claim by the application of it to the amounts owing from Finelli and Penna to the defendant company.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

62 Cal. App. 636

LANE MORTGAGE CO. v. UNITED STATES FIDELITY & GUARANTY CO.
(Civ. 4484.)

(District Court of Appeal, First District, Division 1, California. June 22, 1923. Hearing Denied by Supreme Court Aug. 20, 1923.)

Attachment  192, 344—Undertaking held not statutory bond for release of attachment, but one obligating maker to pay to plaintiff whatever judgment was obtained without first issuing execution.

An undertaking reciting it was given for the release of property attached in a former action and running directly to plaintiff in that action, its maker, defendant, agreeing that it would on demand pay to plaintiff the amount of whatever judgment might be recovered in that action, held not a statutory undertaking within Code Civ. Proc. § 540, for the release of attached property, but a direct undertaking to plaintiff to pay whatever judgment was obtained by him in the former action, so that a showing that an execution in the former action had been issued and returned unsatisfied was not a condition precedent to recovery on the undertaking.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the Lane Mortgage Company against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lawler & Degnan, of Los Angeles, for appellant.

Lloyd W. Moultrie and E. A. Lane, both of Los Angeles, for respondent.

RICHARDS, J. The plaintiff recovered judgment against the defendant upon an undertaking given by the defendant to the plaintiff for the release from attachment of the property of certain defendants which had been attached in an action by the plaintiff against said last-named defendants and was being held by the sheriff prior to its release upon the giving of said undertaking.

The sole contention which the defendants in the present action offer upon this appeal is that said undertaking was in form and effect the statutory undertaking provided under the terms of section 540 of the Code of Civil Procedure for the release of attached property by the attaching officer, and that this being so the plaintiff was not entitled to a recovery thereon in the absence of a showing that an execution in said former action had been duly issued and returned unsatisfied prior to the institution of the present action. In making this contention the appellant relies upon the case of *Passow & Sons v. U. S. Fidelity, etc., Co.*, 177 Cal. 31, 170 Pac. 1124, and it is conceded by the respondent that if the undertaking sued upon herein is to be held the statutory undertaking provided for in said section of the Code, the above-cited case must be given full application to the case at bar and the judgment herein be reversed. The respondent, however, maintains that said undertaking is not such statutory bond, but, on the other hand, is a common-law bond given by the defendant herein directly to the plaintiff herein pursuant to an agreement between the parties to said former action as to the release of the property of the defendants therein upon the execution and delivery of said bond binding the surety company as the maker thereof directly to the plaintiff for the payment of whatever judgment was obtained by it against the defendants in said former action, and hence that the case of *Passow & Sons v. U. S. Fidelity, etc., Co.*, supra, has no application to the facts of the case at bar. The respondent in making this contention relies upon the case of *Kast v. Pacific Surety Co.*, 185 Cal. 450, 197 Pac. 339, as conclusive upon the question, and we are satisfied that its contention in this regard must be sustained. The undertaking in question recites that it is given pursuant to an agreement between

the parties to said former action for the release of the property attached therein. It runs directly to the plaintiff in said action, and its maker by its express terms agrees and promises that, in case the plaintiff recovers final judgment in said former action, "we will on demand pay to plaintiff the amount of whatever judgment may be recovered in said action."

The case of *Kast v. Pacific Surety Co.*, supra, distinguishes an undertaking in this form from that under consideration in the *Passow Case*, and upon the reasoning and authority of said more recent decision it follows that the judgment herein must be affirmed and it is so ordered.

We concur: TYLER, P. J.; ST. SURE, J.

63 Cal. App. 15

STAFFORD v. HILL et al. (Civ. 4047.)

(District Court of Appeal, Second District, Division 2, California. July 10, 1923.)

1. Costs $\S$ 254(5)—Amount paid for reporter's transcript used on former appeal under the alternative method held properly allowed.

Under Code Civ. Proc. $\S$ 1027, providing that a party entitled to costs "may recover entire amount paid out by him in connection with said appeal, and the preparation of the record for the appeal," an amount paid for a reporter's transcript of testimony used on a former appeal of the cause under the alternative method is properly allowed as an item of cost.

2. Costs $\S$ 205—Verification of memorandum of costs held sufficient.

Under Code Civ. Proc. $\S\S$ 1033, 1034, providing what a verification to a memorandum of costs must contain, held, that a verification to the effect, among other things, that the items of the memorandum "are true and correct, and have been necessarily incurred in this cause," was sufficient.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by C. C. Stafford against Frances B. Hill and another. Judgment for plaintiff, and the named defendant appeals from an order taxing costs and refusing to strike memorandum of cost from files. Order affirmed.

See, also, 200 Pac. 33.

Herbert Cutler Brown, of Los Angeles, for appellant.

J. Vincent Hannon, of Los Angeles, for respondent.

WORKS, J. This is an appeal from an order taxing costs and denying a motion to strike a memorandum of costs from the files.

[1] Appellant objects to an item of costs allowed by the trial court, being the amount paid for a reporter's transcript of testimony used on a former appeal of the cause under the alternative method. Appellant cites *Sime v. Hunter*, 55 Cal. App. 157, 202 Pac. 967, as authority for her claim that such an item is not properly taxable as costs, but the opinion in that action does not possess the force which appellant attributes to it. There the item was for a copy of the reporter's transcript used on the appeal, the copy having been paid for by the respondent and having been procured for the private use of that party in connection with the appeal. The respondent claimed the item as costs and it was properly disallowed, of course. Here, however, the item claimed was expended by the appellant on the former appeal, respondent here, for the reporter's transcript which he filed with the District Court of Appeal under the alternative method. This item was properly allowed under the provisions of section 1027, Code of Civil Procedure, providing that a party entitled to costs on appeal "may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal." Under the terms of section 953a, Code of Civil Procedure, providing for the alternative method of appeal, the reporter's transcript filed by an appellant is a part of the record on appeal.

[2] It is insisted by appellant that the memorandum of costs should have been stricken for the reason that it was not verified as required by law. The verification is to the effect, among other things, that the items of the memorandum "are true and correct and have been necessarily incurred in this cause." This language is in exact accord with the requirements of sections 1033 and 1034, Code of Civil Procedure, providing what such verifications must contain, but appellant contends that under the language of section 1027 of the same Code the verification should show that the amounts set forth in the memorandum were actually paid out. The point is without merit. Section 1027 has nothing to do with the form or contents of the verification. It merely provides what items of expenditure may be recovered as costs.

Order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(62 Cal. App. 674)

PEOPLE v. BRITT. (Cr. 946.)

(District Court of Appeal, Second District, Division 2, California. June 26, 1923.)

1. Rape $\hookrightarrow$ 35(4)—Proof held not at variance with information as to time offenses committed.

In a prosecution for rape, testimony of the prosecutrix as to the time of alleged offenses held not at variance with the information.

2. Rape $\hookrightarrow$ 51(2)—Corpus delicti held sufficiently established.

Testimony of a physician that at the time of trial prosecutrix was seven months advanced in pregnancy, together with that of the complaining witness, held sufficient to establish corpus delicti.

3. Rape $\hookrightarrow$ 52(1)—Evidence held sufficient to sustain conviction.

In a prosecution for statutory rape, testimony by the prosecuting witness as to criminal intimacy with defendant, her father, held sufficient to sustain conviction.

4. Rape $\hookrightarrow$ 57(1)—Defense of an alibi held for jury.

In a prosecution for rape, where the prosecuting witness testified that the offense occurred on a Saturday during a particular month, testimony by defendant seeking to establish an alibi to the effect that he had been employed at another place every Saturday during the month, if assumed sufficient to conclusively establish such fact, held only to take the question of guilt to the jury.

5. Criminal law $\hookrightarrow$ 539(1)—No abuse of discretion in permitting leading questions.

In a prosecution for rape, where at the time of trial the prosecuting witness was dead, and her testimony given at the preliminary examination admitted under Pen. Code, § 686, and where the magistrate conducting such preliminary examination had permitted her to answer leading questions and had allowed a rigid cross-examination by defendant's counsel, held, that the admission of such questions, which could not then be reframed, was not an abuse of discretion.

6. Criminal law $\hookrightarrow$ 1170(3)—Error in excluding particular testimony held cured by subsequent admission.

Possible error, in sustaining an objection to a question as to whether the prosecutrix in a prosecution for rape had ever had intimate relations with another than defendant, held cured by the admission of subsequent testimony in answer to a similar question.

7. Criminal law $\hookrightarrow$ 1170(2)—Exclusion of company record properly admissible held not prejudicial error where witness testified fully as to contents.

In a prosecution for rape, where defendant sought to establish an alibi by showing that he had been employed at another place on the date of the alleged offense, error in refusing to permit the introduction of a permanent record

of the employing company held not prejudicial where the witness producing the same was permitted to testify fully as to its contents.

8. Criminal law $\hookrightarrow$ 1172(6)—Instruction as to necessity of proof of particular date of offense held not prejudicial.

In a prosecution for rape where the information charged two offenses on particular dates, an instruction "that it is wholly immaterial on what day or night the offense charged in the information was committed, provided you believe from the evidence it was committed and that the same was committed within three years prior to the filing of the information" held not reversible error where no attempt had been made to establish any offenses other than those charged, or where the testimony admitted did not establish other offenses.

9. Criminal law $\hookrightarrow$ 1178—Review of criticized instructions unaccompanied by citations of authority or argument unnecessary.

Criticized instructions, both given and refused, need not be reviewed on appeal, when unaccompanied by either citations of authority or argument.

10. Criminal law $\hookrightarrow$ 1037(1)—Alleged misconduct of counsel need not be reviewed, where objection not made during trial.

Review of alleged misconduct of counsel on appeal was not required, where objection was not made during trial.

11. Criminal law $\hookrightarrow$ 1166½(6)—Excusing women on jury panel in prosecution for rape held not prejudicial error.

In a prosecution for rape, where the court on the day on which the trial was commenced excused the women on the jury panel, and where no objection was made by counsel to such action, held, in the absence of any showing that the jurors who did serve were not competent, fair, or qualified, that the action of the court was not prejudicial.

12. Criminal law $\hookrightarrow$ 730(7)—Remarks of counsel as to agreement for male jury held not prejudicial misconduct, in view of instruction.

In a prosecution for rape, remarks of prosecuting attorney in his opening argument relating to the advisability of having a male jury, and concerning an agreement between counsel for dismissal of women on the panel, held not prejudicial misconduct, in view of an instruction by the court to disregard statements by counsel of facts not in evidence.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Otha F. Britt was convicted of rape, and he appeals. Affirmed.

William M. Morse, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

SHENK, Justice pro tem. The defendant was accused by information in four counts; the first and third counts charging statutory

rape on or about the 15th day of June, 1921, and on or about the 15th day of September, 1920, respectively, and the second and fourth counts charging incest at the same times at which the alleged rape was committed. A verdict of guilty as to each count was returned by the jury. A motion for a new trial as to counts 2 and 4 was granted. A similar motion as to counts 1 and 3 was denied, and sentence thereon was pronounced. Defendant appeals from the judgment and from the order denying his motion for a new trial.

The contentions of the appellant are: (1) That the corpus delicti was not established; (2) that the evidence was insufficient to warrant or sustain a conviction; (3) that the trial court made prejudicially erroneous rulings during the course of the trial; (4) that instructions were improperly given or refused; and (5) that he was not given a fair trial because of certain matters occurring at the trial and which will hereinafter be more particularly noted.

[1,2] The prosecuting witness, Beulah Britt, died before the trial, and her testimony given at the preliminary examination was offered and received in evidence under section 686 of the Penal Code. She testified that she was the daughter of the defendant; that she was 14 years of age at the time of the alleged offenses. As to the first count she testified that the defendant had sexual intercourse with her "either the first or middle part of June," 1921, about two weeks before school closed, which was about June 20, and when she and her mother and the defendant lived on Alessandro street in the city of Los Angeles. As to the third count she testified that the defendant also had sexual intercourse with her in the same city when their home was on Maple avenue; that they moved to Maple avenue "in July about a year and a half ago." The date of her examination at the preliminary hearing was January 5, 1922. She testified that this occurred when her mother was at the Los Feliz hospital; that her mother returned from the hospital in November, and that she had been at the hospital five weeks. The time thus fixed would place the commission of this act in September, 1920. No fatal variance as to the time alleged and proved is shown (People v. Williams, 133 Cal. 165, 65 Pac. 323). By the testimony of a physician produced on behalf of the people it appeared that the prosecuting witness had been examined on December 28, 1921, and found to be pregnant, and that she had been pregnant for about seven months. There was no dispute as to the age of the prosecutrix. The jurisdictional facts were established, and the testimony of the complaining witness constituted the necessary proof of criminal agency. No more was required to establish the corpus delicti. Peo-

ple v. Flores, 34 Cal. App. 393, 167 Pac. 413; People v. Verrees, 169 Cal. 404, 146 Pac. 890. In addition, proof of pregnancy for seven months by examination made about seven months after the offense charged in count 1 tends further to prove criminal agency. People v. Tarbox, 115 Cal. 57, 46 Pac. 896.

[3] There is no force in the suggestion that the evidence was insufficient to sustain a conviction. The testimony of the prosecutrix was not improbable and upon her statements alone the jury was authorized to convict.

"The truth or falsity of * * * testimony [of the prosecutrix] was exclusively for the determination of the jury and the trial court." People v. McCoy (Cal. App.) 208 Pac. 1016; People v. Benc, 130 Cal. 159, 62 Pac. 404; People v. Akey, 163 Cal. 54, 124 Pac. 718; People v. Crawford, 24 Cal. App. 396, 141 Pac. 824.

Appellant urges that from the evidence taken as a whole a miscarriage of justice has taken place, and that this court should so declare as a matter of law. This contention has resulted in an examination of the entire record. The defense was an alibi, and that the charge was a result of a conspiracy between the wife and the daughter to lay the blame for the latter's condition upon the father, in order to persuade or coerce him not to leave home and abandon his family as he had threatened to do when he learned of the daughter's condition after the examination by the physician. The defendant denied that he had ever had illicit relations with his daughter, but the investigating officers testified that after his arrest he admitted partial penetration. This was sufficient to warrant the jury in concluding that the crime had been completed. Section 263, Pen. Code.

[4] The prosecutrix testified that the offense alleged in count 1 was committed about 7:30 or 8 o'clock on a Saturday morning in the early part of June. Defendant was a brakeman on the Southern Pacific. He produced a railroad clerk who had charge of the records of the company and who testified from the time book that the defendant, during the month of June, was working on the Fillmore-Oxnard local in Ventura county on every Saturday in that month. The defendant testified to the same effect, and further stated that when he had finished his Saturday run he would take the train for Los Angeles, arriving at home on Sunday morning, where he would remain until Monday morning. Mrs. Edna Britt also testified that her husband was not at home on Saturdays in the month of June, that he came home on Sunday morning, and left between 5 and 6 o'clock on Monday mornings, and remained away the rest of the week. The foregoing constitutes the evi-

dence on the alibi. Assuming that it was conclusively shown that the defendant was not at home on any Saturday morning in June, it did appear without question that he was at home every Sunday. Under these circumstances it cannot be said that the testimony of the prosecutrix as to the particular act charged was not convincing because she had been mistaken as to the day of the week. Defendant was at home on Sunday of every week. The effect of this evidence was for the determination of the jury. The defense of an alibi was not interposed as to the charge alleged in count 3 of the information.

As to the defense of conspiracy, Mrs. Britt testified, on behalf of the defendant: That after she and her daughter had gone to a doctor's office and had been informed that the girl was pregnant she told the defendant about it. That he was very angry and threatened to leave them. That the girl then said, "Well, why not blame it on to my father, and he won't leave then at all." That the daughter had resisted the suggestion of her father that she be placed in a home, and said that "she was going to blame it on her father if she was sent out there." That there was an agreement between herself and Beulah that the defendant would be accused. That the girl had told her that a 15 year old boy was responsible for her condition, but notwithstanding this information that she did not advise her daughter not to tell the story about her father. The prosecutrix denied that she had any such agreement with her mother. She testified that she had never discussed such a question with her mother, that she told her mother that her father was the cause of her condition, and that she had told everybody else he was, "because he has done it."

On cross-examination she testified that after she had been to the doctor's office she had talked with her mother many times in the presence of her father about her condition. On this point the testimony was as follows:

"Q. Did you and your mother ever discuss this afterwards? A. Discuss it? Well, she talked to me lots of times. Q. Talk about it at all? A. Yes, she talked about it. Q. Ever say anything to your father in your presence about it? A. She used to fuss at him but that was all, in my presence. Q. What did she say when she was fussing at him? A. She fussed at him for being the cause of my condition. Q. What did he say at that? A. Lots of times he said it never would have happened if she had not been out there at the Los Feliz hospital. Q. Didn't you tell your mother that your father had never had anything to do with you? A. No, sir."

The foregoing statement attributed to the father was not denied by him. The jury undoubtedly questioned the credibility of

the mother's statements as to the alleged conspiracy. An inspection of the record compels the conclusion that the jury was justified in returning the verdict.

[5] Numerous rulings of the court during the course of the trial are assigned as error. Most of them are accompanied by neither argument nor citation of authority. The first contention is that the court erred in permitting leading questions to be propounded to the prosecutrix. As above stated her testimony was contained in the transcript of the proceedings had before the magistrate at the preliminary examination. The magistrate permitted her to answer leading questions. The witness was rigidly cross-examined by defendant's counsel before the magistrate. She was dead at the time of the trial, and the questions could not be reframed in the superior court. No abuse of discretion of the trial court under the circumstances has been shown.

[6] Exception is taken to the ruling of the court sustaining an objection to a question as to whether the prosecutrix had ever had intimate relations with any one else. Later on, however, she was permitted to answer a similar question, and admitted such relationship with a 15 year old boy. If there was any error it was cured by the subsequent questions and answers.

[7] The defendant offered in evidence the time book of the conductor on the Fillmore-Oxnard run of the railroad where defendant was employed in June, 1921. Objection that a proper foundation had not been laid in that the handwriting of the conductor had not been identified was sustained, and this ruling is assigned as error. The clerk in the office of the railroad company who had custody of such records testified that the book was a permanent record of the company, taken in the ordinary course of business. The foundation for the introduction of the book in evidence was sufficient, but the error in excluding it was not prejudicial, for the reason that the witness producing the same was permitted to testify fully as to the contents of the record pertaining to the time that the defendant was on duty in Ventura county. This was the only purpose of the offer.

A letter passing between mother and daughter was offered in evidence by the defendant, and a general objection to its introduction was sustained. The document was inspected by the court and marked for identification, but no record of its contents is found, hence it is impossible to pass upon its admissibility.

[8] Exception is taken to seven different instructions given by the court. The principal contention is with reference to the following:

"The court instructs the jury that it is wholly immaterial on what day or night the offense

charged in the information was committed, providing you believe from the evidence it was committed, and that the same was committed within three years prior to the filing of the information in this case."

When a particular act is alleged and other acts of a similar nature between the same parties are proved for the purpose of showing a lascivious tendency this instruction has been held to be prejudicially erroneous. *People v. Elgar*, 36 Cal. App. 114, 171 Pac. 697; *People v. Williams*, 133 Cal. 165, 65 Pac. 323. The theory upon which this instruction was denounced in those cases is stated therein as follows:

"A verdict of guilty could have been rendered under such an instruction, although no two jurors were convinced beyond a reasonable doubt, or at all, of the truth of the charge, as to any one of these separate offenses. Even worse than that was possible. As to every specific offense which there was an attempt to prove, and which could be met by proof, the defendant may have established his defense, and yet upon the general evidence of continuous crime, which, in the nature of things, he could only meet by his personal denial, he may have been convicted."

In each of those cases there was proof of acts not charged for the purpose of showing an immoral tendency. Obviously this rule can have no application in a case where no offenses are proved other than those alleged. It therefore becomes necessary to determine whether any offense or offenses were proved other than those charged in counts 1 and 3 of the information. Appellant contends that the first intimation of any offense in the record is the testimony of the prosecutrix wherein she stated: "Well, over on Maple avenue I slept with him," and that no date was fixed for this occurrence. In this counsel is mistaken as to the failure to fix the time, for by computation the date of this offense is readily fixed as having taken place in September, 1920, and is the offense charged in count 3. The method of arriving at this date is set forth above in the consideration of the contention that the corpus delicti had not been established and need not be repeated.

The fact that the prosecutrix testified that at the Maple avenue house at the time alleged in the third count her father committed the act "about three times" does not compel an election. She made no attempt to identify either of the three separate acts, but bulked them in the one comprehensive statement that her father at that house committed the act about three times. Under such conditions it is not possible that two or more or any number of jurors less than the 12 could have believed the testimony as to one of these three acts at the Maple avenue house and disbelieved it as to the others. On the contrary, her broad general state-

ment left but two alternatives for the jury, i. e., to accept her statement in its entirety, or to reject it in its entirety. Having found the defendant guilty upon that count which, as the circumstances of the case show, does in effect charge an offense committed while the defendant resided with his daughter at the Maple avenue house, we must conclude that the jury as a whole accepted as true the testimony of the prosecutrix that at that house the father committed the act about three times. That being the situation, appellant could not possibly have suffered prejudicial error because no election was made as between these three acts. The cases of *People v. Elgar* and *People v. Williams*, supra, are therefore not controlling.

It is further contended that a separate offense was intimated by a question propounded by the district attorney to the prosecuting witness as follows: "You say that the first time this occurred was in Kansas City, Mo.?" and that the jury might draw the inference therefrom that an offense not alleged had taken place in Kansas City. An inspection of the record discloses that defendant's counsel objected to this particular question and that the objection was sustained. Furthermore, the court instructed the jury that "if any counsel had intimated by questions, which the court has not permitted to be answered, that certain things are or are not true, you must disregard such questions and refrain from any inferences based upon them." The defendant was therefore not called upon to meet any charge except those alleged and proved.

[9] The other instructions criticized by appellant, both given and refused, are accompanied by neither citation of authority nor argument requiring consideration. Under these circumstances they need not be further commented upon. *Moore v. San Vicente Lumber Co.*, 175 Cal. 212, 165 Pac. 687, and cases there cited; *People v. Zarate*, 54 Cal. App. 372, 201 Pac. 955.

[10] The appellant assigned as error certain statements of and questions propounded by the court and the district attorney during the course of the examination of witnesses. Each assignment has been considered in so far as the action of the court is concerned, and as to the district attorney it is assumed that counsel intended to charge him with misconduct and not with error, but no assignment of error or misconduct as to these matters was made by counsel during the course of the examination of the witnesses, consequently no extended consideration of points now raised is required. Each contention in this regard, however, has been examined and is found to be untenable.

[11] This case was on the calendar in the trial court in the forenoon of the day on which the trial was commenced. The court

excused the women on the jury panel until the following morning, and directed the men to return at 2 o'clock. He stated in effect that the case would not be reached before 2 o'clock and excused the witnesses until that hour. The order excusing the women on the panel until a later time is now assigned as error, as having been made out of the presence of the defendant and without his consent. No objection was made by counsel in the trial court to this method of procedure, and there is no suggestion that the jurors who did serve were not competent, fair, and qualified to act. The defendant was not prejudiced by the order, so long as an impartial jury was obtained. *People v. Harris*, 45 Cal. App. 547, 188 Pac. 65; *People v. Lee*, 17 Cal. 76. See, also, note *People v. Barker*, 1 Am. St. Rep. 519.

[12] Misconduct is charged against the district attorney for using the following language in his opening argument to the jury:

"Now, no doubt you have all surmised that we have mutually agreed upon a male jury because of the peculiar character of the case. I am constrained to say Mr. Morse thought, as well as I did —."

Here the district attorney was interrupted by defendant's counsel with his assignment and then proceeded:

"I was about to say Mr. Morse himself was very courteous about the matter and realized we would have to call a spade a spade, and that certain language which would develop in the testimony would be very difficult for either of us, hard boiled though we may be —."

This was also assigned as misconduct. Defendant's counsel did not deny that such an arrangement had been agreed upon before the trial commenced, and, even if an agreement to that effect had been made in the presence of the jurors, it is difficult to see how they would thereby be prejudicially affected against the defendant. The court instructed the jury that—

"If counsel upon either side have made any statements in your presence concerning the facts in the case you must be careful not to regard such statements as evidence, but must look entirely to the proof in ascertaining what the facts are."

The remarks of the district attorney in view of this instruction could work no possible prejudice to the defendant's rights. The character of some of the testimony was such as to prompt a desire on the part of counsel for both sides to avoid trying the case before a mixed jury.

The judgment and order are affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

62 Cal. App. 717

PEOPLE v. WILLIS. (Cr. 689.)

(District Court of Appeal, Third District, California. June 30, 1923.)

Physicians and surgeons §6(1/2)—**Chiropractors held within statute penalizing practice without licenses; "diagnose" and "disease" defined.**

A chiropractor who practices without a license is guilty of a misdemeanor within St. 1917, p. 114, § 17, requiring any person "who shall practice or attempt to practice, * * * any system or mode of treating the sick * * * or diagnose * * * for * * * any disease," etc., to have a certificate, though his conception of "disease" and "diagnose" may differ from the therapeutic; the statute contemplating the popular meaning of these terms rather than refinements, and the words "practice or attempt to practice any system or mode of treating the sick or afflicted" applying to him whether he "diagnosed" or not.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Disease.]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

J. E. Willis was convicted of practicing medicine without a license, and he appeals. Affirmed.

W. T. Helms, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. The defendant was convicted under an information charging that he—

"did willfully and unlawfully practice a system and mode of treating the sick and afflicted in the state of California, without then and there having a valid unrevoked certificate of license from the board of medical examiners of the state of California so to do."

The statute (section 17, Stats. of 1917, p. 114) provides:

"Any person who shall practice or attempt to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who shall diagnose, treat, operate for, or prescribe for, any disease, injury, deformity or other mental or physical condition of any person, without having at the time of so doing a valid unrevoked certificate as provided in this act, * * * shall be guilty of a misdemeanor and upon conviction therefor shall be punished as designated in this act."

No attack is made upon the validity of the statute, but the claim of appellant is that in following his peculiar mode of treatment he is not subject to its provisions. His brief contains an interesting and illuminating discussion of the philosophy and technique of the chiropractic system, but we perceive

therein no reason for exempting such practitioners from the requirements of this wholesome law, designed, as it is—

"to protect both the individual and the public from the dangers and evils which might result from treatment by those not possessing the knowledge and skill requisite in the treatment of diseases with which mankind is afflicted." *People v. Jordan*, 172 Cal. 391, 156 Pac. 451.

The general trend of appellant's contention may be disclosed by the following quotation from his brief:

"The science of chiropractic is separate and distinct from the science of medicine and surgery and from all other known forms of what is generally termed 'drugless practice.' The particular difference consists in two things: First, excepting the science of chiropractic, each and every other science having to do with improvement or benefits to the human body, bases its effects upon an attempt to heal the body or to cure the body, and may therefore be generally referred to as a therapeutical science, as contradistinguished from the science of chiropractic, which makes no claim to being a science or art of healing the body or treating the diseases of the body. * * * In the second place, chiropractic differs from the so-called therapeutical sciences in this: That chiropractic does not recognize disease as an entity, and consequently it cannot treat diseases, nor men nor women for diseases. Chiropractic only aims to establish and maintain the normal function of the tissues of the body by permitting a normal transmission of nerve energy to take place between the nerve centers and the general tissues of the body. The present Medical Practice Act in the state of California never did, does not, and never will apply to chiropractors, because the Legislature that enacted it, and the act itself expresses nothing but therapeutic language. The very prohibition contained in the penalizing part of the Medical Practice Act provides 'that every person who practices any mode or system of treating the sick or afflicted,' except as therein provided shall be punished," etc.

There is much more to the same effect, and the whole brief, we may say with due deference to the learned counsel for appellant, might be regarded as an appropriate article for a medical journal or a valuable contribution to propaganda in favor of this peculiar system of treatment, but it seems idle to say that it offers any defense to the charge of which appellant was convicted.

Of course, it matters not whether the chiropractor recognizes the existence of "disease," as that term is generally used, or what nomenclature he adopts to designate such condition of discomfort. The statute contemplates a departure from a state of health or what appellant is pleased to term "a defective functioning of some organ of the body, or to a morbid condition affecting certain tissues of the body, after this defective functioning or morbidity has existed a sufficient length of time to indicate its presence in the

body by symptoms." Common folks generally prefer the simpler term employed by the statute, but if appellant and the followers of his system of practice favor a more euphonious designation, the law will not deny them that privilege. The law, however, does not permit the practice of the "healing art" without a suitable license, no matter what peculiar views of the nature of physical ailments may be entertained by the practitioner.

Appellant's defense is no more reasonable than would be that of a man charged with murder who should claim that he could not commit the offense because he did not believe that there was such a thing in existence as a "human being."

The claim that he could not be legally convicted because in his practice he does not "diagnose" human ailments seems to us equally specious and fanciful. The term as applied to pathology is defined in *People v. Jordan*, supra, as "the recognition of a disease from its symptoms." Therein it is said:

"To diagnose a case is as much a part of the practice of medicine as the drawing of pleadings or the giving of advice are parts of the practice of law."

And the court quotes with approval the language of Mr. Justice Holmes in *Collins v. Texas*, 223 U. S. 288, 32 Sup. Ct. 286, 56 L. Ed. 439, as follows:

"The plaintiff in error professes, as we understand it, to help certain ailments by scientific manipulation affecting the nerve centers. It is intelligible therefore that the state should require of him a scientific training. [Citing cases.] He, like others, must begin by a diagnosis. It is no answer to say that in many instances the diagnosis is easy—that a man knows it when he has a cold or a toothache. For a general practice science is needed."

Indeed, it is difficult to conceive of any one trying to restore to a normal condition a person who is abnormal without a prior investigation and determination, in a general way at least, of the character of the abnormality. Manifestly, there are no fixed limits to a diagnosis. It may not amount to a scientific classification of the ailment, but it may go no further than an observation of the most obtrusive symptoms, and may be accurate or inaccurate, and yet be within the contemplation of the statute. It seems like an unjust aspersion on the character and intelligence of this respectable body of practitioners to intimate that they attempt to restore "the normal activity of the tissues" without any inquiry or investigation as to what tissues are affected and in what manner their activity may be abnormal.

Moreover, if it may be said that there may be treatment without diagnosis, then the appellant is equally guilty, because the statute enumerates various acts which separately or

together constitute an offense. One of these is:

To "practice or attempt to practice any system or mode of treating the sick or afflicted * * * without having at the time of so doing a valid unrevoked certificate as provided in this act."

If he does this either with or without a diagnosis he is chargeable with the offense. *People v. Saunders* (Cal. App.) 215 Pac. 120.

The foregoing covers the ground of appellant's objection to the verdict, and we are satisfied there is no merit in his contention.

It may be added that appellant does not question the fairness of the trial judge. To the contrary, he declares "that throughout the entire proceeding, including the argument on the motion for a new trial, the learned lower court was all that could be desired in courtesy and in kindness, both to the defendant and to defendant's counsel," but he adds that he feels the court acted "in all sincerity upon a mistaken view of the law."

We think the lower court properly interpreted the law, and the judgment and order are affirmed.

We concur: FINCH, P. J.; JONES, Justice pro tem.

(62 Cal. App. 744)

In re FITZGERALD'S ESTATE. ROMAN CATHOLIC BISHOP OF MONTEREY AND LOS ANGELES v. TYNAN et al. McLINDEN et al. v. SAME. (Civ. 4189, 4190.)

(District Court of Appeal, Second District, Division 1, California. July 3, 1923.)

1. Wills ⚡812—Charitable residuary bequest diminished, rather than specific bequest to bring total within statutory limitation.

Under Civ. Code, § 1313, limiting the portion of an estate which may be bequeathed or devised to a charitable or benevolent society or corporation by a person leaving legal heirs, where both specific bequests and residuary bequests are made for charitable purposes, the specific bequests must be paid in full, and the residuary bequest diminished, if necessary, to bring the entire charitable bequests with the prescribed limitation.

2. Wills ⚡13(2)—Residuary bequest to bishop as corporation sole held charitable and subject to statutory limitation; "charitable or benevolent purposes."

A bequest, "I give, devise, and bequeath to the Roman Catholic Bishop of * * * a corporation sole, all the rest, residue, and remainder of my estate, * * *" held a bequest for charitable or benevolent purposes within Civ. Code, § 1313, such as was subject to be diminished in order to keep the total of charitable bequests, both specific and residuary, within the statutory limitation.

3. Wills ⚡734(1)—Charitable bequests bear interest under statute after becoming due.

Under Civ. Code, § 1369, providing that legacies bear interest from the time they become due, legacies for charitable or benevolent purposes are entitled to interest after they become due, as are others.

4. Wills ⚡734(1)—Residuary legatee, precluded from taking all of residuum by statute, held entitled to interest on portion taken.

Where the residuary legatee was precluded from taking the whole of the residuum by the limitations contained in Civ. Code, § 1313, so that there was an unbequeathed remainder, held, that the named residuary legatee was, under section 1369, entitled to interest on the portion he did receive after it became due.

5. Wills ⚡734(1)—Statute limiting charitable bequests does not limit right to interest.

Civ. Code, § 1313, limiting the portion of estates of persons leaving legal heirs which may be bequeathed to charitable or benevolent purposes, does not preclude a legatee from recovering interest on a charitable bequest after it becomes due.

Appeals from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Catherine Fitzgerald, deceased. Two appeals from a decree directing distribution; one by the Roman Catholic Bishop of Monterey and Los Angeles, the other by Annie McLinden and others. Decree affirmed.

J. Wiseman Macdonald, of Los Angeles, for appellant and respondent Roman Catholic Bishop, etc.

M. J. McGarry, of Los Angeles, for respondent executors.

Rohe, Yakey & Devin, of Los Angeles, for respondent Mary Fitzgerald.

H. A. Massey and Ben F. Gray, both of Los Angeles, for appellants and respondents Annie McLinden, Sarah Sloan, Rosie Heaton, and Theresa Fitzgerald.

J. Wiseman Macdonald, of Los Angeles, for other respondents.

CONREY, P. J. In case No. 4189, the Roman Catholic Bishop of Monterey and Los Angeles, a corporation sole (hereafter called the bishop), appeals from a decree of distribution of the estate of Catherine Fitzgerald, deceased. In case No. 4190 Annie McLinden, Sarah Sloan, Rosie Heaton, and Theresa Fitzgerald appeal from the same decree.

We will first consider the appeal in case No. 4189. The questions presented on this appeal arise out of the fact that by her will the decedent made several gifts to charitable societies or corporations which, according to the decision of the court, collectively exceeded one-third of the estate of the testatrix, leaving legal heirs. The testatrix died on the 3d day of May, 1918. At that time

section 1313 of the Civil Code read as follows:

"1313. Restrictions on devises or bequests for charitable uses. No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made at least thirty days prior to such death, such devise or legacy and each of them shall be valid; provided, that no such devise or bequest shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law; and provided, further, that bequests and devises to the state, or to any state institution, or for the use or benefit of the state or any state institution, are excepted from the restrictions of this section."

See St. 1917, p. 272.

The total distributable estate of the deceased, after settlement of the final account of the executors, and at the time of the entry of the decree of distribution, was \$39,973.07. The specific bequests for charitable uses in the aggregate amounted to \$11,300. The residue of the estate (after payment of all charges against the estate, including the specific bequests, but not including interest on bequests), amounted to \$12,693.07.

The will by its terms gave to the bishop all of the residue of the estate. The court determined that this bequest to the bishop was a bequest to a charitable corporation, organized for charitable purposes, and therefore determined that the total of charitable bequests was \$23,993.07.

The court further found that, since only one-third of the estate (being \$13,324.36) could lawfully be devised or bequeathed to such charitable societies or corporations or persons, the bishop was only entitled to receive that part of the residue which, together with the specific charitable bequests (but exclusive of interest), did not exceed said sum of \$13,324.36. This reduced the amount of the residue distributable to the bishop from the sum of \$12,693.07 to the sum of \$2,024.36, exclusive of interest.

The court further determined that the bequests were entitled to bear interest at 7 per cent. per annum from May 3, 1919, to December 14, 1921, on all of the legacies, including the residuary bequest. It is provided by sections 1368 and 1369 of the Civil Code that legacies are due and deliverable at the expiration of one year after the testator's decease, and that they bear interest from the time when they are due and payable (with exceptions not pertinent to this case).

Accordingly, the court by this decree of distribution awarded to the bishop, under the residuary bequest, the sum of \$2,024.36, plus interest, \$362.31; total, \$2,386.67; and found that (after allowing also the interest on the other legacies) there remained of the residue of the estate the sum of \$5,347.80.

The court being of the opinion that under section 1313, Civil Code, this remainder should go to the heirs at law, distributed said sum of \$5,347.80 in equal shares to Annie McLinden, Sarah Sloan, Rosie Heaton, Theresa Fitzgerald, and Mary Fitzgerald, who were the surviving sisters and next of kin of the decedent.

[1] On the appeal of the bishop, it is contended in his behalf that the court erred in cutting down the residuary bequests to him as a corporation sole, thereby giving said undisposed of balance to decedent's sisters. It is admitted, under the authority of the Estate of Sloane, 171 Cal. 249, 152 Pac. 540, the court correctly held that, where both specific bequests and a residuary bequest are made for charitable purposes, the specific bequests must be paid in full, and the residuary bequest diminished, so as to bring the entire charitable bequests within the provisions of section 1313, Civil Code. But it is contended that paragraph 31 of the will (the residuary bequest) is not a gift to a "charitable or benevolent society or corporation or to any person or persons in trust for charitable uses." The proposition of the bishop (appellant) is that—

"The Roman Catholic bishop of Monterey and Los Angeles, receiving a devise and bequest to its own use and with no trust imposed by the testatrix, does not come within the purview of section 1313, Civil Code."

The language of the residuary bequests is as follows:

"I give, devise and bequeath to the Roman Catholic bishop of Monterey and Los Angeles, a corporation sole, all the rest, residue and remainder of my estate, whether real, personal or mixed, and wheresoever situated."

[2] It will be seen at once that the decision here depends upon the answer to the question whether or not said corporation sole is a charitable or benevolent corporation, within the meaning of section 1313, Civil Code. Said section 1313 was added to the Civil Code in the year 1874. At the time of the death of the decedent, Mrs. Fitzgerald, it had not been amended, except by an amendment made in 1917, when the last proviso was added thereto. This addition does not affect the present case.

Corporations sole are provided for by section 602 of the Civil Code. This section was enacted in 1878, and has been amended twice; once in the year 1880, and once in the year 1897. Since 1897 it has read (with omissions not material here), as follows:

"602. Religious societies may become a corporation sole. Whenever the rules, regulations, or discipline of any religious denomination, society, or church so require, for the administration of the temporalities thereof, and the management of the estate and property thereof, it shall be lawful for the bishop, chief priest, or presiding elder of such religious denomination, society, or church to become a sole corporation, in the manner prescribed in this title as nearly as may be, and with all the powers and duties, and for the uses and purposes in this title provided for religious incorporations, and subject to all the conditions, limitations, and provisions in said title prescribed.

"Every corporation sole shall, however, for the purposes of the trust, have power to contract in the same manner and to the same extent as a natural person, and may sue and be sued, and may defend, in all courts and places, in all matters and proceedings whatever, and shall have authority to borrow money, and give promissory notes therefor, and to secure the payment thereof by mortgage or other lien upon property, real or personal; to buy, sell, lease, mortgage, and in every way deal in real and personal property in the same manner that a natural person may, and without the order of any court; to receive bequests and devise for its own use or upon trusts to the same extent as natural persons may; and to appoint attorneys in fact. * * *; provided, all property held by such bishop, chief priest, or presiding elder shall be in trust for the use, purpose, and behoof of his religious denomination, society, or church. * * *

The second sentence of section 602 as above quoted was first inserted therein by the amendment of 1897.

Section 604a was added to the Civil Code in the year 1913 (St. 1913, p. 566), and amended in the year 1917 (St. 1917, p. 784). It provides for the formation of religious corporations as corporations aggregate, with boards of directors. The purposes and powers of such a corporation, as defined in the statute, are in large part the same as those of a corporation sole. But in defining the power of such a corporation to receive bequests and devise, instead of using the precise terms used in section 602 to define the same power of a corporation sole, section 604a says that a corporation organized under section 604a "may receive bequests and devise for its own use, or upon trusts, to the same extent as a natural person, subject, however, to the provisions of section thirteen hundred thirteen of the Civil Code of the state of California, and may appoint attorneys in fact."

Counsel for appellant, the bishop, points to that part of section 602, Civil Code, which gives to a corporation sole the right "to receive bequests and devise for its own use or upon trusts to the same extent as natural persons may," and argues therefrom that, since the gift in this case was to the corporation sole, without mention of any trust or trusts, the corporation is therefore en-

titled to receive the gift for its own use to the same extent as natural persons may, and that this right excludes from the gift the characteristics or obligations of a trust. Appellant then directs attention to the provisions of section 604a which we have quoted, and argues that the inclusion in section 604a of the proviso relating to section 1313, and its omission from section 602, amounts to a legislative declaration of intention that the corporation sole may receive a bequest or devise not subject to the limitations of section 1313; and that, since the gift in the will now under consideration does not specify any trust, therefore the gift presumably was to the corporation sole "for its own use," and for that reason should not be construed as a charitable bequest."

We think that there is no convincing force in the argument which seeks to interpret the provisions of section 602 by those of section 604a. Section 602 was in existence, and contained the clause in question, for many years before 604a was enacted. The correct interpretation of section 602, prior to the enactment of section 604a, necessarily would have been ascertained without reference to section 604a. We are of the opinion that the later enactment, relating to religious corporations having a board of directors, in which extra care was taken to specify that bequests and devise to such corporations, either for their own use, or upon trusts, are subject to the provisions of section 1313 of the Civil Code, is so far unrelated to the subject-matter of section 602 that it throws no light upon the intention of the Legislature in the enactment of section 602, as it stood in the year 1913 and long prior thereto.

In the decree of distribution the court found "that the Roman Catholic Church is a Christian church, organized not for profit but for religious purposes and to promote the worship of God and to administer to the spiritual needs of mankind and to bring mankind under the influence of religion, and to that end the said Roman Catholic Church follows and spreads the teachings of Jesus Christ, as expounded in the Holy Bible. That the rules, regulations, and discipline of said Roman Catholic Church having so required for the administration of the temporalities thereof and the management of the estate and property thereof in the diocese of Monterey and Los Angeles," the said corporation sole was brought into existence in the manner prescribed by law, "with all the powers and duties, and for the uses and purposes and the behoof in said title provided for religious incorporations, and subject to all the conditions, limitations, and provisions in said title prescribed, with power of succession; and that the said Roman Catholic bishop of Monterey and Los Angeles, a corporation sole, holds and administers all the assets and temporalities

of said Roman Catholic Church and bishop in said diocese of Monterey and Los Angeles."

A gift to a church is a charitable one, for it is well settled that a Christian church lawfully existing is a charity. A gift to a church without restrictions as to the use to be made of the property is a gift to be applied for the promotion of public worship and of religious instruction, which must necessarily influence other than church members, and has all the elements of a public charity. 5 R. C. L. p. 327, and cases there cited. Having in mind these facts and principles, we turn again to the statement in section 602, Civil Code, which gives to a corporation sole "for the purposes of the trust," power to contract, etc., as a natural person may; "to receive bequests and devises for its own use or upon trusts to the same extent as natural persons may." If the words "or upon trusts" were not there, we think that the words "for its own use" would have to be interpreted in the light of the character of the corporation as an instrumentality for the administration of the temporalities of the church. "The purposes of the trust" are those purposes having relation to the administration of the temporalities of the church. A gift to the corporation "for its own use" is in effect a gift to the church for its own use, and this is a gift for charitable purposes. This view is emphasized by the further proviso in section 602, that "all property held by such bishop, chief priest, or presiding elder shall be in trust for the use, purpose, and behoof of his religious denomination, society, or church." This leads to the further conclusion that the words "or upon trusts" refer to specific and limited trust purposes defined in the gift. This is illustrated in the present case. The will of decedent, among its specific devises and bequests, gave to the bishop the sum of \$5,000, "to be used by him for the education and support of such deserving young men as the said bishop of Monterey and Los Angeles may select from the diocese of Monterey and Los Angeles, who, having the vocation for the priesthood, yet have not the necessary means to procure the required education or to support themselves during the course of studies essential as a preliminary to their education." Here there is a specific trust to the bishop for a limited purpose, a purpose for which he is directly empowered by the statute to receive the bequest. The residuary bequest, however, being not limited to a specific purpose, is one for the general use and benefit of the church within said diocese. Nevertheless, being a gift for those uses, it retains the character of a charitable bequest. As such it is subject to the provisions of section 1313 of the Civil Code.

[3, 4] In case No. 4190 four of the sisters

of the decedent direct their appeal to that part of the decree which allowed interest on the charitable bequests, including the allowance of interest on the principal sum distributed to the bishop under the bequest to him of the residue of the estate. Section 1369 of the Civil Code, in providing that legacies bear interest from the time when they are due, makes no distinction between legacies for charitable purposes and any others. We think it is beyond question that specific charitable bequests share in the legal right to interest from and after the time when they become due. It only remains to consider whether the same rule applies to a charitable bequest of the residue of an estate.

Under ordinary circumstances, where the total amount of the charitable bequests, including the residue and interest thereon, does not exceed one-third of the distributable assets of the estate, this question would not arise. For, since the residuary legatee would receive all of the residue, it would not concern him to analyze the gift for the purpose of distinguishing part of it as interest. Nevertheless, if curiosity led to such inquiry, it may be that, under the strict reading of the statute, a part of the sum so received would be interest. In the present case, however, since there is (because of the law) an undivided or unbequeathed remainder over and above the amount which the residuary legatee may receive, it here becomes necessary to determine whether he is entitled to interest.

We think that he is entitled to the interest claimed by him and awarded by the court. The effect of the law limiting the total amount of charitable bequests to one-third of the distributable assets is that, under the facts of this case, the residuary bequest is no longer any different in its nature from a specific bequest. Construing the will, together with the statute, the so-called residuary legatee has become entitled, not to the entire residue of the estate, but only to a specific sum, leaving a residue that goes to the legal heirs because it cannot be distributed under the will. Under these circumstances, we see no valid reason why the said "residuary legatee" is not entitled to the benefit of the statute which allows interest on all legacies.

Counsel for appellant, after searching the authorities, concede that this exact question has not been passed upon in this state by any decision. They cite a few cases from which they claim that the conclusion for which they contend should be implied. *Estate of Hinckley*, 58 Cal. 457, 516; *In re Pearsons*, 98 Cal. 603, 611, 33 Pac. 451; *Estate of Sloane*, 171 Cal. 248, 152 Pac. 540. In these decisions it was held or assumed that the value of the disposable property of the estate, one-third of which may be given to charitable uses,

must be fixed as of the time of distribution, because that is the time when the allowed claims against the estate, and costs of administration, have been determined and the amount of the residuum has become fixed. But it is equally true that for the same reason that is also the time when the amount of interest due can be ascertained.

[5] We agree with counsel for the residuary legatee in his contention that the right to interest is derived from the statute and not from the will. Therefore the limitation contained in section 1313 of the Civil Code, wherein it is provided that the devises or bequests contained in a will shall not collectively exceed one-third of the estate of the testator leaving legal heirs, applies to the principal only of such devises or legacies. It is not a limitation or denial of the right of any legatee of a gift for charitable purposes, to receive interest on his legacy in the same way that interest is allowed on any other legacy.

For the reasons above stated, we are of the opinion that the decree of distribution is in all respects correct.

The decree is affirmed.

We concur: HOUSER, J.; CURTIS, J.

(62 Cal. App. 697)

Ex parte SNYDER. (Cr. 1008.)

(District Court of Appeal, Second District, Division 1, California. June 28, 1923.)

1. Criminal law §641(1)—Failure to allow private consultation with counsel while confined in jail held violation of constitutional rights.

Where one legally confined to jail and charged with a felony was permitted to interview his attorney only when seated opposite him at a table, with a fine mesh screen between them, such that the exchange of articles or papers was impossible, and the reading through the screen difficult, and where chairs of other persons were so close that privacy was impossible, held, that accused's constitutional right to the assistance of counsel had been violated, nor would the fact that complaint was made by the counsel, rather than accused, affect his right to relief.

2. Criminal law §641(1)—Counsel demanding private consultation with one confined in jail need not specify reasons or necessity therefor.

Failure to permit one confined in jail to privately consult with his counsel in the preparation of his defense cannot be excused, on the ground that counsel making the demand for a private consultation did not disclose any reason why such a hearing was desirable or necessary.

Application by Leslie G. Snyder for writ of habeas corpus, to be directed against the Sheriff of Los Angeles County. Writ granted.

Ida May Adams, of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., and A. R. Van Cott, Deputy Dist. Atty., both of Los Angeles, for respondent.

CURTIS, J. Application for writ of habeas corpus by petitioner, who claims that he is unlawfully restrained of his liberty by the sheriff and jailer of the county of Los Angeles. The petition shows that Leslie G. Snyder, the petitioner, is confined in the county jail of said county, charged with the commission of a felony. He admits that his detention is legal, but claims that he is unlawfully restrained of his liberty, in that he is prevented by said sheriff and jailer from privately consulting with his attorney in preparing for his defense in said action, and that he is only permitted to consult with his attorney in the presence of numerous other attorneys and clients and other persons, who, on account of their proximity, are able to overhear conversations between petitioner and his counsel, and furthermore that respondents refuse to permit petitioner to confer with his attorney, save from across a table and through a close mesh steel wire screen, through which it is impossible to clearly observe facial expressions, read or sign papers, or to do the acts necessary to be done between petitioner and his counsel in the preparation of petitioner's defense. Petitioner asks that a reasonable opportunity be afforded him to consult privately with his counsel and to prepare for his defense.

The return, after setting forth the charge upon which petitioner is held, in substance denies that petitioner has been refused permission to consult privately with his attorney or to prepare for his defense. It admits that the petitioner and all other prisoners confined in the county jail, when in consultation with their attorneys, are required to communicate with them across a table and through a wire mesh screen, between such prisoners and their attorneys, but denies that said screen is of such a character as to prevent parties conversing through the same from clearly observing one another, and alleges that such screen furnishes but slight obstruction to persons conversing through it. The return further asserts that the petitioner has personally never made any objection to the conditions under which he has been obliged to communicate with his counsel, but that the attorney of petitioner, without any demand for a fuller opportunity to communicate privately with petitioner, arbitrarily declined to communicate with him, for the sole reason that said table and said screen were between her and her client.

[1] From the evidence adduced at the hearing it appears that the table and screen were recently installed in one of the rooms

of the county jail by the authorities of said county for the use of prisoners confined therein when consulting with their attorneys or visitors. The table is of sufficient length, so that eight persons can be seated on either side thereof, when the chairs are so arranged that they touch each other. There are no partitions on said table, separating the space occupied by one person from that occupied by persons on either side of him, although the evidence shows that it is the intention of the authorities to equip said tables with such partitions in the near future. The addition of such partitions will, in our opinion, greatly improve the conditions prevailing in the room at the present time. As the room is now equipped with said table and screen, there is nothing to prevent any person from seeing or hearing anything that another person sitting next to him may do or say. The screen referred to, and which separates the prisoner from the person conversing with him, does not, in our opinion, prevent a clear observation of the facial expressions of one person by the other, nor does it in any substantial manner interfere with the free conversation between the parties on either side thereof. It does, however, prevent any documents, papers, or other articles being passed through it, and, as admitted by the return, it makes it difficult to read papers through it.

While the room as now equipped with the table and screen furnishes adequate and reasonable facilities for the ordinary conversations and consultations between attorneys and their clients, it must be apparent to any one that it does not permit of that privacy that must prevail quite frequently in conferences between those accused of crime and their legal advisors. One of the constitutional rights vouchsafed to all persons under criminal charge is the right to the advice and assistance of counsel, and the opportunity to adequately prepare for their defense. This right, we submit, would be denied them if they are compelled to hold consultations with their attorneys within the hearing of others, and without any opportunity to receive, exchange, sign, examine, or read legal documents and other writings.

In a recent decision by Division 2 of this court it was held that the constitutional right of one accused of crime to the assistance of counsel carried with it the right to private consultations prior to trial for the purpose of preparing for the prisoner's defense. The court interpreted the law in the following language:

"In this state, the right of an accused to consult with his counsel is guaranteed by the Constitution, which, in section 13 of article 1, expressly declares that 'in criminal prosecutions, in any court whatever, the party accused shall have the right to * * * appear and defend, in person and with counsel.' This clause of the Constitution unquestionably was

adopted to secure to the accused person all the benefits which may flow from the employment of counsel to conduct his defense. To afford him those benefits it is essential that he should be allowed to consult with his counsel, not only during the actual trial, but prior thereto, in order to prepare for his defense. The privilege of the presence of counsel upon the trial would be a poor concession, if the right of consultation with such counsel prior to the trial were denied. It is equally essential to the enjoyment of this constitutional guaranty that the accused should have the right to a private consultation with his counsel." In *re Rider*, 50 Cal. App. 797, 195 Pac. 965.

It is insisted, however, by respondents, that, admitting that petitioner has the right to a private consultation with his attorney, yet no relief should be granted him in this proceeding, for the reason that no demand was ever made by him or by his attorney for a private hearing, other than that which would be offered by the room above mentioned. On this point there was a conflict in the testimony produced at the hearing. For the purpose of this proceeding we are assuming that such a demand was made. There was not only evidence to this effect, but the jailer testified that no other room or place had been provided by the authorities wherein private consultations could be held by attorneys and clients. It is true that one witness testified that he, as an attorney representing a prisoner confined in said jail, had demanded and was furnished a place in which he could and did hold a private consultation with his client; but we gather from the whole evidence before the court that this was an exceptional case, and that no such general privilege is accorded to the prisoners confined in said jail, and that no provision had been made by the authorities for any place where such a private consultation could be held. It is also true that petitioner personally made no demand for a private hearing; the only claim being that such a demand was made by his attorney. It is to be presumed that his attorney was better informed as to the necessity for such a hearing than the client himself. The attorney was intrusted with the defense of the prisoner. She spoke for her client, and her demand was not only for the interest of her client, but was the demand of the client himself. As long as the attorney was in charge of the case and responsible for the result thereof, her judgment in such matters should prevail over that of the client; otherwise, the client would need no attorney, and the attorney would be of no assistance to the client.

[2] It was suggested at the hearing that, admitting the attorney made demand for a private consultation, yet those in charge of the jail were not in duty bound to grant said demand, as the attorney gave no reason why such a hearing was desirable or necessary.

We cannot agree with this suggestion. No attorney should be compelled to disclose to any person any fact which would directly or indirectly affect the defense of his client. To require the attorney to give to the officer in charge of the jail, the reason why he desired a private consultation with his client might in some cases lead to the disclosure of information of vital importance to the client, the knowledge of which should be confined to the client and to those to whom he voluntarily communicates the same. Furthermore, to require the attorney to give to the officer in charge the reason why he desires a private interview with his client would, by inference at least, give such officer the power to determine whether such reasons were sufficient or not to grant such interview. For what purpose would it serve to give to the officer the right to demand the reason for a private interview, if he is to grant it, whether or not the reason given appealed to him to be sufficient? To adopt such a rule would be to substitute the judgment of the officer, upon questions involving the prisoner's defense, in the place of the judgment of the prisoner and his counsel.

From the return and evidence herein, it is apparent that the purpose of equipping said room with said table and screen and requiring all conversation between prisoners in said jail and their attorneys to be carried on through said screen, was to prevent the passing into said jail of narcotics, weapons, and other articles forbidden by the authorities. We fully appreciate the difficult task of the officers in their efforts to discharge their duty in this respect, and it is not the desire of this court to interfere or hamper them in this commendable work. At the same time, we all realize that official duty, grave and important as it is, must be performed in subordination to the constitutional rights of others. We are fully persuaded that some plan can be provided by the authorities which will adequately protect the county jail from the introduction therein of such articles as may be forbidden, and at the same time not intrench upon the right of those confined therein to every privilege accorded them by the laws of our state.

It is ordered that respondents, W. I. Traeger, sheriff of the county of Los Angeles, state of California, and Mark Bailey, jailer of said county, be and they are hereby ordered and directed, upon request of petitioner or his counsel, and at all reasonable times, to permit petitioner to consult privately with his attorney in such place and under such circumstances as will afford reasonable opportunity for absolute privacy of consultation.

We concur: CONREY, P. J.; SHENK, Justice pro tem.

62 Cal. App. 558

McKISSICK CATTLE CO. v. ANDERSON et al. (Civ. 2590.)

(District Court of Appeal, Third District, California. June 16, 1923.)

1. Appeal and error — Discretionary permission to amend a complaint not in record not reviewable.

Where the original complaint is not in the record, it is impossible to determine whether the court abused its discretion in permitting an amendment thereof.

2. Pleading — Allowance of amendment to complaint not changing cause of action, but curing demurrable complaint, not abuse of discretion.

In an action to determine riparian water rights and enjoin illegal appropriation, allowance of an amendment to the complaint merely adding "during the irrigation season" following the words "each and every year," the sole purpose being to show continuous usage through that season, was not an abuse of discretion, even if the original complaint failing to plead riparian rights correctly was subject to general demurrer; the amendment not changing the cause of action or stating a new one.

3. Pleading — Refusal of proposed answer on day of trial where new matter would delay trial within court's discretion.

In an action to determine water rights, denial of a motion made on the day of trial to file an answer setting up the right to condemn and appropriate the water to a public use, under Code Civ. Proc. § 534, as added by St. 1917, p. 744, was not an abuse of discretion, since the answer would add new issues requiring plaintiff to postpone or go to trial insufficiently prepared.

4. Pleading — Counsel's admission that denial of motion to file answer would not harm defendant is waiver of objections.

In an action to determine water rights, counsel for defendant, on motion to file a new answer by admitting that a condemnation suit involving practically the same issues was then pending, and that he would not be harmed by refusal of amendment, thereby waived his right to object to the denial of his motion.

5. Waters and water courses — Evidence held insufficient to support claim to prior appropriation of stream water to definite amount.

In the absence of any showing as to when defendants and their predecessors, the upper riparian owners, acquired title, where plaintiff's right to appropriate stream water is not statutory, mere proof that plaintiff's predecessor 25 years prior to the action built certain dams and canals appropriating certain quantities of water, the testimony as to the exact measurement of such water being mere guesses of inexperienced witnesses, does not sustain a finding that plaintiff had appropriated 2,000 inches measured under a 4-inch pressure.

6. Waters and water courses ⚡130—Lower riparian owner cannot acquire prescriptive rights in water against upper owner.

A lower riparian proprietor cannot acquire either by prescription or appropriation as against an upper riparian owner the waters from a stream to which their respective lands are riparian.

7. Waters and water courses ⚡152(8)—Evidence held sufficient to show riparian use of stream water.

Testimony of many witnesses long familiar with a stream tending to show continuous user by plaintiff for irrigation purposes for 25 years held sufficient to prove plaintiff's riparian use, and hence the right to the normal flow of the stream, despite proof of the construction of a county road across it; such obstruction not being due to any act of defendants.

8. Waters and water courses ⚡152(8)—Facts held to negative acquiescence in diverting stream waters.

Evidence that plaintiff at all times asserted its rights to stream waters by removing obstructions and opening gates of defendant's reservoir to allow the water to return to the creek held to negative acquiescence in defendant's use of the stream.

9. Trial ⚡47(2)—Exclusion of offer of evidence subject to renewal held not error.

Where defendant's attorney, at the court's suggestion to wait until he opened his defense, withdrew an offer of a complaint and judgment in a former action between the same parties, counsel failing to renew his offer or press the matter further, the court's ruling is not error.

10. Witnesses ⚡379(7), 389—Impeachment of witness by complaint in former action between same parties.

In the absence of any showing that it would shed light on the issues, a complaint in a former action between the same parties is admissible only to impeach a witness by first showing the witness himself personally responsible for the allegations of fact, that it contained statements inconsistent with the material testimony given by him in the present case, and that he denied making such statements or authorizing them.

Appeal from Superior Court, Lassen County; Geo. H. Thompson, Judge.

Action by the McKissick Cattle Company against August Anderson and others, to determine water rights. From a judgment for plaintiff, defendants appeal. Reversed as to appropriation and affirmed as to riparian rights.

Dennett & Zion, of Modesto, and Grover C. Julian, of Susanville, for appellants.

N. J. Barry, of Susanville, for respondent.

HART, J. The plaintiff is a corporation, and has for many years been engaged in the business of raising cattle in Lassen county, and owns a body of land, consisting of 1,280 acres, upon which it has for many years

raised and harvested hay and pastured cattle. The climate and the lands in the immediate neighborhood of those owned by the plaintiff, and just referred to, are arid, and it is, of course, conceded that grasses suitable for making hay cannot be grown upon said lands without irrigation.

It appears from the complaint, the evidence, and the findings that the lands of the plaintiff constitute what is known as a sink, and has been formed largely "through the emptying and spreading thereon of the waters of a certain mountain stream known as Red Rock creek. This creek has its source on the west side of what is known as the "Warner range of mountains." It flows in a general southeasterly direction to, over, and across certain lands known as the "Moulton meadows," and thence to, over, and across the said lands of the plaintiff. Red Rock creek is one of the characteristic mountain streams which are sometimes known as "flash" creeks, whereby it is meant that the volume of water is variable, and regulated according to the character of the winters with respect to the amount of snow falling upon the mountains feeding that and other creeks or the watersheds of the localities through and over which they flow. In other words, the waters flowing into said creek are mainly from melting snow, produced, of course by the rise of the climatic temperature incident to the spring and summer seasons.

It appears from the evidence and the findings that, when the waters from Red Rock creek reach the lands of the plaintiff, they spread out and divide into many channels, and later converge in a solid body and overflow the said lands. These lands, it may be added, are naturally hard, slick, and unproductive, and crack so as to produce large fissures therein. The spreading of the water from Red Rock creek over the sink causes silt to be deposited therein which fills the fissures, and, indeed, which has formed the soil of said sink. It appears from the evidence that many years before the plaintiff became the owner of the sink its predecessors in interest, by means of small dams in the channels and the construction of ditches leading from said creek, caused the waters thereof to extend over a large body of arid land adjacent to the sink, and so increased the area of the sink until it consisted of a body of 1,280 acres of land. Said creek, if the winter season has been propitious for that purpose, carries a large volume of water in the spring and summer months, diminishing in volume, however, as the season advances.

At a point on Red Rock creek, between the Moulton meadows and the McKissick sink, there is maintained, and had been for a number of years, a reservoir known as reservoir

No. 1. It seems that this reservoir was originally constructed by the Union Land & Live Stock Company, a corporation, which had been given a permit by the general government to construct and maintain the same for the purpose of storing water. This company, however, lost its right to the reservoir site, and the defendant Anderson thereafter acquired said right from the government of the United States to store water in said reservoir. Below said reservoir is a diversion dam (which is referred to in the evidence as reservoir No. 2), the purpose of which was to divert the water from the channel of Red Rock creek into a reservoir designated and known as reservoir No. 3. There is evidence to show that the water stored in the last-mentioned reservoir is taken from the watershed of Red Rock creek and that said water is never returned to the creek or to lands that drain into the creek, and after its storage, therefore, said water is entirely lost to the land riparian to or within said watershed, including the lands of the plaintiff, which are described in the complaint and known as the McKissick sink. It appears that the defendant Anderson has for a number of years caused reservoir No. 3 to be stored with water, and has thus prevented the waters of Red Rock creek from proceeding in their natural flow to the said lands of the plaintiff. The plaintiff, through its agents, has for many years prior to the commencement of this action caused the gates of the reservoir to be opened, and any dams which were maintained in the creek to divert the waters thereof from flowing in their natural course to be destroyed, so as to facilitate the flow of the stream to its lands. This conduct upon the part of the plaintiff was based upon its claim that the waters of said creek and the watershed thereof are riparian to the lands described in the complaint, and that no one has the right to molest in any way the usual or normal flow of the stream before it reaches the lands of the plaintiff.

The plaintiff in its complaint pleads a right by appropriation to a flow of the waters from said creek over and upon lands described in the complaint to the extent of 2,000 inches measured under a 4-inch pressure, and also sets up the right to the waters of said creek as a riparian owner.

The answer specifically denies all of the material allegations of the complaint, and, in addition thereto, among other things, alleges, in effect, that the waters which reach the lands of the plaintiff described in the complaint come not alone from Red Rock creek, but also from Buckhorn creek, Painter creek, and Cold Spring creek; that only about one-third of the water flowing upon the lands of the plaintiff comes from Red Rock creek. A supplemental or amended answer was filed, and therein it was alleged, among other things:

That there have been stored in reservoir No. 1 for more than five years prior to the commencement of this action waters diverted from said Red Rock creek, and used for the irrigation of lands within the Red Rock Creek irrigation district, and more particularly for the irrigation of the lands of the defendant August Anderson; that said waters have not reached the lands of the plaintiff; "that during all of said time, the said plaintiff had knowledge that a right adverse to its right had been claimed, and had stood by and had seen the said August Anderson develop his lands and cultivate the same, and plant the same to crops, depending for the irrigation thereof upon the waters stored in said reservoir and diverted for the use thereof, and that the said plaintiff is now estopped to question the right of said August Anderson, and of the other residents of said Red Rock Creek irrigation district, and of the Red Rock Creek irrigation district, to divert all of the water of said Red Rock creek, or to store the same and thereafter divert the same so far as they may be necessary for the irrigation of the lands within said Red Rock irrigation district."

The answer, as it was originally framed and filed, referred to no lands upon which any of the defendants claimed the right to use the water of said creek. It transpired, however, that the defendant Anderson, while the trial was in progress, became the assignee and owner by purchase of a contract between one T. F. Dunaway, the owner at the time of the making of said contract of all or a portion of Moulton meadows, and one Dana C. Dodge, whereby the former sold to the latter 440 acres of said Moulton ranch, of which 200 acres are conceded to be riparian to said Red Rock creek. Upon his application said Anderson was permitted to so amend his complaint as to set up the riparian right to said 200 acres.

The court found:

That the 1,280 acres of land described in the complaint, and comprising what is known as the McKissick sink, were riparian to Red Rock creek; that the plaintiff, as a prior appropriator, was entitled to "take and divert from the waters of said creek for the irrigation of its lands all of the waters of said creek up to 2,000 inches, measured under a 4-inch pressure, from the 1st day of March of each year until said creek ceases to flow any water, or as long as said creek will flow during the year," and that whatever rights the defendants and each of them claim to said waters are "subordinate, subservient, and subsequent to the right of the plaintiff," as such prior appropriator.

The court also found:

"That the defendant Anderson is the owner of certain lands consisting of 440 acres in section 21, township 35 north, range 16 east, which said lands are the same lands described in an agreement to sell made by one T. F. Dunaway to Dana C. Dodge, and by said Dodge assigned to said Anderson; that of said 440 acres 200 acres in the north half of said section 21 are riparian to said Red Rock creek,

and that said Red Rock creek flows through and over and upon said 200 acres, and the same are susceptible to and can be irrigated from the said Red Rock creek, and that such irrigation is necessary for the raising of crops upon said 200 acres; that there never has been any use of the water of said Red Rock creek by any of the defendants which was continuous, open, uninterrupted, adverse, and under claim of right of either of them to the plaintiff, and that none of the defendants have ever acquired any adverse right or right by prescription as against plaintiff to the waters of said stream; * * * that the plaintiff never waived its right to the waters of said stream, or acquiesced in any use thereof by the defendants, or either of them, and that defendants were never misled in the building of any reservoirs or canals or their attempted use of the waters of said stream by any act or conduct or word or deed of the plaintiff, or any of the grantors of the plaintiff."

Other essential facts were found, among which were these:

That with the aid of irrigation from Red Rock creek the lands of plaintiff, described in the complaint, were capable of producing large quantities of hay and grasses; that in every year when Red Rock creek carried a heavy or large volume of water the plaintiff, by the use of said water, flooded its said lands, and as a result thereof produced large quantities of hay and pasture; that said lands are of an "open and porous" character, and would not produce any hay whatever, or even pasture to the extent that it could advantageously be utilized without the same being flooded during the irrigating seasons; that "in the early part of the year 1920 plaintiff had standing and growing upon said lands large quantities of hay, and grasses for pasture, and was depending upon the water of said stream for the irrigation of said crops, and that in the early part of the said year 1920 defendants willfully, wrongfully, unlawfully, and without the consent of plaintiff entered upon the channel of said stream at a point above the lands of plaintiff, * * * and without the consent of plaintiff closed a dam in the channel of said stream, and willfully, * * * and without the consent of plaintiff, obstructed the flow of all the waters of said stream," and that the defendants Anderson and Red Rock creek irrigation district threatened to continue so to maintain said dam and obstruct the flow and divert the waters away from the lands of plaintiff, "and beyond and outside the watershed of said stream," etc.

The decree follows the findings in all essential particulars, and, besides declaring the respective rights of the parties in and to the waters of Red Rock creek, awards as against the defendants the injunctive relief prayed for by the plaintiff.

This appeal is prosecuted by the defendants from said judgment upon a record made up according to the alternative method.

[1,2] The point first made by the appellants is that the court erred by its action in allowing the plaintiff to amend its complaint. The amendment was made before the actual trial of the action began. The original

complaint is not in the record, and it is therefore impossible for us to determine whether the court abused its discretion in permitting the amendment thereof. Counsel for defendants state in their brief, which statement is, of course, dehors the record, that the plaintiff, in its original complaint, did not "correctly plead riparian rights," and that the amendment was designed to correct the deficiency of the complaint in that respect. The record shows that, when the discussion as to the proposed amendment was under way before the court, Mr. Barry, attorney for plaintiff, stated, "The only purpose of offering this amended complaint was to show they used it [the water from Red Rock creek] continuously through the irrigation season;" that the amendment merely resulted in inserting after or immediately following the words "each and every year," as those words were used in the original complaint, the words "during the irrigation season." Accepting these statements as a correct representation of the extent of the amendment of the original complaint, it is clear that it cannot be said that there was an abuse of discretion in allowing the amendment. But, even if it be true that the original complaint failed to "correctly plead riparian rights," it would involve no abuse of discretion, abstractly speaking, to allow an amendment of such pleading so that it would plead such rights "correctly." Such an amendment, under such circumstances, would not have the effect of changing the cause of action or stating a new one. The statement that a certain fact is "not correctly pleaded" implies that an attempt of some character to plead it has been made, and, even if a pleading unavailing attempts to plead a fact properly, and is for that reason subject to the objection of a general demurrer, it would not involve an abuse of discretion for the court to allow the pleader so to amend his complaint as to make it state a cause of action, if it was in any circumstances capable of being so changed or amended as to state a case for the relief demanded.

[3,4] The next point made by the defendants is that the court erred in refusing to allow the defendant Red Rock creek irrigation district to file an answer under section 534 of the Code of Civil Procedure, added to said Code by the Legislature of 1917 (Stats. 1917, p. 744), whereby and wherein it set up the right to condemn and so appropriate to a public use so much of the waters flowing in Red Rock creek as were not required by the plaintiff for its actual and necessary beneficial uses. There was no abuse of discretion in disallowing the proposed answer to be filed. The motion to file the answer was made on the day on which the action was called for trial. The filing thereof would have added to the case new issues of a nature requiring either a postponement of

the trial or the plaintiff to go to trial without preparation for meeting those new issues. Moreover, it appeared from the colloquy between court and counsel following the proposal to file said answer that a condemnation suit brought by the said defendant, and involving precisely the same water rights, was, at the time of the application to file the answer, pending in the superior court of Lassen county, and counsel for the defendant admitted before the court that the said defendant corporation would not be harmed by a refusal to allow the answer to be filed. In fact, counsel for the defendants in effect waived any objection to the ruling of the court declining to allow the answer to be filed.

[5] As to the decision, it is contended by the defendants that the evidence does not support either the finding that the plaintiff has a right by appropriation to the waters of Red Rock creek to the extent of 2,000 inches, measured under a 4-inch pressure, or the finding that the lands described in the complaint are riparian to said creek. We have painstakingly read and examined all the evidence presented by the record before us, and thus we have satisfied ourselves that, as to the finding of plaintiff's alleged right to the waters of Red Rock creek by appropriation, the contention of the defendants must be sustained, but that there is ample evidence to support the finding that the lands described in the complaint are riparian to Red Rock creek, and that the plaintiff is therefore entitled to the benefit of the normal flow of said creek to the lands described in the complaint.

It is not pretended that the right claimed by the plaintiff to the waters of Red Rock creek by appropriation is based upon the statutory provisions as to the appropriation of the waters of the public streams of the state. The contention is that, many years ago, long before the defendants or their predecessors in interest acquired from the government title to any of the lands which they now claim are riparian to said creek, or claimed the right to the use of any of the waters thereof by virtue of appropriation, and before any of the defendants or their predecessors became riparian proprietors in so far as the waters of said creek are concerned, the plaintiff appropriated from said creek, and has uninterruptedly used the same during all the years referred to since that time, the 2,000 inches of water which the court found it was entitled to by virtue of the right of appropriation. There is some evidence to the effect that about 25 years before the commencement of the present action the predecessor in interest of the plaintiff, by means of dams and small canals, did appropriate for the use of the lands described in the complaint certain quantities of the water flowing in Red Rock creek. As to the

quantity of water so appropriated, the evidence is indeed very unsatisfactory. There is no pretense that any measurement, scientific or otherwise, was ever made of the water so appropriated. The witnesses, testifying as to the quantity of water so alleged to have been appropriated, merely ventured guesses as to such quantity of water. None of said witnesses pretended to be experienced in such matters and each merely gave his conclusion as to the matter from his power of general observation. But the principal obstacle in the way of the upholding of the finding as to the alleged appropriation is that there is no testimony showing when the defendants or their predecessors in interest acquired title to the lands which they claim are riparian to the waters of said creek. Obviously, if the defendants or their predecessors in interest acquired title to the lands to which they claim the waters of Red Rock creek are riparian before the plaintiff made the appropriation which it claims here, then such appropriation cannot prevail or be maintained as against the riparian rights of the defendants as upper riparian proprietors.

[6] It is so well settled that authorities need not be cited to confirm the statement that a lower riparian proprietor cannot acquire either by prescription or by appropriation as against the upper riparian owner the waters from a stream to which their respective lands are riparian. We will, however, cite these cases as supporting this proposition: *Hargrave v. Cook*, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; *Bathgate v. Irvine*, 126 Cal. 135, 140, et seq., 58 Pac. 442, 77 Am. St. Rep. 158; *Pyramid Land & Stock Co. v. Scott*, 51 Cal. App. 634, 197 Pac. 398.

[7] It is not necessary to present herein a résumé of the evidence which supports the finding that the lands of the plaintiff which are described in the complaint are riparian to Red Rock creek. It is sufficient to say that a large number of witnesses testified that said creek has had for many years a well-defined channel passing over and through the Moulton meadows, and thence to said lands of the plaintiff. Some of these witnesses stated that they had been familiar with the creek for upwards of 25 years, and declared that the channel thereof from the Moulton meadows to the McKissick sink was of sufficient depth and width to carry a sufficient volume of water to flood the said sink in the irrigation season, and thus cause it to produce bountiful harvests of hay and large quantities of pasturage. It is true that the testimony shows that the county built a county road across said creek at a point between Moulton meadows and the sink, and that thus the flow of the creek to the lands of plaintiff was for a time obstructed. But this was obviated by ditching around that portion of the road crossing the creek, and so causing the water to flow on in its natural

course to the sink. This obstruction was not, obviously, due to any act of the defendants or any of them. It did not involve the exercise on their part of any right that they might have claimed to stop the normal flow of the creek to the sink for the purpose of diverting it to their own uses. If the plaintiff had any complaint to make against anybody for said obstruction it was against the county, and not against the defendants.

[8] The contention that the plaintiff is estopped from claiming the rights to the waters in Red Rock creek because of its alleged acquiescence in the use of said waters by the defendant Anderson and his predecessors in interest cannot be sustained. The evidence clearly shows, as we have above pointed out, that the plaintiff at all times asserted its right to said waters by removing from time to time any obstructions which were placed in the stream to prevent the waters from flowing to its lands, and by opening the gates of the reservoir so as to allow the waters therein stored to return to the creek.

As to the defendants other than the defendant Anderson, it appears that they have or claimed no interest at the time of the bringing of this action and at the time of the trial in the waters of Red Rock creek. The brief of counsel for the defendant so states, and further declares:

"The Red Rock Creek irrigation district includes the lands farmed by Anderson, and proposes to acquire the right to use the waters of Red Rock creek, and the other defendants (Eneboe and Pefsey) are directors of the district. It is not contended that they have ever diverted, used, or exercised control over the water of the creek."

In fact, on the close of plaintiff's case counsel for the defendants moved for a nonsuit on the ground that the plaintiff failed to establish "any action entitling them to an injunction or damage against" said defendants. The motion was denied, not upon the ground that said defendants had been shown by the plaintiff ever to have been in any way concerned in preventing the waters of the creek from flowing to the lands of the plaintiff, but upon the ground that, since this is an action to quiet title, and said defendants were charged in the complaint with claiming some rights in the waters of the creek, and did not in their answer deny that charge, it was upon them to show in their defense, if they could, any claim that they might have to said waters which were superior to that of the plaintiff. It will thus be seen that, according to counsel for the defendants, the real controversy was between the plaintiff and the defendant Anderson, and, as to the latter, the court, as seen, found and decreed that he was a riparian owner of so much of the waters in the creek as were necessary to irrigate the 200 acres out of the 440 acres of

the Moulton meadows which he acquired through the taking over of the agreement of sale of said land from one Dodge.

[9, 10] The defendants complain that the court erred in refusing to permit them to introduce in evidence the complaint filed in an action brought in the superior court of Lassen county by the plaintiff against the defendant Anderson on the 14th day of July, 1915, and also an order or judgment by said court dismissing said action. This record was offered in evidence in connection with the cross-examination of the plaintiff's principal witness, F. R. Enyart, who, for a period of 25 years, was familiar with the lands described in the complaint, and for 18 years in active management of said lands and the cattle-raising business of plaintiff on said and adjacent lands. The pertinency of the proposed proof in connection with the cross-examination of Enyart is not apparent from the record; but it is stated in the brief of defendants that "it was material both to test his accuracy and to find the scope of his information." There was no objection to this testimony by counsel for the plaintiff, but the court suggested to counsel for the defendants that it would be more regular to postpone the offer to introduce the complaint and the order referred to until they opened their defense, whereupon the witness interrupted to say, in effect, that all he knew about said action was what had been told him about it, to which statement counsel for the defendants replied that they did not want him to state what he "understood," but what he actually knew about the action. The matter was not thereafter brought up or further pressed by counsel for the defendants. It is clear that the ruling was not erroneous. The complaint in said action is not in the record here, and therefore we are afforded no enlightenment on what its averments were or whether in any view it would reflect any light on the issues involved in this action. Indeed, we know of no way in which the complaint could pertinently be received into this record except by way of impeachment, and so by first showing that the witness himself was personally responsible for its allegations of fact, that the pleading contained statements inconsistent with the material testimony given by him in the present case, and that he denied making such statements or authorizing them to be made.

In accordance with the foregoing views, so much of the judgment appealed from as awards the plaintiff, as an appropriator of the waters of Red Rock creek, "the use of all the waters of said creek up to 2,000 inches, measured under a 4-inch pressure, and measured at a point where the channel of said stream enters the lands of plaintiff, from the 1st day of March of each year for so long a time as said waters will flow to the lands of plaintiff for the irrigation of the

crops growing thereon," etc., is reversed, and the remaining portion of said judgment, establishing the respective rights of the plaintiff and the defendant Anderson as riparian proprietors to the waters of Red Rock creek, and granting the injunctive relief as prayed for in the complaint, in so far as such relief applies to the riparian rights of the plaintiff, is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

(62 Cal. App. 771)

VANDERBUSH v. BOARD OF PUBLIC WORKS OF CITY OF LOS ANGELES
et al. (Civ. 3822.)

(District Court of Appeal, Second District, Division 2, California. July 5, 1923.)

1. Evidence ⚡28—Judicial notice of law prior to taking effect held impossible.

Judicial notice cannot be taken of any law until it takes effect, because until then it has no existence.

2. Evidence ⚡32—Superior court cannot judicially notice unpleaded ordinance before finally effective.

The superior court cannot take judicial notice of an unpleaded city ordinance one day before it takes effect, even though approved by the mayor and ordered published.

3. Mandamus ⚡168(4)—Affirmative allegation of a legal ordinance, held not proved.

Where the board of public works, in answer to an application for a writ to compel issuance of a building permit, pleaded a zoning ordinance, prohibiting erection of the building contemplated, but not taking effect until one day after this case was heard, petitioner's testimony showing that he had been fully informed of the contents of the ordinance, that he had been handed a copy, etc., held insufficient to prove legality of the ordinance as pleaded in the answer, since petitioner did not admit that the ordinance was legally binding on him.

4. Mandamus ⚡165—Affirmative allegations of answer taken as true if not demurrable.

On application for a writ of mandate, affirmative allegations of the answer, if not demurrable, are to be taken as true unless they are countervailed by petitioner's proof.

5. Mandamus ⚡165—Answer pleading legality of ordinance not yet effective not taken as true because too speculative.

On application for a writ compelling issuance of a building permit, though affirmative allegations in the answer, if not demurrable, are taken as true, an answer predicting that an ordinance "now being duly published" would take effect on a future date involves too great uncertainty, since many things might still happen to prevent the measure from becoming law.

6. Mandamus ⚡187(9)—Appeal judgment limited to facts before trial court.

On appeal from a denial of a writ of mandate to compel issuance of a building permit,

the appellate court pronounces judgment only upon facts before the trial court at the time its judgment was rendered.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Petition for writ of mandate by R. H. Vanderbush against the Board of Public Works of the City of Los Angeles and others, to require issuance of a building permit. From a judgment for defendants, petitioner appeals. Reversed.

Turnbull, Heffron & Kelley, of Los Angeles, for appellant.

Jess E. Stephens, City Atty., Lucius P. Green, Asst. City Atty., and Philip Sterry, Deputy City Atty., all of Los Angeles, for respondents.

WORKS, J. This proceeding was instituted in the superior court for the purpose of procuring the issuance of a writ of mandate. The petition, which was filed November 16, 1921, alleges that petitioner, being desirous of constructing a five-unit bungalow court upon certain property in the city of Los Angeles, had made application to defendant board of public works for a permit to make the improvement, and that the application was denied. Immediately after the filing of the petition, and on the day upon which it was filed, the court issued its alternative writ of mandate requiring defendant board to issue the permit or to show cause for its failure to do so. Defendant board did not issue the permit, but on November 28, 1921, filed its answer to the petition for the writ. The answer alleges, in connection with certain denials of averments of the petition:

That the property upon which petitioner proposed to construct the bungalow court is located in a certain designated portion of Los Angeles; "that said portion * * * is a highly improved residential district, and is improved with many expensive single family dwellings; * * *" that "on or about the 18th day of October, 1921, the council * * * of Los Angeles duly and regularly enacted and adopted an ordinance, being Ordinance No. 42666 (new series), which ordinance provides generally for the zoning of said city, and in particular has created the district wherein" petitioner's property "is located as a zone wherein none but single family dwellings may be erected, constructed, and maintained, said zone being in said ordinance designated as zone A; * * * that said ordinance was thereafter approved by the mayor of * * * Los Angeles, and that the same is now being duly published * * * as provided by the charter of * * * Los Angeles, and will become effective November 29, 1921. * * *"

Here followed certain other affirmative allegations which it is not necessary to repeat. The proceeding came on for hearing November 28, 1921, which, it will be observed, was

the day before ordinance No. 42666 was to take effect, according to the allegations of the answer. The hearing was concluded on the same day, and on that day the trial court made its order or judgment discharging the alternative writ of mandate and denying the issuance of a peremptory writ. Petitioner appeals.

[1, 2] The judgment of the trial court appears to have been based upon the affirmative allegations of the answer which are set forth above. At any rate, respondents defend the judgment upon that theory. Appellant contends that there was no evidence before the court which would have supported a finding that those allegations were true, particularly those concerning ordinance No. 42666. Respondent's insistence is, in the first place, the ordinance not having been introduced in evidence, that the trial court must have taken and did properly take judicial notice of its provisions. This position clearly is untenable. Granting, for the moment, that the superior courts may take judicial notice of the terms of city ordinances as laws, they cannot take such notice before such ordinances take effect. Nor does this statement apply peculiarly to city ordinances. It is trite to assert that the courts can take judicial notice of the existence of no law before it has an existence. When the trial court heard and decided this proceeding, Ordinance No. 42666, so called, was not an ordinance, if, indeed, it ever became one. Its provisions, therefore, cannot, under the law of judicial notice, afford any support to the judgment.

[3] Respondent makes the contention, also, that there is evidence in the record which proves the allegations of the answer concerning the "ordinance," and refers to certain testimony of appellant. That testimony was to the effect that when he got ready to commence work on his proposed improvement appellant "could not get the permit, on account of the zoning ordinance going into effect"; that when he referred to the zoning ordinance going into effect he meant "an ordinance which is referred to in the answer of respondent here, which has not yet gone into effect"; that he "became somewhat familiar * * * with the so-called Zone Ordinance that was enacted by the city of Los Angeles recently" when he "went to the city hall to apply for a permit"; that "they" then handed him "a copy of the ordinance of the zoning commission." We can perceive nothing in this testimony which in the slightest degree tended to prove any of the provisions of the so-called Ordinance No. 42666. For appellant to say that he could not obtain the desired permit on account of the going into effect of the ordinance referred to in the answer was not, surely, for him to testify that the legal effect of the ordinance was as alleged in that pleading. Neither from this statement, nor from anything else testified

to by appellant, could the trial court have found that the provisions of the "ordinance" were as alleged in the answer. Moreover, the testimony of appellant is subject to the comment which we have already passed upon the matter of the contention that the trial court could have taken judicial notice of the contents of the "ordinance." Indeed upon the score of difference in degree, if not in kind, that comment may be broadened. The trial court was asked to take judicial notice of the "ordinance" one day before it became an ordinance. Appellant's knowledge of the contents of the proposed measure, if any he had, appears to have been derived from an "ordinance of the zoning commission," not of the council, which was handed him two weeks before ordinance 42666 was to take effect according to the answer, for his petition for the writ of mandate was filed on November 16, 1921. On the whole, it would be going far to assert that appellant's testimony showed anything as to the contents of any ordinance in effect as an enactment of the council of the city of Los Angeles.

[4, 5] There is a point which would lead to an affirmation of the judgment if it could be said that the new matter pleaded in the answer states a defense. In a proceeding for the writ of mandate affirmative allegations of the answer, if not demurrable, are to be taken as true unless they are countervailed by proof presented by the petitioner. *McClatchy v. Matthews*, 135 Cal. 274, 67 Pac. 134. Is a defense stated by the affirmative matter in the answer now before us? We think not. In the maze of uncertainties incident to this mundane existence no man may predict with success that any particular event will happen at any time in the future, unless the fact that it will occur at a certain moment is within the domain of scientific knowledge, as, for instance, that an eclipse of the sun will transpire in Southern California on September 10, 1923. The pleader in actions in the courts labors under the same disability. He may not predict the occurrence of events the happening of which is involved in uncertainty. Whether Ordinance No. 42666 so called, would take effect on November 29, 1921, or at any other time, could not be foretold. To illustrate the situation, a peculiar allegation of the answer may be examined. It is averred that the proposed measure "is now being duly published." Surely nothing can be said as to whether the publication of a proposed ordinance has been duly made until after the time of the publication has run and the facts surrounding the publication are examined under the law. In the present instance notwithstanding the allegations of the answer, it may have happened that the publication was not duly made, and that the proposed measure did not go into operation for that reason; at least not on November 29, 1921. Further, some means

may have been found by which the "ordinance" was prevented from going into operation by the courts. In short, the new matter in the answer is but a prediction, and not an allegation of fact.

[6] Respondents are solicitous lest a reversal of the judgment may lead to a requisition upon respondent board to perform acts which by the ordinances of the city it is now forbidden to perform. We trust such an outcome may not follow. It is to be understood, of course, that we pronounce judgment only upon the facts before the trial court at the time its judgment was rendered. As respondents showed no excuse for the refusal to grant to appellant the permit which he sought, the judgment of the trial court cannot stand. If, however, there are at present in existence any grounds upon which it may be claimed that respondent board may not now be required to grant the permit, the trial court will doubtless discover means whereby respondents may have a hearing upon them.

Judgment reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(62 Cal. App. 531)

SANTA CLARA VALLEY LAND CO. v. MEEHAN, City Marshal. (Civ. 4528.)

(District Court of Appeal, First District, Division 1, California. June 16, 1923. Rehearing Denied July 16, 1923. Hearing Denied by Supreme Court, Aug. 13, 1923.)

1. Municipal corporations ⚡418—**Waters and water courses** ⚡183(1)—**City of sixth class empowered under Public Utilities Act of 1913 to purchase waterworks system and assess property therefor.**

Under Public Utilities Act of 1913, a city of the sixth class could purchase a water supply system and levy an assessment on the property of property owners within the city to procure the purchase money.

2. Constitutional law ⚡284(1)—**Eminent domain** ⚡2(11)—**Municipal corporations** ⚡407(2)—**Public Utilities Act of 1913, authorizing purchase of established waterworks system and assessing cost thereof on real property benefited, not invalid; "tax."**

Assessments to defray the cost of local improvements are not ordinarily taxes levied for the purpose of sustaining the government, but are charges impressed on individual property because that property receives a special benefit which is different from the general one which the owner enjoys in common with other citizens as such, and Public Utilities Act of 1913, authorizing a city of sixth class to purchase an established waterworks system and limiting the cost thereof to real estate to the exclusion of personal property, is not invalid as taking private property without compensation or without due process, nor did it lack

uniformity in not being levied against every character of property alike.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tax—Taxation.]

3. Municipal corporations ⚡407(1)—**Special assessment not a tax in constitutional sense.**

An assessment is not a tax in the constitutional sense.

4. Constitutional law ⚡284(2)—**Full opportunity to property owner to object to special assessment is due process.**

Where, in a proceeding by city of the sixth class, to purchase an established waterworks system and assess cost of the improvement on the property benefited thereby, full opportunity was given for persons interested to object, the requirement of due process was met.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Santa Clara Valley Land Company against Arthur Meehan, as City Marshal and ex officio Tax Collector of the City of San Bruno. Judgment for defendant, and plaintiff appeals. Affirmed.

Harry J. McKannay, of San Francisco, for appellant.

H. A. Mason, City Atty., of San Bruno, for respondent.

TYLER, P. J. Action to restrain and enjoin defendant as an officer of the city of San Bruno from selling certain property of the plaintiff, under an assessment levied for the purpose of acquiring a municipal water system.

A demurrer to the complaint was sustained without leave to amend, and it was adjudged that plaintiff take nothing by its complaint, and that defendant recover his costs. This is an appeal from the judgment.

The complaint recites that the city of San Bruno is a municipal corporation of the sixth class, organized and existing under the Municipal Government Act (St. 1883, p. 93 as amended) and that defendant Meehan is its city marshal and ex officio tax collector; that plaintiff is the owner of a number of parcels of land situate therein and is a taxpayer of said city; that prior to the 26th day of May, 1920, the San Bruno water system, a privately owned corporation, supplied the municipality and its inhabitants with water; that on the last-mentioned day the board of trustees of the city passed its resolution of intention to acquire the water system, and thereafter the city engineer made and presented to the trustees his report pursuant to the resolution, which report contained all the necessary data upon the subject; that proceedings were thereupon had under which an assessment district was established in conformity with the report, the area including

every lot of land situated in the city, as shown upon the records, and such lots were assessed for the acquisition of the water supply; that subsequently defendant caused to be published a notice of sale of the property within the district upon which the assessment had become delinquent, and thereafter he sold the same for the amount due under the assessment. It is then charged that defendant will, unless enjoined, execute and deliver to the purchasers deeds to the property so sold in conformity with his certificates of sale.

There is no dispute concerning the regularity of the proceedings leading up to the purchase, but in seeking relief from the effect of the assessment appellant assails the validity of the improvement, contending that, as his property already enjoys the advantage of the existing privately owned water distributing system, no benefit whatever is derived by it under the sale of such system to the municipality, and that its acquisition, therefore, does not constitute an improvement justifying an assessment. It is further contended that, in so far as the Public Utilities Act of 1913 (St. 1913, p. 421) purports to authorize the purchase of existing waterworks and to assess the costs thereof against real property to the exclusion of personal property, it is unconstitutional and void.

[1] It is conceded that the trustees would, under the act, have the authority they have here exercised if the levy was for the original construction of such a system. The precise question here involved was presented and passed upon in the case of *Kane v. Wedell*, 54 Cal. App. 516, 202 Pac. 340. It is there held that the original construction of reservoirs and necessary appliances requisite to the creation of a municipal water system is such a public improvement as to come within the terms of the act in question. It is further held that there is no real distinction between the original construction of such a system by a municipality and its acquisition after its construction by private parties, in so far as the nature of the work as a public improvement is concerned, since the same effect is accomplished in either case, namely, that of providing the municipality with a publicly owned improvement which it did not possess before. It is there pointed out that the title of the act indicates that no such distinction as is here contended for was ever intended, since it purports to be "An act to provide for the acquisition, installation, construction, reconstruction, etc., of waterworks." That decision is based upon the same proceedings here assailed, and the precise objections here presented were there raised and passed upon.

[2, 3] The question of the infringement of constitutional guarantees, while involved in *Kane v. Wedell*, is not discussed in the opinion. Appellant claims that, in so far as the

Public Utilities Act purports to limit the cost of the improvement to real estate to the exclusion of personal property, it is void upon several constitutional grounds governing taxation.

In this connection it is urged that the assessment constitutes a taking of private property without just compensation, or without due process of law, and further, that it lacks uniformity in not being levied against every character of property alike.

[4] The claim is without merit. Local improvements are, as a general rule, levied upon land alone, for the reason that it is the kind of property which is usually benefited thereby. Assessments to defray the costs thereof are not ordinarily taxes levied for the purpose of sustaining the government, but are rather charges impressed upon individual property because of the fact that the property upon which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys in common with other citizens as such. A special assessment is not in the constitutional sense a tax at all. *Spring Street Co. v. City of Los Angeles*, 170 Cal. 24, 148 Pac. 217, L. R. A. 1918E, 197. The provisions invoked contain no restriction upon the power of the Legislature to permit and authorize the imposition of special assessments to defray the cost of a public improvement, unless by the manner of its assessment it takes property without due process of law or without compensation. Here there was no irregularity in the proceedings leading up to the acquisition of the improvement in question, so far as the pleadings show, and full opportunity was given for persons interested to object. This constitutes due process. If the exaction imposed upon an owner for the cost of an improvement is in substantial excess of the benefits accruing to him, undoubtedly, to the extent of such excess, it is a taking, under the guise of taxation, of property without compensation. Here, however, no claim is made that there is a disproportion of benefits, but only that, by reason of the existence of the privately owned system, no possible benefit could accrue to plaintiff's lands under the improvement, as such benefits already existed.

It being admitted that the city might acquire a water system if none existed, and that appellant's lands could be impressed with a proper assessment to defray the cost thereof, an extended discussion of the subject becomes unnecessary. The benefit which plaintiff's lands secured through the acquisition by the city of the waterworks, with the more certain probability of the continued existence of the same, considering the opportunity of the municipality to operate such works at actual cost, as against the less certain probability of their being continued under private ownership, is such a benefit as justi-

fies the assessment. Moreover, the ownership and operation of this public utility by the municipality would have a tendency to make the lots more desirable as a place of residence, or more valuable in the general market, as a municipality is authorized to expend public funds for the purpose of extending and improving the same; a thing an individual or a private corporation operating in a small community might not feel justified in or be capable of doing.

No other questions are presented.

For the reasons given, we are of the opinion that the judgment should be and it is hereby, affirmed.

We concur: ST. SURE, J.; RICHARDS, J.

(62 Cal. App. 549)

In re SIMPSON et al.

In re RICHARDSON.

(Civ. 3681.)

(District Court of Appeal, Second District, Division 2, California. June 16, 1923. Hearing Denied by Supreme Court Aug. 13, 1923.)

1. Newspapers ⇨3(2)—Judgment declaring newspaper to be of general circulation held final and binding as against proceedings to vacate.

In view of Code Civ. Proc. §§ 1908, 1911, a judgment determining that a newspaper as then published was a newspaper of general circulation was final, and matters there passed on, which appeared on the face of the judgment, are not open to inquiry in proceeding under Pol. Code, § 4462, to vacate such judgment.

2. Newspapers ⇨3(2)—Suit to vacate order declaring newspaper to be of general circulation filed only on showing that it had ceased to be such; "ceased."

Under Pol. Code, § 4462, suits may be filed to annul orders declaring newspapers to be of general circulation, but to be successful it must be on proof supporting an issue not determined in the original action, and it must be shown that the newspaper has "ceased" to be one of general circulation; the legislative use of "ceased" importing that a change has taken place.

3. Action ⇨3—Change of conditions held fact necessary to be established where suit shows change necessary to relief.

Where a statute evinces an intention that a change from a former condition is a necessary prerequisite to the granting of the relief provided, an alteration of conditions is a fact necessary to be established before a cause of action can be said to have been made out.

4. Newspapers ⇨3(2)—Requirement of showing that newspaper has ceased to be of general circulation necessitates comparison of conditions.

In a proceeding to annul an order adjudging a newspaper to be of general circulation,

under Pol. Code, § 4462, the requirement that it be shown that the paper has ceased to be such necessitates a comparison of present conditions with those at the time when it was judicially determined to be of such general circulation.

5. Judgment ⇨812(3)—Judgment in rem binding on all persons.

Judgment in rem is binding on all persons.

6. Newspapers ⇨3(2)—Elements involved in determination of whether newspaper is one of general circulation.

Whether a newspaper is one of general circulation involves other elements besides the number of its subscribers and the size of the community in which it is published and circulates, and, where it has been judicially determined to be one of general circulation, in a proceeding to annul such order it does not follow that contestant has sustained the burden of proof of changed conditions when he shows that it has ceased to be of general circulation because he has proved that some element involved in the judicial determination has been changed.

7. Newspapers ⇨3(2)—Increase of population of a city not such change as to affect newspaper's status as one of general circulation.

Where a newspaper has been judicially determined to be one of general circulation and in a proceeding to vacate such order the only fact proved or of which judicial notice could be taken which has been altered since the former proceeding was that the population had increased from 12,000 persons in 1913 to 18,000 in 1920, it could not be inferred therefrom that it had ceased to be one for dissemination of news nor of general circulation.

8. Evidence ⇨12—Judicial notice taken of increase in population of cities.

Judicial notice taken that the population of Bakersfield increased from approximately 12,000 persons in 1913 to 18,000 in 1920.

9. Newspapers ⇨3(5)—144 paid subscribers held to make newspaper one of general circulation.

It cannot be said that a newspaper having 144 bona fide subscribers, nearly all of which were distributed in a city of 18,000 inhabitants, might not be one of general circulation.

10. Newspapers ⇨3(2)—Res judicata rule relaxed to show change of condition of newspaper of general circulation.

In a proceeding under Pol. Code, § 4462, to vacate an order declaring a newspaper to be one of general circulation, the statute permits the entire subject to be reopened on condition that the ultimate facts are shown to have changed materially subsequent to the original order, and hence the application of the rule of res judicata is relaxed to the extent that proof of changed conditions authorizes the vacation of the decree first made.

11. Judgment ⇨948(1)—Res judicata must be pleaded.

Res judicata must be pleaded in order to invoke it.

12. Newspapers — 3(2) — Petitioner held to have burden of avoiding effect of judgment.

In a proceeding to vacate an order declaring a newspaper to be of general circulation, where, in such proceeding, the petition showed rendition of the original judgment, no plea of res judicata need be interposed by respondent, but petitioner must avoid effect of the judgment shown by its own pleading to exist.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

In the matter of the application of W. E. Simpson and another that the Daily Report be declared a newspaper of general circulation. On application of Friend W. Richardson to vacate an order declaring it to be such a newspaper. From judgment refusing to set aside such order, applicant appeals. Affirmed.

F. H. Borton, C. V. Anderson, and Kaye & Siemon, all of Bakersfield, for appellant.

J. W. Wiley and Irwin & Laird, all of Bakersfield, for respondent.

CRAIG, J. On August 18, 1913, the superior court of Kern county, in a proceeding duly instituted and prosecuted for that purpose, entered an order adjudging the Daily Report to be a newspaper of general circulation. This is a proceeding under section 4462 of the Political Code to annul the order previously made. The ground set forth in the petition is the alleged fact that the Daily Report had ceased to be a newspaper of general circulation. After a trial the superior court denied the petition and dismissed it. From the order of dismissal the petitioners appeal.

The petition alleged and the court found the Daily Report to be a publication issued and published in the city of Bakersfield. A number of typical issues of the publication issued in September and October, 1920, were introduced as exhibits at the trial and are before this court for inspection. An inspection of these and of the paper published in 1913, also offered in evidence, shows that with regard to its contents the Daily Report now contains more items of general interest and is not otherwise less qualified to be termed a newspaper of general circulation than at the date of the original hearing and adjudication. The evidence shows also that it now has more paid subscribers than formerly. Political Code, § 4460, provides that to be a newspaper of general circulation, a publication must be "published for the dissemination of local or telegraphic news and intelligence of a general character," and that if it be "devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling," etc., it is not such a newspaper. Section 4462 makes provision for the vacation of a judgment which has determined a newspaper to be one of general circulation. The sole requirement

which authorizes the vacating of the judgment previously entered is that "such newspaper has ceased to be a newspaper of general circulation, as that term is defined by section four thousand four hundred and sixty."

[1-3] The judgment entered on August 18, 1913, necessarily determined the fact to be that the Daily Report, as then published, having regard for conditions in its community, was a newspaper of general circulation. This judgment became final. The matters there passed upon and which appeared upon the face of the judgment are not now open to inquiry. Code Civ. Proc. §§ 1908, 1911. If this were not so, since section 4462 of the Political Code allows any person to apply for the vacation of the original judgment, the paper might be required to litigate, over and over, the same issue in innumerable suits. Of course, nothing can prevent the bringing of actions at law, but when an issue is res adjudicata that particular matter will not be again considered. Additional suits may be filed in the nature of the instant one, but in order to succeed, the petitioner must do so upon proof supporting an issue not determined in the original action, and, particularly, it must be shown that the newspaper has "ceased" to be one of general circulation. The Legislature used the word "ceased," which imports that a change has taken place. In order that the original judgment may be vacated, it must be shown that the publication as now issued is not one of general circulation. The determination of that fact may necessitate proof that the relation of the paper is not the same as it was when it was adjudged to be a newspaper of general circulation. Unless the issue sought to be determined upon the petition to vacate is different from that passed upon in the original proceeding, the hearing of the former would be, in effect, a new trial. Where the language used in a statute evinces an intention that a change from a former condition is a necessary prerequisite to the granting of the relief provided, an alteration of conditions is a fact necessary to be established before a cause of action can be said to have been made out. *Barbiera v. Ramelli*, 84 Cal. 154, 23 Pac. 1086.

[4] The requirement that it be shown that the paper has "ceased" to be one of general circulation necessitates a comparison of conditions. We cannot know that a child is larger or taller to-day than it was a year ago unless we are informed as to its size and height both then and now. We cannot say that the Daily Report has ceased to be a newspaper of general circulation unless we know its character and as compared with the character and size of the community, the extent of its circulation, not only now, but at the time when it was judicially determined that it was one of general circulation. This does not involve solely a viewing of the evi-

dence introduced in the proceeding in 1913, as petitioner assumes to investigate the basis of the judgment then rendered. The consideration given the condition then existing is for the limited and single purpose of using it as one of the points of the comparison required to be made. Had the conditions existing in 1913 been placed before the court, the fact that the former judgment is *res adjudicata* would necessitate the holding in the present instance that those conditions, whatever they were, constituted the paper one of general circulation at that time. It then would have remained for the petitioner to prove such a change as would show the paper to be no longer what it was in that regard. There is nothing in the record on appeal to indicate that any substantial change has taken place.

Petitioner earnestly insists that the judgment in 1913 is not of such a character as to be regarded as finally deciding the matter there adjudicated as against those petitioners. Much stress is placed on the concurring opinion of Mr. Justice Shaw in *Re Herman*, 183 Cal. 153, 191 Pac. 934. In questioning the right of the Legislature to enact legislation of this character if it authorizes a judgment binding, as contended by respondent here, the learned justice cites no authorities and gives no definite reason for the doubts upon the matter entertained by him. The decision of the court in that proceeding expressly held that the question here presented was not in issue and could not properly be passed upon. However, from what is there determined, it logically follows that the decision in the instant proceeding in 1913 is binding, not only upon the parties, but upon all persons. In *Re Herman* the court points out that section 4462 of the Political Code provides that any person may appear and contest the petition; any person may show that the newspaper in question is not the proper medium for the publication of legal notices, etc.; and any person may appeal without showing that he is interested in an individual capacity or otherwise than as one of the public. It is logical to conclude that if "any person" had such rights and failed to exercise them he is bound by the judgment rendered, though, perchance, it may be merely through his failure to interpose a contest.

[5] It is elementary that a judgment in *rem* is binding upon all persons. It is said by Mr. Freeman, in his work on Judgments, that the distinguishing characteristic of judgments in *rem* "is that wherever their obligation is recognized and enforced as against any person, it is equally recognized and enforced as against all persons." According to Chand's *Law of Res Judicata*:

"A judgment is in *rem* whenever the process and proceedings are such as to warn all persons that the court may render judgment affecting certain property and their interests therein, and that they must, at or within a

time specified, appear before the court if they wish to protect those interests from judicial condemnation. The fact that, under the mode of serving process provided by law, some claimant or even all claimants of the property do not receive actual notice of the proceeding will not prevent the judgment from operating in *rem*, if the mode adopted was reasonable under the circumstances, and calculated to give notice to the claimants, and the process was such as that the claimants, had it been seen by them, should have known therefrom that their interests were or might be imperiled, and that they might be heard for the preservation of such interests."

The judgment of 1913 determined the status of the *Daily Report* to be a newspaper of general circulation.

If this were the only question involved in the instant proceeding, the facts which were the basis of the former judgment would not alone suffice to grant the relief sought in this proceeding. The doctrine of *res adjudicata* would prevent their consideration for such a limited purpose. The peculiar language of this statute requires a showing of a change having taken place, and this at once necessitates proof of the condition of affairs which must appear to have ceased to be in order that the judgment may be set aside.

[6] The question as to whether or not a paper is one of general circulation involves other elements besides the number of its subscribers and the size of the community in which it is published and circulates. It does not necessarily follow that the contestant has sustained the burden of proof required of him to show that a paper has ceased to be one of general circulation because he has proved that some one of the elements involved has changed. The difference must be of such a nature as to bring about an altered relativity of conditions as contrasted with that which existed when the original judgment was entered. For example, if the only changes which had taken place were in the matter of population of the community and the number of bona fide subscribers, and if these had remained proportionally unaltered, it could not be said that the newspaper had ceased to occupy the status of being one of general circulation. This is true because the trial court in the original proceeding passed upon the ultimate fact, at the time having before it supporting facts relatively the same as upon the later hearing. Counsel for petitioner suggests that there are many elements entering into the fact as to whether or not a newspaper is one of general circulation other than existed in 1913; that in this day the radio may be used to disseminate news; mail may be distributed by flying machine, and many other discoveries, inventions, and improvements have revolutionized the newspaper business. He argues that a newspaper may cease to be one of general circulation, not by any reason of a change in itself, but as a result of this and other changed conditions in

the community where it is published. It must be conceded that all of these things might have transpired, but in order to be relevant to the issue here under consideration there must be some evidence in the record to show that the community in which the Daily Report circulates has acquired the aid of the flying machine, the radio, etc., to assist in the dissemination of news.

[7, 8] As shown by the record on appeal, the only fact proven or of which this court can take judicial notice which has been altered since the former proceeding is that the population of Bakersfield has increased from approximately 12,000 inhabitants in 1913 to 18,000 in 1920. From this evidence it cannot be inferred that the paper has ceased to be one for the dissemination of local and telegraphic news and intelligence; nor from the fact of change of population alone can it be concluded that it is no longer true that the paper is not devoted to the interests or published for the entertainment or instruction of the particular class, profession, trade, calling, race, or denomination, or for any number of classes, professions, trades, or callings; nor would the circumstance of increase of inhabitants in itself show that the newspaper has ceased to have a bona fide subscription list of paying subscribers. Appellant admits that these ultimate facts are all conclusively determined by the court's order of August, 1913. Obviously, mere change in population would not affect any of them, yet change in population is the single, isolated element shown to have altered since 1913. Although other conditions have remained unchanged as far as the record shows, we are asked to say that, regardless of the contents of the publication and of the diversity of its subscribers, this one fact of additional population, notwithstanding the other elements conclusively established by the former order, is of such controlling weight as to compel a finding that the paper has ceased to be one of general circulation. This we cannot do.

[9] The Daily Recorder, published and issued in Sacramento, was held to be a newspaper of general circulation, although the court said that the "paying subscribers to said paper somewhat exceeds the number of 200." In re Green, 21 Cal. App. 138, 131 Pac. 91. The decision just cited refers with approval to *Hesler v. Coldron*, 29 Okl. 216, 116 Pac. 787, in which the Daily Legal News, with from 205 to 215 subscribers, was recognized as a paper of general circulation. We cannot say that a newspaper having a bona fide subscription list of 144 subscribers, nearly all of which is distributed in a city of 1,800 inhabitants, might not be one of general

circulation. Until the city of Bakersfield becomes so large that the number of people living in it precludes that conclusion that the paper can be one of general circulation with a bona fide subscription list of almost 194 subscribers, a decision of the trial court adjudging that its circulation is general will not be disturbed on appeal, where other conditions appear to have remained unchanged since the first decree was entered.

[10] Appellant contends that the rule which we uphold is one of unprecedented severity. On the contrary, if the ancient doctrine of *res adjudicata* were applied without modification, it would not be permissible to again challenge any of the ultimate facts found by the court in the first proceeding. But the statute permits the entire subject to be reopened, upon condition, however, that the ultimate facts are shown to have materially changed subsequent to the original order having been made. Hence the application of the rule of *res adjudicata* is relaxed to the extent that proof of changed conditions authorizes the vacation of the decree first made.

[11, 12] It is argued that *res adjudicata* must be pleaded in order that it may be invoked. This is no doubt usually the rule, but as was said by the court in a similar situation in *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674, it was for the plaintiffs to show the right which they claimed. If their right had been legally extinguished at the commencement of the action, the defendant was entitled to prove it under a general denial. In this proceeding the petition shows, as it must, the rendition of the original judgment. No plea of *res adjudicata* need be interposed by respondent, but petitioner must avoid the effect of the judgment shown by its own pleading to exist.

We conclude that a cessation of the status found to exist by the judgment in the original proceeding must be shown to have taken place before the petitioner's case can be said to have become a *prima facie* one. The burden is not upon the respondent to show that conditions have remained unchanged. The duty rests squarely upon the petitioner to bring his case up to the standard established by the Code in the measure of proof required to set aside an order decreeing a paper to be one of general circulation, to wit, evidence of the cessation of that condition, necessarily through a change of one or more of the essential facts formerly contributing to the production of it.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

62 Cal. App. 712

PEOPLE v. MENDIVAL. (Cr. 954.)

(District Court of Appeal, Second District, Division 2. California. June 29, 1923.)

Robbery — 24(1)—Evidence held sufficient to sustain conviction.

Facts tending to prove that appellant drove two automobiles, one stolen and the other rented by appellant under an assumed name, in which he and his codefendants rode to and away from the bank which the codefendants held up and robbed, held sufficient to sustain the inference that the use of two automobiles, instead of one, was intended to mislead the authorities, and the judgment of conviction as against appellant, in view of Code Civ. Proc. § 1958, defining "inference."

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Salvador Mendival was convicted of robbery, and he appeals from the judgment and an order denying a new trial. Affirmed.

Theo. Gottsdanker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

SHENK, Justice pro tem. Appellant and his codefendants, Broulio Galindo, Jose Hernandez, and Faustino Rivera, were jointly charged with the robbery of the First National Bank of Arcadia on the 5th day of April, 1922. Appellant, Galindo, and Hernandez were convicted and sentenced. Rivera was in the hospital at the time of the trial, and so far as the record shows his case is undisposed of. Appellant alone has appealed from the judgment and from the order denying his motion for a new trial.

The sole contention is that the evidence was insufficient to sustain the verdict in that there is no evidence, so it is claimed, tending in any way to connect the appellant with the commission of the crime. No authorities are cited in appellant's brief. It contains a short summary of the evidence, with the suggestion that in order to determine the question raised it will be necessary to consider the evidence in its entirety, and the request is made that this court read the transcript for that purpose. That has been done.

About 7:30 o'clock on the morning of the day of the robbery the defendant and his codefendant Galindo went to the auto livery station of Parsons Bros. in Los Angeles and rented a Ford car without a driver. Appellant signed the receipt and rental agreement in which it was specified that the car was to be returned before midnight of the same day. To this receipt and agreement appellant signed the name of Joe Rivas, an assumed name.

A few minutes before 1 o'clock on the after-

noon of the same day a Chevrolet touring car stopped in front of the bank. Three men got out of the car and entered the bank unmasked. They were plentifully supplied with firearms. Two of the men had two revolvers each, and the third man had one. At the points of these guns the president, cashier, and two bookkeepers were ordered first to put up their hands and then to lie down on the floor. Presently a customer entered the bank. He, too, was required to join the officers and employees on the floor. While one of the trio kept watch over the victims, the other two proceeded to pack into two canvas bags about \$2,800 in currency and silver, \$3,720 in bonds, and \$2,700 in travelers' checks. When the packing was concluded, all persons reclining upon the floor were required to enter the vault.

The trio left the bank with the loot and boarded the waiting Chevrolet car, which departed speedily on the highway toward the south. Galindo and Hernandez were positively identified by several witnesses at the trial as two of the men who entered the bank. Rivera was positively identified at the preliminary examination as the third man. While these three were in the bank, a fourth man, whom the prosecution claimed and the jury found to be the appellant, remained in the Chevrolet car, sitting under the steering wheel and keeping the motor running. No witness at or in the vicinity of the bank positively identified the fourth man as Mendival. Several saw the form of a man in the front seat of the car. A telephone man who was in an office across the street testified that the man who remained in the car wore a light hat pulled down over the side of his face. Other witnesses testified that the man who remained in the car wore a light gray cap. One witness stated that the complexion of the man in the car resembled the complexion of the appellant as he saw him at the trial.

A rancher testified that shortly after 1 o'clock on the same afternoon he was about three miles southeast of the bank; that he saw the Chevrolet car with four men in it speeding along the Azusa road at about 35 miles per hour; that he recognized the defendant Galindo as one of the occupants; that the car was proceeding in an easterly direction toward the Sawpit wash; that the car struck the wash with such force that it almost overturned; that at about the time he saw the car disappearing in the wash he heard a whistle blowing which he recognized as the police alarm whistle of the city of Monrovia, a city adjoining Arcadia on the east, and that his suspicions were aroused; that he went to Monrovia and notified the police authorities as to what he had seen; that in the company of an officer he went in the direction in which the Chevrolet car was

traveling and found it in a lonely spot on Chicago Park Island in the San Gabriel river; that there was no one in the car, and that the radiator was hot; that the car was started and driven without difficulty; that the license number plates had been removed, and that there were fresh tracks of another automobile near the place where the Chevrolet car had been abandoned. Pieces of paper, such as are used in wrapping coins with the denomination of the coins stamped thereon, were found strewn on the floor in the rear of the car.

An automobile salesman testified that he was the owner of this Chevrolet car and, that it had been stolen from his garage some time during the night before the robbery.

A motorcycle officer testified that about 2 o'clock of the same day he arrested the four defendants for speeding in Monterey Park, a few miles westerly from the island in the San Gabriel river; that they were riding in the Ford car rented that morning from Parsons Bros. and were the only occupants of the car; that he gave them the usual ticket requiring them to report and permitted them to go on; that they proceeded toward Los Angeles; and that the appellant was driving the car.

The robbery was immediately reported to the office of the sheriff of Los Angeles county. Two deputy sheriffs and the constable of Azusa township, who happened to be at the sheriff's office, started in automobiles for the San Gabriel valley, wherein Arcadia is situated. As they were proceeding through Coyote Pass, about midway between San Gabriel valley and Los Angeles, they stopped this same Ford car which was speeding toward Los Angeles and placed the four defendants under arrest. The appellant was driving the car. Five revolvers were taken from the four defendants. Some of these revolvers were identified by the officers of the bank as those used in the robbery. One revolver was taken from the person of the appellant. All of the defendants were wearing caps. Two dark-colored hats and several articles of clothing were found on the floor of the car. These hats were identified as those worn by two of the defendants when they entered the bank. Two empty canvas bags resembling in appearance those used as containers for the stolen property were also found, one on the person of Galindo and the other in the rear of the car. The defendants were taken back to the bank that afternoon for the purpose of identification. The three who entered the bank were positively identified by the victims, but they could not identify the appellant because, as they stated, he did not come into the bank, and they did not obtain a sufficient view of him to be able positively to identify him.

The cashier of the bank testified that a few silver dollars were found on the floor

of the Ford car when it was examined at the bank after the return of the defendants with the officers.

When questioned by officers as to what he was doing with the Ford car, appellant stated that they had rented it for the purpose of going to San Gabriel for some oranges and that they had taken the guns along to shoot rabbits.

The defendant Galindo was the only one of the defendants who testified. He denied any and all participation in the robbery. The only other defense offered was an alibi on behalf of Galindo and evidence of previous good character on behalf of appellant.

From the foregoing facts and circumstances the jury undoubtedly concluded that the stolen Chevrolet car was employed by the defendants, including appellant, as a means of thwarting any successful investigation which might follow the recovery and identification of that car. The jury must also have concluded that the use of the Ford car was a ruse also to prevent identification. The evidence justifies these conclusions. It was undisputed that the appellant rented the Ford car under a fictitious name a few hours before the robbery. It was also undisputed that he was driving that car when he and his codefendants were arrested for speeding at Monterey Park and when they were again arrested by the officers in Coyote Pass. With the appellant were the three men positively identified. Five guns were found in the party, corresponding to the number used in robbing the bank, and one of these guns was taken from the person of the appellant. Hats used in the commission of the crime, and later undoubtedly discarded for caps to avoid identification, were found in the car. Canvas bags resembling those used for carrying away the loot were also found in the car. The fact that silver dollars were also found on the floor of the car after the arrest is a very significant circumstance tending to connect the use of the Ford car with the cleverly conceived plan to avoid apprehension.

It is entirely reasonable to conclude that the appellant had knowledge of and took part in the commission of the robbery, especially in view of the fact that he had rented and taken the Ford car to the San Gabriel valley in company with Galindo, whose participation in the robbery has been adjudicated; that when arrested for speeding and later by the deputy sheriffs he had with him, not only Galindo, but also Hernandez, whose part in the crime likewise has been adjudicated, and also Rivera whose identity as a participant was established; that incriminating evidence was found in the car and that the appellant at the time of the arrest was driving the car with its guilty occupants toward Los Angeles at high speed with the obvious purpose of escape.

Appellant's participation in the crime sat-

isfactorily appears from the facts shown in evidence and the inferences which it was the province of the jury to draw therefrom. Section 1958, Code Civ. Proc.; *People v. Messersmith*, 61 Cal. 246.

The judgment and order are affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

62 Cal. App. 668

SLATER v. FRIEDMAN et al. (Civ. 4482.)

(District Court of Appeal, First District, Division 1, California. June 26, 1923.)

1. Appeal and error — 1071(6)—Failure to find particular fact requested held not reversible error.

In an action against a taxicab owner for injuries sustained, a failure to find that defendant was a common carrier or that he operated the machine for hire, *held* not reversible error, where the driver of the machine was ultimately found to have been acting beyond the scope of his employment.

2. Master and servant — 302(2)—Master only liable for servant's acts "in course of employment."

A master is only answerable for the acts of his servant when the servant is acting "in the course of his employment," which means "while engaged in the service of his master." If engaged on a mission of his own, the master is not liable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

3. Carriers — 283(2)—Taxi owner not liable for driver's acts, after hour when driver should have ceased work.

In an action by a passenger against a taxicab owner for personal injuries, sustained while defendant's agent was driving his machine, where the driver was shown to have been employed to work from 10 a. m. to 10 p. m., and unauthorized to work after that hour, and where the accident occurred after 10 p. m., while the driver was engaged upon his own enterprise, *held*, defendant was not liable.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Pauline Slater against S. Friedman, Robert Nuccio, and others. Dismissed as to all defendants except S. Friedman. From judgment for defendant and order denying a new trial, plaintiff appeals. Affirmed.

E. Burton Ceruti and C. A. Jones, both of Los Angeles, for appellant.

Griffith Jones and John J. Craig, both of Los Angeles, for respondents.

TYLER, P. J. Action for damages for personal injuries.

The case was tried by the court sitting without a jury. Upon plaintiff's motion the action was dismissed as against the fictitious defendants and also against the defendant Robert Nuccio. After trial, judgment was rendered in favor of defendant Friedman, and this is an appeal from the judgment and order denying a new trial.

The evidence shows, in substance, that defendant was, on the 17th day of July, 1920, engaged in the taxicab business in the city of Los Angeles, and had in his employ one Schlau, who operated his machine for hire; that about 11:45 p. m. on the day last mentioned the taxicab was standing on the corner of Fifth and Spring streets with Schlau in charge, and a sign was attached to it indicating that the machine was for hire. The plaintiff, accompanied by her niece and a friend, engaged the services of the driver to convey the party for a consideration to the Santa Fé station. While proceeding on the journey a collision occurred, and plaintiff was seriously injured, her skull being fractured, her body and limbs bruised, and her nervous system affected. It further appeared in evidence that the hours of the driver's employment were from 10 in the morning until 10 at night, and that on the evening in question the driver had discovered that his employer has retired early and he kept the taxi out longer than his instructions warranted him in doing, for the purpose of his personal gain.

The trial court found the defendant to be the owner of the machine and that Schlau was employed by him to operate the same, but it further found that after 10 p. m. of the day of the accident the driver was not acting in the course of his employment, but was on a mission of his own, and judgment was accordingly rendered in defendant's favor. A motion for a new trial was made and denied.

[1] As ground for reversal, appellant complains of the action of the trial court in failing to find defendant to be a common carrier, and that he operated the taxi for hire, and that Schlau was at the time of the accident his agent, servant, and employee. Such findings, it is claimed, are justified by the evidence. Complaint is also made of the express findings as being contrary to the law and the evidence.

The fact as to whether or not defendant operated his taxi as a common carrier, or that he operated the machine for hire, are questions that are unimportant, if the finding of the ultimate fact that the driver was acting beyond the scope of his employment is warranted by the evidence, and as we are of the opinion that the trial court was correct in its conclusion upon this subject, failure to find upon these questions cannot constitute error requiring a reversal, as the only effect

thereof would be to establish the degree of care required of defendant.

The evidence upon the subject, as above narrated, is without practical conflict. It shows that Schlau was employed by defendant Friedman to operate the taxi, and that his hours of employment were limited from 10 o'clock in the morning to the same hour in the evening; that, disregarding these express instructions, and for purposes of his own, about midnight of the day of the accident he undertook for hire for his own benefit to convey plaintiff to her destination. Under these circumstances it is the claim of plaintiff that, as the driver had actual authority to represent his principal up to the hour of 10 o'clock in the evening, he had ostensible authority to represent him after that hour, as he was acting in the capacity for which he was employed.

No subject in connection with the law applying to the operation of automobiles has given rise to more views than the question of the responsibility of an owner for the acts of his chauffeur and agents. The numerous cases upon the subject have been productive of much astute and interesting discussion in the courts, and eminent judges have differed widely in the application of the principles as applied to different cases. These cases are far from being in harmony on the subject, and it is not an easy task to reconcile them, and it would be a matter of supererogation to attempt to do so.

[2] At the outset it may be stated that a master is only liable for the acts of a servant when such servant is acting within the scope of his employment. If he is so acting, even against his master's express command, the master is nevertheless answerable for his acts, but if he is engaged on a mission of his own, without being at all on his master's business, the master cannot be held liable. In other words, it is a well-established rule that, if an act causing injury is done without the authority of the master, and not for the purpose of executing his orders or doing his work, then he is not responsible; but, if it is done in the execution of the authority given by the master and for the purpose of performing what he was directed, then he is responsible, whether the act be willful or negligent. *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490. These rules are simple and well understood; the only difficulty being in their application to the facts of a particular case.

The test to determine whether a master is liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of. If he was, the fact that he was not doing it in the way directed is immaterial. But if at the time he did the act which caused the injury he was not acting

within the scope of his employment, the master is not liable. *Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670. There are two principal questions for determination in all cases involving the doctrine of respondeat superior: (1) The existence of the contractual relation, and (2) whether the act or omission was one performed or occurring within the scope of that relation. As above stated, in determining whether a particular act is done in the course of employment the first inquiry that is presented is whether or not the servant was at the time engaged in serving the master. If the act is done while the servant is at liberty from service and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master.

The doctrine as stated in *Morier v. St. Paul, etc., R. R.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793, is frequently quoted in the cases upon the subject. It is there held that, in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act is done while the servant is at liberty from the service and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time the injury was inflicted, acting for himself and as his own master pro tempore, the master is not liable. If the servant step aside from his master's business for however short a time to do an act not connected with such business, the relation of master and servant is for the time suspended.

To the same effect is *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598, where the doctrine is briefly set forth to be that a master is not liable for injuries occasioned to a third party by the negligence of the servant, while the latter is engaged in some act beyond the scope of his employment, although he may be using the instrumentalities furnished by the master with which to perform his duties. The expression "in the course of his employment" means, in contemplation of law, "while engaged in the service of his master" and nothing more. Beyond the scope of his employment, therefore, a servant is as much a stranger to his master as any third person. *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057.

Whether the subject be viewed from the question of agency or of master and servant there can be no difference in principle, as here suggested, for while there is a distinction between an agent and a servant, this distinction in no sense impairs the application of the doctrine of respondeat superior

to both classes of individuals. *Evans v. Dyke Auto Co.*, 121 Mo. App. 266, 101 S. W. 1132.

[3] Applying these principles to the evidence in the case, the act here complained of must be held to have been done while the driver was at liberty from his service and pursuing his own ends exclusively, and defendant cannot therefore be held responsible, even though he afforded the means without which the accident might not have occurred. *Glassman v. Harry*, 182 Mo. App. 304, 170 S. W. 403; *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161; *Robinson v. McNeill*, 18 Wash. 163, 51 Pac. 355; *Christensen v. Christiansen* (Tex. Civ. App.) 155 S. W. 995; *Tyler v. Stephans*, Adm'r, 163 Ky. 770, 174 S. W. 790; *Evans v. Dyke Auto Co.*, supra; *Gousse v. Lowe*, 41 Cal. App. 715, 183 Pac. 295; *Steffen v. McNaughton*, 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N. S.) 382, 19 Ann. Cas. 1227; *Davis on Motor Vehicles*, § 216; 2 Cyc. 1537; *Mauchle v. Panama-Pacific I. E.*, 37 Cal. App. 715, 174 Pac. 400.

In conclusion, it might be said that if there was any evidence in the record which showed in any manner that the driver had authority to operate the machine after his working hours for the benefit of defendant, or any circumstance from which such authority might be inferred, the case would present a different aspect, but there is none. Nor is there any evidence upon which a claim could be made that plaintiff was relying upon the fact that the defendant owned the taxi, for there is nothing in the record to indicate that she had any knowledge upon this subject, nor is there any evidence from which knowledge of the actual ownership of the vehicle could be inferred. In other words, there is no evidence upon which any question of estoppel might be raised other than the mere employment discussed.

For the reasons given the judgment is affirmed.

We concur: RICHARDS, J.; ST. SURE, J.

(62 Cal. App. 638)

STEPHANY v. HUNT BROS. CO. (Civ. 4511.)

(District Court of Appeal, First District,
Division 1, California. June 23, 1923.)

1. Appeal and error ⇨842(11)—Finding of court held one of fact and conclusive.

In an action for the breach of a contract under which plaintiff had been employed by defendant to sell canned fruits in European countries on commission, where plaintiff was shown to have made a trip to various European countries and while there promoted business for defendant and another company for whom he was also selling, a finding of the court that, in view of the dual purpose of his trip, he

was entitled to recover upon defendant's breach only one-half of the expenses incurred held one of fact and conclusive.

2. Principal and agent ⇨41—Value of services held insufficiently established to warrant recovery of damages for loss thereof.

In an action to recover for the breach by defendant of a contract under which plaintiff was to sell canned fruits in various European countries for defendant, evidence of the value of plaintiff's services during the time he lost while making a trip to Europe in the promotion of defendant's business held insufficient to warrant a recovery of damages therefor.

3. Damages ⇨40(1)—Reasonable certainty of realization and reasonable certain basis of ascertainment necessary to warrant damages for loss of prospective profits.

In order to sustain a recovery of prospective profits, there must be a reasonably certain basis for their ascertainment, and it must be shown that they were reasonably certain to have been realized but for the wrongful act complained of, though they were not rendered irrecoverable merely because they cannot be directly and absolutely proved with mathematical certainty.

4. Principal and agent ⇨41—Evidence held insufficient to warrant damages for loss of prospective profits.

Proof of prospective profits which would have accrued to an agent selling canned fruit in European countries under a contract for a commission held insufficiently definite to warrant an award of damages for loss of such profits after a breach of contract by defendant.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Hilmar Stephany against the Hunt Bros. Company. From judgment for plaintiff in insufficient amount, and from the denial of his motion for a new trial, he appeals. Judgment affirmed.

Jay Monroe Latimer, of San Francisco (J. E. Pemberton, of San Francisco, of counsel), for appellant.

Chickering & Gregory, of San Francisco, for respondent.

TYLER, P. J. This action was brought to recover damages for the breach of a contract. Recovery was had by plaintiff in the sum of \$1,675.15, but, deeming this sum to be inadequate, he moved for a new trial. The motion was automatically denied, and this is an appeal by him from the judgment and order.

The record shows that the contract sued upon was entered into by the parties on September 15, 1915. By its terms plaintiff was constituted the exclusive sales agent for defendant's products, consisting of numerous varieties of canned fruits, in the countries of Sweden, Norway, Denmark, Germany, Aus-

tria-Hungary, and Switzerland. The contract was to exist for a period of five years from its date. Plaintiff's sole compensation for his services was to be computed upon a commission basis; it being agreed that he was to receive 6 per cent. on the amount of consummated sales, out of which he was to pay his expenses and any subagents he might employ. To properly carry out his part of the contract plaintiff concluded to visit the countries mentioned therein. Accordingly, at his own expense he made a trip to Europe, which consumed some five months or more, upon which occasion he appointed subagents to solicit business, and did in fact procure certain orders. The bulk of these orders, however, went only as far as New York owing to the refusal of the War Trade Bureau in Washington to issue permits for shipment abroad, and they are not here involved. Confronted with this situation, plaintiff returned to this state, it being impossible for him to do business of any kind in either neutral or belligerent countries. Shortly prior to the time that the contract in question was entered into, plaintiff had procured a similar agreement with the Haiku Fruit & Packing Company to handle its goods in the same territory and for the same period covered by his contract with defendant. The product of the Haiku Fruit Company consisted of canned pineapple, a commodity defendant company did not handle. In the latter part of the year 1918 and upon the signing of the armistice, the embargo with European countries was lifted, and plaintiff thereupon offered to complete performance of his contract with defendant company. He was notified that it had abrogated the same, and that, so far as it was concerned, the matter was at an end. Plaintiff thereupon brought this action for damages sustained by him in consequence of the breach of the contract on the part of defendant.

By the prayer of the complaint, plaintiff seeks to recover the expenses incurred by him in the sum of \$3,342.25; he also asks for \$10,000 as compensation for loss of time, labor, and skill employed by him in making his trip to Europe, and for the further sum of \$100,000 by reason of the wrongful abrogation of the contract.

The trial court found in effect that, while plaintiff had observed and performed all the provisions of the contract required of him to be performed, and had in so doing expended time and money upon the faith that defendant would carry out its obligations, the company failed to do so, but on the contrary breached its agreement. It further found that the trip to Europe taken by plaintiff was a necessary act to properly carry out the agreement, and that the expense incident thereto amounted to the sum of \$1,676.16. Upon the items of claimed damages for loss of time and prospective profits, however, it

was found that the evidence was insufficient to form any basis for compensation upon the subjects, as it failed to establish any method by which such damage might be ascertained with any reasonable probability or certainty, and relief was accordingly denied upon these items.

Plaintiff appeals from the judgment and from the denial of his motion for a new trial, claiming that under the evidence he has been inadequately compensated for his loss growing out of the breach of the contract by defendant.

Under the terms of the contract, as above pointed out, plaintiff was not entitled to compensation for expenditures incurred by him in the performance of his obligations as payment for his services was provided for upon a strictly commission basis, and the amount thereof was to cover any and all outlay on his part. It is conceded, however, that in the event of a breach of contract, where loss of profits cannot be estimated with sufficient certainty, recovery may be allowed for actual expenditures of money and for loss of time in connection with the contract.

[1] Plaintiff contended at the trial that he actually expended in connection therewith the sum of \$3,342.25. It appears from the record that this sum was a mere approximation on his part of his expenditures. He insists, however, that he should have been allowed the full amount so approximated by him. It developed on his cross-examination that he had a similar contract with the Haiku Company for the sale of that company's product, and that upon the occasion of his European trip he divided his efforts in his endeavor to sell the products of both companies. In rendering judgment upon this element of damage the judge of the court below no doubt concluded that defendant company could only be charged one-half of the approximated expenditures, for the sum allowed is practically one-half of that amount, it being some \$5 in excess thereof. Respondent makes no objection to the excess, and appellant is in no position to do so, as he is not injured thereby. The finding of the court upon this subject being one of fact, and there being evidence to support it, is determinative and conclusive here.

[2] Upon the element of damages concerning the value of plaintiff's services for his loss of time, there is no evidence in the record upon which a judgment for damages could be predicated. Defendant himself, when asked to put a value on them, stated that on account of their peculiar nature he was unable to do so. It appears in evidence that he had for a number of years represented other companies dealing in similar products, and that he maintained a store in Berlin, where he kept such goods on hand, and that he was known as a dealer in California products. While this experience may have added to his

value as a sales agent, it in no manner afforded the court an opportunity of determining with reasonable or any degree of certainty the damages suffered by plaintiff in this connection. Without some evidence upon the subject a determination thereon would have been purely conjectural and speculative. If defendant himself could not place a value upon his services, the trial court was in no position to do so, in the absence of any other evidence showing their value, and there was none. We are of the opinion, therefore, that as to this element of damage the ruling of the trial court was also correct.

[3,4] The remaining element of damages, referring to the loss of prospective profits by reason of the breach, presents appellant's main contention.

Upon this subject plaintiff offered in evidence proof of the fact that he had procured between September, 1915, and February, 1916, orders for 2,491 cases of defendant's goods in Norway and Sweden alone, but delivery was not had on account of war conditions. He also produced a witness who was an importer and exporter of products similar to those dealt in by defendant company, who testified that in the Scandinavian countries the opportunity for the sale of such goods was practically unlimited. He further testified that he had made sales therein during a period of time covered by plaintiff's contract to the amount of between \$75,000 and \$100,000, and that the average value per case was \$8, which would mean on a \$75,000 basis over 9,000 cases. He also testified that he could have sold from 100,000 to 200,000 more cases if his firm could have procured the goods. Statistics of the United States relating to exports of canned products to the countries covered by the contract were introduced for the purpose of showing the volume of business which existed between the United States and the countries covered by the contract, and how the demand for the same had increased since plaintiff had procured the orders in 1915. By a system of multiplication based thereon plaintiff endeavored to show the probable volume of business he would have secured but for defendant's breach.

With this evidence as a basis we are asked if plaintiff's witness could have sold from 100,000 to 200,000 cases if he had the goods, what amount could plaintiff, with his long experience and wide acquaintance in the trade, have sold? We are constrained to answer that we do not know. The conservatism pervading the law is against allowing damages purely speculative, fanciful, or imaginary. In order to entitle one to recover prospective profits he must show that the profits claimed were reasonably certain to have been realized but for the wrongful act complained of. It is not an insuperable objection to their recovery that they cannot be directly and absolutely proved with mathematical cer-

tainly. In the nature of things, where performance has been prevented, the proof of profits cannot be absolute, and one who breaches his contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages. *Shoemaker v. Acker*, 116 Cal. 244, 48 Pac. 62; *Cederberg v. Robinson*, 100 Cal. 93, 34 Pac. 625. That plaintiff ought to recover there is no question, as the evidence fully supports the finding that defendant deliberately breached its contract. In order to do so, however, it was incumbent on him to prove his case.

In *Parke v. Frank*, 75 Cal. 364, 17 Pac. 427, the court, in dealing with this subject, said:

"It seems not infrequently to be lost sight of in the trial courts, that, in actions upon contracts, the amount of damages caused by an alleged breach is to be proved as a fact."

It is there pointed out that actions based upon contract differ from those of tort, where the amount of recovery is left upon general principles to the "sound discretion" or "dispassionate judgment" of the jury.

There can be no recovery of prospective profits unless there is a reasonably certain basis for their ascertainment. Here the trial court found there was none, and we think rightfully so, for the evidence presented affords no means by which the court could by any degree of reasonable probability determine what amount would be a fair approximation of the amount of profit plaintiff might have earned but for the breach.

Counsel for appellant have cited us to several cases in this and other jurisdictions in support of his contention that the evidence offered presents a basis for the computation of his claimed damages. We do not deem a discussion of those cases necessary, as in all of them there was some definite basis upon which damages could be predicated. The last expression of opinion on the subject in this state is found in *Friedman v. McKay Leather Co.*, 179 Cal. 566, 178 Pac. 139, where it is held that speculative damages are not recoverable, and that, where the compensation of the agent is a commission, based on sales made by him, damages on the basis of suppositive sales are not recoverable. The evidence affording no definite basis upon which a judgment could be predicated that would not be conjectural and speculative, the trial court properly denied the relief sought under the items of damages based upon services and prospective profits. 2 Corpus Juris, p. 791, § 455; 1 Sedgwick on Damages (9th Ed.) § 172.

For the reasons given, the judgment is affirmed.

We concur: RICHARDS, J.; ST. SURE, J.

62 Cal. App. 583

PRICE et ux. v. CENTRAL SAV. BANK OF OAKLAND. (Civ. 4545.)

(District Court of Appeal, First District, Division 2, California. June 18, 1923.)

Quieting title — 7(4)—Judgment debtor discharged in bankruptcy, entitled to removal of cloud preventing sale of homestead.

Where a judgment debtor filed a declaration of homestead, went through bankruptcy, and later, in the action in which the judgment was rendered, secured a perpetual stay of execution, he may nevertheless remove the judgment cloud on his title without paying the judgment where the pleadings admit that the creditor's threats to enforce his judgment have rendered sale or mortgage of the homestead impossible, since the judgment became a mere moral obligation and plaintiff's rights being statutory are insufficiently protected by the stay of execution.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Suit by W. C. Price and wife against the Central Savings Bank of Oakland. Judgment on the pleadings for plaintiffs, and defendant appeals. Affirmed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

P. L. Benjamin, of San Francisco, for respondents.

STURTEVANT, J. The plaintiffs commenced an action against the defendant to remove a cloud on the title to their real estate. The defendant answered; thereafter the plaintiffs gave notice of a motion for judgment on the pleadings; thereupon the defendant gave notice of a motion for judgment on the pleadings; and both motions came on for hearing at the same time. The trial court granted the motion of the plaintiffs, and from the judgment so entered the defendant has appealed.

On July 20, 1917, the appellant commenced an action against W. C. Price and took out a writ of attachment and levied the same on the real estate standing of record in the name of W. C. Price. On May, 20, 1918, W. C. Price duly executed and recorded a declaration of homestead on said real estate. Judgment in that action was entered on July 9, 1918, for the sum of \$37,875.03 plus \$35.85 costs, and the judgment has never been paid, nor has W. C. Price, or Helen V. Price, ever offered to pay the judgment or any part or portion thereof. On July 3, 1918, W. C. Price was adjudicated a bankrupt, and on September 14, 1918, he was discharged in bankruptcy. On October 19, 1921, W. C. Price appeared in the first action and on motion obtained an order perpetually staying the issuing of any execution upon the said judgment. On August 8, 1921, the plaintiffs filed

this action and after reciting many of the foregoing facts they also alleged:

"That the defendant asserts and claims that the said judgment so as aforesaid rendered and entered in its favor against the said W. C. Price is still in full force and effect, notwithstanding the said discharge in bankruptcy, and that the said judgment is a valid and existing lien upon and against the said homestead premises, notwithstanding their homestead character as aforesaid, and that it is entitled to have a writ of execution issued on said judgment and to have the said homestead premises sold under the said writ of execution."

And they further allege that—

"The said docketing of the judgment and the said assertions and claim by defendant of a lien upon said homestead premises as aforesaid have created and caused doubts as to the validity of the said homestead right of plaintiffs in and to the said homestead premises, and as to the exemption of said homestead premises from sale under any writ of execution that may be issued upon the said judgment, and have thereby clouded and rendered doubtful and questionable the validity of said homestead and the rights of plaintiffs. * * *

Thereupon they prayed that it be decreed that this defendant "has no claim or lien or right of any kind in, to, upon, or against the said homestead premises, * * *" and that it be enjoined from asserting the contrary.

In its answer the defendant admitted all of the allegations of the complaint, and alleged in appropriate form the nonpayment of the judgment and no tender of payment or offer to do equity in any way whatever. It will be noted that the defendant's judgment against the plaintiffs was apparently a just judgment; that the plaintiffs have not paid it nor offered to pay it; but, on the other hand, they have taken advantage of the bankruptcy laws and the homestead statutes for the purpose of avoiding the payment of said judgment. In taking that course the laws of the land fully authorize their acts. In so far as the record discloses, every single statutory provision in favor of the plaintiffs has been fully and completely respected and upheld by the courts. Regarding the acts of the plaintiffs, the defendant perchance may claim that such acts were immoral, but as was said in *Ontario State Bank v. Gerry*, 91 Cal. 94, 98, 27 Pac. 531, 532:

"There is no question here about the morality of the transaction. It is simply a matter of statutory provision."

Challenging the judgment rendered by the trial court, the appellant contends that the judgment should not have been in favor of the plaintiffs (1) because even though the judgment was discharged in bankruptcy and the attachment lien was dissolved by the

lapse of time, the moral obligation to pay the debt remained and respondents should have been required to do equity and discharge the same as a condition precedent to the grant of equitable relief, and (2) because the respondents had already applied for, and actually obtained, in the principal action a decree perpetually staying execution so that they had already obtained adequate relief at law and the court of equity had no jurisdiction to make its decree. As to the first reason assigned, it is sufficient to state that the discharge in bankruptcy operated to relieve the plaintiff W. C. Price from the legal obligation to pay the judgment, and as to the second contention it may be said that the relief granted by the motion in the trial court was not in all respects the relief sought in the instant case. As to both contentions it cannot be stated as a broad proposition that equity will not grant relief to a homesteader under the facts involved in this case. This proposition will be made more apparent as we proceed.

The appellant also contends that the respondents did not require equitable relief (1) because the decree perpetually staying execution fully protected the homestead interest and afforded adequate relief at law; and (2) because respondents did not require a decree to facilitate the sale of the premises for a sale would terminate the homestead and thereby render protection unnecessary; and (3) because, if the homestead is voluntarily sold, the statute fully protects the proceeds of sale, thus rendering a decree of a court of equity wholly unnecessary. Each of the last propositions is nearly correct, but is slightly inaccurate. It will be observed that the answer admitted all the allegations of the plaintiffs' complaint, and that in their complaint the plaintiffs had alleged "That the defendant asserts and claims that the said judgment so as aforesaid rendered and entered in its favor against the said W. C. Price is still in full force and effect, * * *" and that the acts and claims of the defendant "have created and caused doubts as to the validity of the said homestead right of plaintiffs in and to the said homestead premises * * * and have rendered it impossible for plaintiffs to sell or mortgage the said homestead premises, and will continue to cloud the title of plaintiffs to said homestead premises and the homestead right of plaintiffs. * * *" Comparing one with the other, it must be conceded that the order staying execution was not addressed to the matters contained in the quotations which we have just made from the pleadings. To say that the respondents did not require a

decree to facilitate a sale is to ignore a fact admitted by the pleadings. Conceding that if a sale is made the statute protects the proceeds leads us nowhere. There can be no proceeds of a sale if, as alleged in the complaint, no sale can be had so long as the record title stands as it stood before the decree in the instant case.

The contention of the appellant that the respondents are not entitled to a decree until they do equity is a fundamental rule. But we do not believe that the rule is to be applied in a case brought by a homesteader in which it is an admitted fact that, although he has complied with every statute, nevertheless one of his former creditors is making such contentions that the homestead can neither be sold nor mortgaged. The right to mortgage and the right to sell a homestead are two valuable property rights which the homesteader is entitled to have fully protected by the decrees of the courts. Without first paying the moral obligation, or offering to do so, the homesteader or his grantee has applied to the courts and has been given relief at law, or in equity, when necessary, fully protecting the homestead and the incidental rights flowing therefrom. Thus in the case of Lubbock v. McMann, 82 Cal. 226, 234, 22 Pac. 1145, 10 Am. St. Rep. 108, the Supreme Court affirmed the judgment of the trial court issuing an injunction against the sheriff restraining him from selling the homestead property. To the same effect was *Roth v. Insley*, 86 Cal. 134, 24 Pac. 853. In the case of *Security Loan, etc., Co. v. Kauffman*, 108 Cal. 214, 41 Pac. 467, the court affirmed a judgment in favor of the homesteader's wife, refusing to foreclose a mortgage on the homestead which she had not executed on her part. *Lange v. Geiser*, 138 Cal. 682, 72 Pac. 343, is closely parallel to the instant case; but it will be conceded that the answer of this appellant slightly distinguishes the case at bar from the *Lange* Case. In the case of *Magneson v. Pacific Mfg. Co.*, 26 Cal. App. 52, 146 Pac. 69, the court affirmed the judgment of the trial court rendered in favor of the wife of the homesteader in an action brought by her to quiet title. The latter case cites other cases from California where equity interfered to protect fully and completely the homestead right. So, in this case, we think that in view of the allegations of the pleadings, the trial court did not err in entertaining the application of the respondents for the relief which they sought.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(62 Cal. App. 619)

McKESSON v. HEPP. (Civ. 4428.)

(District Court of Appeal, First District, Division 1, California. June 21, 1923.)

1. Judgment ☞253(1)—Not erroneous because in excess of amount prayed for.

Under Code Civ. Proc. § 580, which, in absence of answer, precludes the granting of relief in excess of the amount demanded, but provides that in any other case the court may grant any relief consistent with the case made by the complaint and embraced within the issue, a judgment in other than a default case in excess of the amount demanded is not because of that fact erroneous.

2. Appeal and error ☞1122(2), 1140(1)—Appellate court held without authority to make findings, and excessive judgment accordingly reversed.

On appeal, where findings below have been waived, the appellate court is without authority to make findings, and a judgment which is clearly excessive must accordingly be reversed, unless the excess is remitted.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by R. F. McKesson against Israel Hepp. Judgment for plaintiff, and defendant appeals. Modified and affirmed on condition.

O. D. Richardson, of San Jose, for appellant.

J. M. Thomas, of San Francisco, for respondent.

TYLER, P. J. This action was brought to recover the sum of \$467.46 for goods sold and delivered, with interest thereon from October 21, 1921. The complaint was filed November 25, 1921. The answer denied the indebtedness and set up a counterclaim in the sum of \$164.09. The case went to trial, and plaintiff recovered judgment on June 23, 1922, for the sum of \$474.66, with interest from the 16th day of July, 1921, amounting to the sum of \$7.20.

Upon both principal and interest, it will be noticed, the judgment is in excess of the amount prayed for.

Findings were waived.

The evidence upon the trial—which is before us—shows without conflict that defendant was entitled to a credit in the sum of \$44.09 under one of the items of his counterclaim. Defendant sought to have the matter corrected upon motion for a new trial. His motion was denied. He is here asking for a modification of the judgment. There is no contention with reference to this state of the record. At the hearing of the motion for a new trial plaintiff contended, and does

here, that inasmuch as findings were waived the defendant is in no position to take advantage of the situation and is without remedy.

[1] The judgment, in so far as it awards plaintiff an amount in excess of that which he prayed for, is not for that reason objectionable. Section 580 of the Code of Civil Procedure provides:

"The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint, but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

The relief provided for by this section is confined in case of default to that demanded in the complaint, as was the rule under a prayer for special relief in equity; while in other cases it is extended to granting relief similar to that granted under a prayer for general relief in chancery courts. *Johnson v. Polhemus*, 99 Cal. 240, 33 Pac. 908. The section is but a concise statement of the rule observed upon the subject of relief in courts of equity. *Mock v. Santa Rosa*, 126 Cal. 330, 58 Pac. 826. A court may, therefore, under the section grant additional relief under the original complaint, without an amendment thereof for that purpose alone, when the relief is not inconsistent with the pleadings and the issues tried. *Kent v. Williams*, 146 Cal. 3, 79 Pac. 527; *Securities Loan Co. v. Boston, etc., Fruit Co.*, 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; *Murphy v. Stelling*, 8 Cal. App. 702, 97 Pac. 672. Here there is evidence to show that plaintiff was entitled to the additional amounts allowed him. This being so, there is no merit in appellant's contention that the relief granted should have been confined to the amount stated in the prayer of the complaint.

[2] The evidence, however, shows, and without conflict, that defendant was entitled under one of his items of counterclaim to a credit of \$44.09 for freight paid by him. The judgment, therefore, to this extent, with the interest allowed thereon, is excessive. We are without authority to make findings upon the subject, and the judgment must accordingly be reversed unless the excess is remitted.

If respondent shall within 30 days file in this court a stipulation to the effect that the judgment may be modified by reducing the amount \$49.10, with the interest allowed thereon, the judgment thus modified is affirmed; otherwise it is reversed. The appellant shall recover costs on this appeal in either event.

We concur: **RICHARDS, J.; ST. SURE, J.**

62 Cal. App. 622

TOLOSANO v. WILL. (Civ. 4342.)

(District Court of Appeal, First District, Division 2, California. June 21, 1923. Hearing Denied by Supreme Court Aug. 20, 1923.)

1. Appeal and error ⇨1011(1)—Finding on conflicting evidence not reviewable.

Appellate court is without power to review questions of fact determined by the trial court on conflicting evidence.

2. Brokers ⇨86(1)—License of real estate broker by state department held sufficiently established.

In a broker's action for commission, a duplicate license issued in lieu of the lost original held sufficient to show plaintiff was duly licensed; it being unnecessary to establish such fact by evidence of the original license.

3. Brokers ⇨3 — Realty broker's principal place of business named in license need not be his only place to avoid cancellation under statute.

Though a realty broker's license recited that a certain place was the licensee's "principal place of business," and also declared that the license was "void except at this place of business," held, that the licensee was not required to maintain the office at the place named in the license as his exclusive place of business in order to avoid the automatic cancellation of his license pursuant to St. 1919, p. 1252, § 11, as amended by St. 1921, p. 1294.

4. Brokers ⇨84(1)—Introduction of duplicate license by realty broker prima facie proof he has been duly licensed.

A real estate broker suing to recover a commission, who produces a duplicate license certified from the state, prima facie establishes his status as a duly licensed broker; the burden being on defendant, if he desires, to show a cancellation of that license.

5. Brokers ⇨40 — Realty broker's contract held sufficiently definite as to property involved to sustain recovery of commission.

In an action by a realty broker to recover a commission where the contract between the parties sued upon was written on a "listing card" which described the property as 40 acres "located twelve miles west of F., also thirty-six acres of said land are planted to Thompson grapes, four years old and four acres of alfalfa," and which also contained a description of the improvements, farming tools, and implements thereon, held sufficiently definite as to the property involved to sustain a judgment for plaintiff, particularly in view of testimony by defendant that he owned 40 acres in that locality and did not own any other 40 acres.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by M. A. Tolosano against A. M. Will. Judgment for plaintiff, and defendant appeals. Affirmed.

A. M. Drew, of Fresno, for appellant.
Savage, Lopez & Lovejoy, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for \$2,000. The plaintiff is a real estate broker and brought the action to recover 5 per cent. commission under a contract between himself and defendant for the sale of certain real property near Fresno owned by defendant. Plaintiff alleged the making of the contract in writing and the production of a purchaser by him ready, able, and willing to purchase under the terms of the said contract, and the refusal of the defendant to consummate the transaction.

[1] There is some conflict in the testimony as to the signing of the contract between the parties, also a suggestion of change in its terms, etc., but the trial court, after hearing all the testimony, concluded in its findings that the contract was signed by the defendant; that plaintiff did not change or cause any alterations to be made in the same; that plaintiff produced a purchaser ready, willing, and able to purchase the property upon the terms and conditions agreed upon between plaintiff and defendant; that plaintiff duly performed all the terms and conditions of the contract between himself and defendant upon his part to be performed, but that the defendant refused to complete the sale of said property. We shall not go back of these findings and discuss the conflicting evidence found in the record upon these questions of fact, as we are without power to review questions of fact settled by the trial court upon conflicting evidence.

[2] The only substantial attack made by the appellant upon the findings is with reference to the finding that at all times mentioned the plaintiff was duly licensed by the real estate department of the state of California as a real estate broker under the provisions of the laws of the state of California licensing real estate brokers. Upon this matter the evidence is without conflict. It is alleged and found that the contract between the parties was entered into on April 9, 1921, and that the purchaser was produced on May 4, 1921. The plaintiff offered in evidence a license from the state of California to engage in the real estate business as an individual broker, which reads as follows:

"M. A. Tolosano, whose principal place of business is at No. 319-20 Griffith-McKenzie Bldg., in the city of Fresno, county of Fresno, state of California, having paid to the Real Estate Commissioner of the State of California the sum of seven and 50/100 dollars and having complied with all conditions as required by law, license is hereby granted him to act in the capacity of real estate broker, as provided by law, for the period from April 1, 1921 to January 1, 1922.

"Void except at this place of business.

"Witness my hand and official seal this twenty-third day of May, 1921 [Seal of Real Estate Commissioner.]

"Edwin T. Keiser, Real Estate Commissioner of the State of California.

"Reason issued: Duplicate lost in transit.

"No charge for this license."

Indorsed across said license: "1921, Duplicate License."

Appellant contends that this duplicate license, issued in May, 1921, attempted to relate back to April 1, 1921, and that the real estate commissioner has no power to make a license retroactive. We think that question is not presented by the record. The license, on its face, shows that it was issued as a duplicate because the original had been lost in transit. It was not necessary for the plaintiff to prove that he was a duly licensed real estate broker by the evidence of the original license itself. If the license had been lost or destroyed, its efficiency would not have been impaired thereby and proof could have been made by the certificate of the real estate commissioner that the same had been duly issued. This duplicate license in evidence is, for all purposes, such a certificate.

[3] It is contended that the plaintiff was not doing business at the place specified in the license and, therefore, under the act relating to real estate brokers (Stats. 1919, p. 1252, as amended by Stats. 1921, p. 1294), section 11 thereof, the license was automatically canceled. No question of law in relation to this matter is presented by the record, because the facts in evidence do not bear out appellant's contention. The duplicate license recites that plaintiff's principal place of business is 319 Griffith-McKenzie Building. Plaintiff testified that on April 9th, the time of the execution of the contract, he had his own license; that at the time he and Mr. Stevenson were working as a partnership, he had a partnership license, but that he had sent it back because it "wasn't good form" and got his license. He continued:

"I sent the license in the first part of April, before I leave 1025 J street; was to move to 1909 Fresno. I send my license in, I send my old license back, and send them a check to send me the new license."

This testimony does not indicate that the Griffith-McKenzie Building was not the principal place of business of the plaintiff. The statement that he "was to move to 1909 Fresno" is not a statement that he actually did move here, but even though we were to concede that the statement is susceptible of such a construction, nevertheless plaintiff is not required to maintain an office in the Griffith-McKenzie Building as his exclusive place of business.

[4] We think that when the plaintiff produced the duplicate license certificate from the state of California, he made prima facie proof of his status as a duly licensed broker,

and if defendant wished to show any facts which effected a cancellation of the same, it was his duty to take up that burden.

[5] The only other point requiring discussion is the contention of appellant that the property involved here is not sufficiently described in the contract between the parties to make the same a valid and enforceable obligation. The contract between the parties was written upon what is known as a "listing card." It was offered in evidence. Upon that card, among other matters, the property is described as 40 acres, located 12 miles west of Fresno; also that 36 acres of said land are planted to Thompson grapes, four years old, and 4 acres of alfalfa; that there is situated upon the property a house of three rooms, a barn, a tankhouse, a windmill, and an electric plant. The number of sweat boxes, picking boxes, horses, farming tools, and implements upon the premises were also stated.

Plaintiff testified that he asked for a description of the land by metes and bounds, but that defendant was unable to furnish the same, but told plaintiff to go to the assessor's office and get the description. Plaintiff secured the description from the assessor's office and filed it with the card as a part of the contract. At the trial defendant objected to this particular description being admitted in evidence as a part of the contract and is contending on appeal that it should have been excluded and that without it the description in the contract is insufficient to make it enforceable.

It would seem that when defendant told plaintiff to secure this description from the assessor's office for the contract, he made him his agent to do so and to make it a part of the contract between the parties. However that may be, it is unnecessary to so hold for a decision of the legal problem involved, for we think the contract was sufficient without the description obtained from the office of the assessor. The defendant testified that he did not own any other 40 acres adjoining this property and that the property described in the complaint was the only property he owned in the locality. He also testified that he resided 12 miles west of Fresno on Belmont avenue on the property described in the complaint, and that he was the owner of said property, which was the same property set out in the listing contract.

The case of *California Packing Corp. v. Grove*, 51 Cal. App. 253, 196 Pac. 891, is peculiarly apt in this connection. In that case the description of the real property in the contract was "The following orchards and lands leased or owned by the seller in the county of —, state of California, to wit: Located $\frac{3}{4}$ miles southeast of Visalia." The contract then stated the number of acres planted and the varieties of fruit upon the

same. The appellate court said, quoting from *Mulford v. LeFranc*, 26 Cal. 108:

"But if the meaning of the language of the instrument can be considered doubtful, 'another rule of construction is, that when the words of a grant are ambiguous, the court will call in the aid of the acts done under it as a clue to the intention of the parties.'"

In said case of *California Packing Corp. v. Grove*, supra, the following pertinent language appears:

"Independently of any construction based upon the acts of the parties, the language used in the description is sufficiently definite. In considering this point the court is required to keep in mind two leading principles. First, in a conveyance of real property, the law exacts only such description as, when aided by evidence applying the description to the property, will serve to identify it; and, secondly, it requires no such completeness of description in executory contracts. Upon the second point we cite *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386, where the court says: 'But the rule as to particularity of description required in executory contracts to convey is extremely liberal in favor of their sufficiency. The rule is, that where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract, and the complaint must contain the averments of such extrinsic matter as may be necessary to render the description complete. * * * But parol evidence cannot be heard to furnish a description. The only purpose for which such evidence can be heard is to apply the description given to the subject-matter. Thus if the description were *my farm* in Los Angeles county, an allegation in the complaint that I owned but one farm in said county and where it was situated, would apply the description to the proper subject-matter and render it certain. But if the description were *a farm* in Los Angeles county, it could not be rendered certain by the allegation of such extrinsic matter.' Again, in another case, the court says: 'This, it is to be remembered, is a contract for the sale of land and not a deed of grant of the land, and much greater liberality is allowed in construing the descriptions contained in such contracts. The certainty required in deeds is not essential where even by parol evidence the property, in contemplation of the parties, to be conveyed can be definitely ascertained. * * * And even in the case of deeds, the ancient strictness of the rule is not adhered to.' *Lange v. Waters*, 156 Cal. 142, 103 Pac. 889, 19 Ann. Cas. 1207.

"But in this case now under review, the description of the land and its identity are only incidental to the main purposes of the contract. The contract does not involve the title or right of possession of the land. And it seems that in such case, even a less stringent rule applies than in the case of executory contracts to convey land. As said by this court, quoting from an earlier case: 'Much greater liberality is allowed in construing and curing defective descriptions in broker's contracts than in a

deed of grant of land, for, so far as the statute of frauds is concerned, the terms of the employment are the essential part, and such contracts will not be declared void merely because of a defect, uncertainty, or ambiguity in the description of the property to be sold or exchanged when such defect can be cured by the allegation or proof of extrinsic facts or circumstances.' *Goodrich v. Turney*, 30 Cal. App. Dec. 683, 186 Pac. 806."

The cases of *Carr v. Howell*, 154 Cal. 372, 377, 97 Pac. 885, and *Kent v. Williams*, 146 Cal. 3, 10, 79 Pac. 527, are also in point upon the subject under discussion.

There are no other matters requiring discussion, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

62 Cal. App. 729

CALIFORNIA PACKING CORPORATION v. KANDARIAN. (Civ. 4279.)

(District Court of Appeal, First District, Division 1, California. July 2, 1923.)

1. Names — Husband signing sale contract of own property with wife's initial held bound.

Where defendant A. K. executed a contract to sell raisins, signing M. K., the M. being the initial of his wife's first name, and in an action by the buyer to reform the contract and recover damages for defendant's breach it was shown without dispute that the land and the raisins belonged to defendant, the question of his agency for his wife became immaterial; defendant being liable on his contract, irrespective of the manner in which it was signed.

2. Names — Person may transact business, execute contracts, sue and be sued by another name than his own, without abandoning latter.

One may adopt and transact business, execute contracts, issue negotiable paper, and sue and be sued by any name, style, or signature wholly different from his own name, without thereby abandoning the latter, and, having so signed a lawful agreement, is bound thereby.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by the California Packing Corporation against M. Kandarian, sometimes known as A. Kandarian. Judgment for plaintiff, and defendant appeals. Affirmed.

A. M. Drew, of Fresno, for appellant.
Lindsay & Conley, of Fresno (F. W. Docker, of Fresno, of counsel), for respondent.

ST. SURE, J. This is an action to reform a contract and to recover damages for breach

thereof as reformed. The plaintiff obtained judgment against the defendant, reforming the contract, and giving it judgment against defendant for damages in the sum of \$1,000 and costs of suit. Defendant appeals from the judgment.

The contract is one for the sale to plaintiff by defendant of 25 tons of Muscat raisins at 9 cents per pound, said raisins grown by defendant on land owned by him during the year 1919, and to be delivered before December 1, 1919. The contract omitted to describe the land from which the raisins were to come, and it is in this particular that plaintiff sought reformation, alleging that the description was omitted through mutual mistake.

The contract was made upon a printed form known among packers as a "dried fruit contract." It was dated and filled out by W. D. Weaver, a buyer for plaintiff, and signed by him on behalf of plaintiff. Defendant admitted that he knew Weaver and had theretofore had business transactions with him relating to the sale of raisins. He also admitted that he had met and conversed with Weaver about the time it is alleged the contract was made, but he denied that he had ever seen the contract in question, or that the signature "M." Kandarian, subscribed thereto, was his. He said that the signature resembled his "a little, very little, not all." Defendant's real name is "A." Kandarian, and his wife's "Mary" or "M." Kandarian. She cannot write. Witness Weaver told of the meeting between himself and the defendant at the time the contract was made. He testified in part as follows:

"He (Kandarian) asked me what I was doing. I said still buying raisins, and he says, 'I will sell you 25 ton.' He asked me the price, and I told him 9 cents, and he says, 'I will sell you 25 ton,' so I says 'All right,' and I just pulled out my contract book and started in making the contract, A. Kandarian, and he says, 'No; make it M. Kandarian.' So I proceed to write it accordingly."

Weaver testified positively that the defendant signed the contract "M." Kandarian" in his presence. Judge Woolley was witness for plaintiff. Reference is made to his appearance at the trial, and his testimony is summed up as follows by counsel for defendant in his brief:

"J. E. Woolley, one of the superior court judges of Fresno county, formerly in the em-

ploy of Short & Sutherland, attorneys for plaintiff, was called as a witness. He testified on behalf of plaintiff that when the action was first brought, he called Mr. Kandarian to his office, and that he (Kandarian) admitted that he had signed his wife's name to the contract, and also that he had sold all of his own raisins at the time Mr. Weaver, the agent of the plaintiff, came to his place."

Counsel for defendant urges in his brief three grounds for reversal of the judgment, as follows:

"First, that the contract pleaded is not the contract proved.

"Second, that the evidence does not sustain the judgment reforming contract.

"Third, that the defendant was acting as agent for the principal at the time he signed the contract."

Upon the oral argument before this court counsel for defendant abandoned and waived the first two grounds above named, and rests his appeal solely upon the third ground. He argues in support thereof that—

"It was evidently intended that the defendant M. Kandarian, the wife of A. Kandarian, would sell to the plaintiff corporation 25 tons of raisins upon her approval of the contract."

[1, 2] The undisputed evidence shows that the land belonged to defendant, and that the crop was his. No showing was made that defendant's wife had any interest in either crop or land. Because of the situation disclosed by the evidence, we think the question of agency is immaterial. The trial court found that the defendant "executed said agreement in writing and signed his name as M. Kandarian." There is ample evidence to support such a finding. Defendant chose to sign his name as "M." Kandarian. There is nothing in the law which inhibited his doing so, and, having so signed an agreement in all respects lawful, he is bound thereby. Without abandoning his real name, a person may adopt any name, style, or signature wholly different from his own name by which he may transact business, execute contracts, issue negotiable paper, and sue and be sued. *Emery v. Kipp*, 154 Cal. 83, 86, 97 Pac. 17, 19 L. R. A. (N. S.) 983; *Badger Lumber Co. v. Collinson*, 97 Kan. 791, 156 Pac. 724.

The judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

62 Cal. App. 687

In re LYNCH'S ESTATE.

FIRST FEDERAL TRUST CO. v.
STEWART.

(Civ. 4629.)

(District Court of Appeal, First District, Division 1. California. June 28, 1923. Hearing Denied by Supreme Court Aug. 27, 1923.)

Executors and administrators ⇨366—Confirmation of sale of realty by executor on oral bid after receipt of written bid held warranted.

Where executor conducting a sale of real property under Code Civ. Proc. § 1549, after the receipt of written bids on the day of the sale announced the amount of the largest bid and requested other bids, several of which were made, the largest being finally reduced to writing, *held*, that the court did not err in confirming the sale over objection of the bidder who had submitted the largest written bid, executor's request for written bids being not equivalent to an agreement to accept the largest submitted.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In matter of the estate of Jeremiah Lynch, deceased. From an order confirming a sale of realty by the First Federal Trust Company, executor, Charles Stewart appeals. Affirmed.

Knight, Boland, Hutchinson & Christin, of San Francisco, for appellant.

Cushing & Cushing and Harold L. Levin, all of San Francisco, for respondent.

Joseph G. De Forest, of San Francisco, *amicus curiæ*.

TYLER, P. J. This is an appeal from an order confirming the sale of certain real property in the above-entitled estate.

The facts are substantially without conflict. It appears therefrom that the First Federal Trust Company, executor of the will of Jeremiah Lynch, advertised a sale of certain real property under the provisions of section 1549 of the Code of Civil Procedure. The notice stated that the executor would sell at private sale on or after Monday, the 9th day of October, 1922, at 10 o'clock a. m. of said day, to the highest bidder therefor, upon the terms and conditions mentioned. One of the terms provided that all bids or offers should be in writing. In response to this notice four bids were received by the executor, and subsequently, at the time stated in the notice, the representatives of such bidders were present in the office of the executor when the bids were opened. The executor announced that the highest bid received was \$131,550, and then asked if there was any one who wished to raise the amount.

Thereupon one of the bidders made an oral offer in a higher sum. Other bids followed, the appellant herein raising his own offer twice, until finally one Louis Levin made a bid of \$136,000, which was the highest one received, and, upon being reduced to writing, it was accepted by the executor, and 10 per cent. of the purchase price was thereupon paid. Appellant's original bid made in response to the notice of sale was the highest sealed one received, it being \$131,550. No objection, however, was made by him to the action of the executor in calling for or receiving higher bids. On the contrary, as heretofore stated, when such bids were asked for, he voluntarily and without objection entered into the competitive bidding. Thereafter the executor filed a return in the superior court of the sale to Louis Levin at the price of \$136,000. At the hearing, and for the first time, appellant objected to the confirmation of the sale on the ground that it was not legally made or fairly conducted, for the reason that the executor, instead of accepting the highest written bid offered, proceeded to open the bidding to all present in manner of a sale at public auction.

In his objections to the confirmation of the sale appellant prayed that the court order and direct the executor to confirm his bid and offer, or in its discretion order a new sale to be made. The court overruled the objection, and confirmed the sale to Mr. Levin at \$136,000. The appraised value of the property in June, 1922, was \$130,000. Appellant here seeks a reversal of the order of confirmation, claiming that an agreement of sale was created between him and the executor upon the return of his sealed bid, and that the sale to Levin was void for the reason that it was accepted pursuant to a sale at public auction rather than at private sale as advertised.

It is argued in support of this contention that, by reason of the change in the statutory provisions of the Code relating to sales and conveyances of property of deceased persons, there is now no provision which declares that a sale by an executor is invalid until confirmed; that as the law now stands an executor may sell property of the estate upon his own initiative whenever he thinks that such sale is necessary to pay the debts and legacies, or when it is for the advantage, benefit, or best interests of the estate and those interested therein, without an order of court (Code Civ. Proc. § 1536); and that a sale when made is binding upon the estate unless there exists some statutory ground for refusing it as laid down in the Code (In re Pearsons, 98 Cal. 603, 33 Pac. 451; Bennialack v. Richards, 125 Cal. 427, 58 Pac. 65; Estate of Robinson, 142 Cal. 152, 75 Pac. 777). These cases have to do with the validity of executed sales between executors and purchasers, and they declare under what

circumstances they must be confirmed. We fail, however, to see in what manner appellant is aided in his contention by the doctrine announced therein. The vice of appellant's argument is in assuming that the acts here presented constitute a sale. The notice merely amounts to an indication to sell; and the mere submission of a bid in response thereto cannot be construed as an acceptance of an offer. That the executor did not accept the appellant's bid (offer) is evidenced by his act in calling for higher bids and his acceptance of the Levin offer. The act of the executor in advertising for bids did not, therefore, constitute an offer. It was but a mere preliminary act, amounting to no more than a mere solicitation of bids, leading up to a sale. The bid of appellant was, of course, an offer, but until accepted no rights were created thereby between the parties. There is nothing in the advertisement to the effect that the sale would be without reserve; and, even in the case of sales by auction, in the absence of such condition it has been uniformly held that the mere advertising for bids does not in itself constitute an offer, but is rather a mere invitation for an offer, and that the property advertised may be withdrawn at any time before acceptance. 1 Williston on Sales, § 30 et seq.; Civ. Code, § 1794. Had the notice contained the announcement that the sale would be without reserve, there might be some merit in appellant's contention. Civ. Code, § 1796.

We do not wish to be understood, therefore, as holding that it is not possible for one seeking tenders to be bound by a notice expressed in positive terms that he will accept the highest bid. The case, however, does not present this situation. If the effect of a notice of public auction sale does not constitute an offer, there is every reason for holding that one of private sale does not. There is no distinction in principle. Then, again, the notice stated that the executor would sell at private sale on or after the time mentioned therein, which indicates that other bids would be considered if presented subsequently. This is in conformity with the duty of the executor to obtain the best possible price for the property intrusted to his care, and is in keeping with the requirements of the statute (Code Civ. Proc. § 1549) providing that such sales must not be made before the day noticed, but must be made within six months thereafter. The further objection is made that the sale to Mr. Levin was made upon an oral bid, which was void under the statute. Code Civ. Proc. § 1549. There is no merit in this contention. From the evidence it appears that, upon acceptance of the highest bid, it was immediately reduced to writing, and the necessary deposit made.

There was nothing in connection with the sale that was unfair, and the price obtained

was the highest offered, and there is no evidence to show that it was disproportionate to the value of the property; nor was there any legal reason presented against its confirmation. There was, therefore, nothing left for the court to do but to confirm it. Estate of Leonis, 138 Cal. 194, 71 Pac. 171. Respondent claims in support of the order that whatever rights appellant may have had he waived when he entered into the competitive bidding, and that his act in so doing constituted a relinquishment of his bid, and he is therefore estopped to object to the confirmation of the sale. Considering the conclusion we have reached, it is unnecessary to discuss or decide this question.

Concluding, as we do, that the notice of sale amounted to nothing more than a solicitation for bids, the response thereto by appellant created in him no rights, his offer not having been accepted. This being so, the judgment should be, and is hereby, affirmed.

We concur: ST. SURE, J.; RICHARDS, J.

(62 Cal. App. 732)

KENNARD v. BINNEY et al. (Civ. 4183.)

(District Court of Appeal, Second District, Division 1. California. July 3, 1923.)

1. Judgment $\S$ 101(2)—Complaint in absence of specific demurrer held sufficient to sustain default judgment foreclosing mortgage.

A complaint, in an action to foreclose a mortgage, alleging contrary to the terms of the mortgage which was made a part thereof that the mortgage conveyed certain shares of water stock, *held* sufficient, in the absence of a specific demurrer to sustain a default judgment.

2. Judgment $\S$ 128—Default judgment in foreclosure proceedings held not in excess of relief demanded.

Where the complaint, in an action to foreclose a mortgage, asked only for a sale of the "lands and premises," held that a default judgment decreeing a sale of the land described and various shares of irrigation water stocks, *held* not invalid as being in excess of the relief demanded; it being presumed in support of the judgment that the water stocks involved were issued in compliance with Civ. Code, § 324, and were therefore appurtenant to the land.

3. Judgment $\S$ 101(2)—Confusion in use of names in a complaint held not to render invalid a default judgment.

In an action to foreclose a mortgage on realty and water stock, some confusion in the use of the names of the water companies, whose shares of stock were involved, *held* not such irregularities as would invalidate the default judgment.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Flora H. Kennard against George A. Binney and wife and the Glendora Co-operative Fumigating Company. Judgment for plaintiff, and first-named defendants appeal. Affirmed.

Clark, Law & Clay, of Los Angeles, for appellants.

Charles S. Davis, of Los Angeles, for respondent.

CURTIS, J. This action was instituted to foreclose a mortgage executed by the defendants George A. Binney and Jennie I. Binney, his wife. These defendants interposed a demurrer to the complaint, which was overruled, and, upon their failure to answer, judgment by default was rendered against them. The transcript on appeal contains no copy of defendants' demurrer, but it is conceded by each party to the action that it was a general demurrer. The complaint contained the following allegations:

"That on the 22d day of March, 1912, this plaintiff and her husband, E. O. Kennard, by grant deed, for a consideration of \$25,000, sold and delivered to George A. Binney and Jennie I. Binney, his wife, the herein mortgaged premises and certain water and water rights, which water and water rights were afterwards represented by and converted into thirty shares of the Glendora Consolidated Mutual Irrigating Company stocks of a value of \$3,000, and two shares of Cienega Springs stock, with a value of \$200, and at the same time and place the said purchasers gave back a purchase-money mortgage to said Flora H. and E. O. Kennard, covering the same premises in question and the said thirty shares of Glendora Consolidated Mutual Water Company stocks and the two shares of Cienega Springs stock."

A copy of the mortgage was annexed to the complaint as an exhibit, and the mortgaged property was described therein as follows:

"The south 10 acres of the east one-half of the southeast quarter of the southeast quarter of section 30, township 1 north, range 9 west, S. B. M., including all buildings and improvements thereon or that may be erected thereon; together with all and singular the tenements, hereditaments and appurtenances, water and water rights, pipes, flumes, and ditches thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof."

The court in the decree of foreclosure found the amount due on the note and adjudged the same to be a valid lien upon the ten acres of land above described, and upon "thirty shares of Glendora Consolidated Mutual Irrigation Company water stocks, and two shares of Cienega Springs Company water stocks."

Defendants appeal from the judgment, and advance two reasons why the same should

be reversed: First, that there is no allegation in the complaint warranting the court ordering the sale of said water stock; and, secondly, that the prayer of the complaint fails to ask for the sale of the water stock.

[1] Appellants' first contention is that the complaint, having set out the mortgage in full any allegation therein contrary to the terms of the mortgage to the effect that the shares of water stock were covered by the mortgage is surplusage, that the same must be so regarded by the court, and that such an allegation cannot support a judgment based thereon.

In *Linz v. McIver & Becker*, 29 Cal. App. 470, 156 Pac. 1000, the court said:

"The general allegations of the complaint were sufficient * * * to charge the defendant [Becker] as an individual maker of the promissory note sued upon. The complaint, however, contains a copy of the note, which shows that defendant Becker signed his name thereto as a member of the firm of McIver & Becker and not as an individual maker thereof. The only question involved upon this appeal is whether the variance between the general allegation of the complaint and the face of the note is fatal to the plaintiff's judgment. The rule in this state is that a variance between the direct allegations of a complaint and a copy of an instrument set forth therein, or an exhibit attached thereto, can be successfully attacked only by special demurrer, and cannot be taken advantage of by general demurrer. *Mendocino County v. Morris*, 32 Cal. 145. In the case of *Blasingame v. Home Ins. Co.*, 75 Cal. 633, 17 Pac. 925, the appellant therein relied for a reversal of the judgment upon a variance between a direct allegation of the complaint as to the identity of a person to whom a policy of insurance was payable, and an apparently contrary statement in the copy of the policy set forth in the complaint. The court there held that the complaint was sufficient to support the judgment when tested by a general demurrer."

To the same effect is *S. F. Sulphur Co. v. Aetna Indem. Co.*, 11 Cal. App. 695-698, 106 Pac. 111. From these authorities, and there seems to be none holding a contrary rule, it is apparent that the complaint is sufficient to support the judgment.

[2] The further objection is made to the judgment that, being a judgment on default, it grants relief in excess of the prayer of the complaint, in that the prayer of the complaint only asks for a sale of the "lands and premises," while the judgment decrees a sale of the land described in the mortgage, being the ten-acre tract hereinbefore described, and "thirty shares of Glendora Consolidated Mutual Irrigation Company water stocks, and two shares of the Cienega Springs Company water stocks." Appellants argue that, as the prayer of the complaint asks only for the sale of the "lands and premises," and there

is no allegation in the complaint that the water stock is appurtenant to the land, that it will be assumed that the water stock referred to is that of a private corporation which is personal property and not appurtenant to the land, unless issued as required by section 324 of the Civil Code. With this contention of appellants we cannot agree. Upon the facts stated in the complaint, the stock was appurtenant to the land. Every presumption must be in favor of the regularity of the proceedings upon which the judgment is based and of the validity of the judgment, and, where any error is claimed, it is the duty of the appellant to produce the record clearly showing such error. *U. S. Film Co. v. U. S. Fidelity, etc., Co.*, 44 Cal. App. 227-229, 186 Pac. 364. In the present case the record contains no copy of the shares of stock of the water companies involved herein, and there is nothing to indicate from the record before us whether they were issued in the ordinary manner prescribed for the issuance of shares of stock by corporations, in which event they would be personal property, or whether they were issued in compliance with the provisions of section 324 of the Civil Code, whereby they would become appurtenant to the land. Under such a condition of the record it is our duty, in support of the judgment, to presume that they were issued in the manner which made them appurtenant to the land. *Woodstone M. & T. Co. v. Dunsmore, etc., Co.*, 47 Cal. App. 72-78, 190 Pac. 213. If the water stock was appurtenant to the land, then it was a part and parcel thereof, and would pass by a conveyance thereof, whether mentioned in the conveyance or not. This being true, it would be unnecessary to refer to them specifically in the prayer of the complaint, after having asked that the "land and premises" be sold. The water stock would be as much a part of the "land and premises" as the buildings thereon or any other appurtenances.

[3] There appears to be some confusion in the use of the names of the water companies whose shares of stock are involved in this action. In some instances the Glendora Consolidated Mutual Irrigation Company is referred to as the Glendora Consolidated Mutual Irrigating Company and in others as the Glendora Consolidated Mutual Water Company, and the Cienega Springs stock is referred to as the Cienega Springs Company water stocks, Cienega Springs water stocks, and the Cienega Springs Water Company stocks, but in our opinion these irregularities do not invalidate the judgment.

We find no errors in the record sufficient to justify a reversal of the case, and therefore the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

62 Cal. App. 709

PEOPLE v. MURPHY. (Cr. 695.)

(District Court of Appeal, Third District, California. June 28, 1923.)

1. Criminal law **1023(3)—Order denying permission to withdraw plea of guilty reviewable on appeal from judgment.**

On appeal from a judgment rendered after a plea of guilty in a prosecution for attempt to commit robbery, the court's order denying defendant's motion for permission to withdraw his plea of guilty is properly reviewable.

2. Robbery **24(1)—Evidence held sufficient to sustain conviction for attempt to rob.**

Evidence held sufficient to sustain a conviction for attempt to rob.

3. Criminal law **274, 1149—Abuse of discretion in refusing to permit withdrawal of plea of guilty held unestablished; permitting withdrawal discretionary.**

The granting of permission to withdraw a plea of guilty is within the trial court's discretion, and not reviewable in the absence of a showing of abused discretion, and where defendant was represented by counsel both in the justice court and in the superior court, where at the time of his arraignment he received a copy of the information and entered a plea of guilty, it cannot be said there was an abuse of discretion in denying permission to withdraw the plea of guilty.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Willie Murphy appeals from a denial of his motion to withdraw a plea of guilty of attempt to commit robbery. Affirmed.

George J. Raymond, T. A. Farrell, and Theodore W. Chester, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

JONES, Justice pro tem. The appellant and one Hatler were jointly charged with an attempt to commit robbery on H. C. Cann. Upon his arraignment in the superior court the appellant pleaded guilty and asked for probation, but before his motion for probation was passed upon, he moved the court for permission to withdraw his plea, the motion being based upon the ground that the plea of guilty had been made through inadvertence, ignorance, and without due deliberation. In his affidavit filed in support of the motion, the appellant claims that he was not aware of the fact that he was charged with an attempt to rob Cann, and that he had not had any intention of robbing Cann. This motion was denied, as was also the motion for probation, and the court rendered judgment, from which an appeal has been taken.

[1] In support of his appeal appellant presents but one ground—that the court erred in not permitting the withdrawal of his plea,

and properly maintains that the order denying his motion may be reviewed on the appeal from the judgment. *People v. Dabner*, 153 Cal. 398, 95 Pac. 880.

[2] On the hearing of the motion in the superior court, all the testimony produced at the preliminary examination of the two codefendants was made a part of the record, and an examination of that testimony shows that the appellant admits that, on November 25, 1922, in the evening, he and Hatler, in an automobile went out on the H street road just out of Sacramento, with the intention of holding up travelers on the highway, and that he, (Murphy) carried a revolver and had a handkerchief tied around his neck in such manner that it could be used as a mask. Two attempts to stop passing machines were made; but, their efforts not proving successful, he and his confederate, according to his statement, abandoned their plans to rob, and started back to the city.

In the meantime, two deputy sheriffs, in response to telephone calls, drove along the road, and, going beyond the machine of appellant for a short distance, turned back and followed the appellant, and they observed that the license plates on appellant's automobile were covered. After proceeding a short distance, the latter machine came to a stop, and appellant got out and walked toward the deputies, who had brought their machine to a standstill. In a statement made after his arrest, appellant stated that he went back to "see why they were following us so close," and that, as he approached the deputies, his hand was on his gun in his coat pocket, but that he did not intend to rob them, and did not take his gun out of his pocket or try to. The deputies, however, each testified, at the preliminary examination, that the appellant came up to their machine and pulled a gun partly out of his pocket, at which time one of the deputies pointed a gun at him and compelled him to throw up his hands. He and his companion were then put under arrest and later were jointly charged in the justice court with the crime of attempting to rob the deputy, Cann.

At the preliminary examination, held on February 21, 1923, the appellant was represented by counsel, and, though waiving the reading of the complaint, was present when it was read to his codefendant. Upon the conclusion of the preliminary examination the two defendants were held to answer to the superior court, and when appearing there, on February 27th, for arraignment, the appellant was again represented by the same attorney who had appeared for him in the justice court, and who, in the superior court, apparently waived the reading of the information. At this time a copy of the information was handed to the appellant and on being asked for his plea he said, "Guilty." The

motion for probation was then made, and the court, after stating that there "was very little chance for a highway robber to get probation" from it, referred the matter to the probation officer for investigation and report.

That the evidence produced at the preliminary examination would be sufficient, if presented to a jury, to sustain a verdict of guilty, cannot be doubted. *People v. Moran*, 18 Cal. App. 209, 122 Pac. 969.

[3] The granting of permission to withdraw a plea of guilty is a matter within the discretion of the trial court, and before its action will be reversed there must clearly appear to have been an abuse of such discretion. *People v. Dabner*, supra; *People v. Bostic*, 167 Cal. 754, 141 Pac. 380; *People v. Manriquez*, 188 Cal. 602, 206 Pac. 63, 20 A. L. R. 1441.

No showing was made by appellant that any advantage of him was taken in any of the proceedings leading up to his arraignment in the superior court. He was represented by an attorney in both the justice and superior courts; he was present when the complaint was read to his codefendant in the justice court, and upon his arraignment in the superior court he received a copy of the information (which, he avers, he handed to his attorney without reading), and, when asked for his plea to the charge, he responded that he was guilty. In view of these facts, the trial court was not compelled to accept, as true, the averment of the appellant that he was not aware of the charge of the attempt to rob Cann, and a review of the entire record fails to substantiate his claim that there was an abuse of discretion in not granting his motion. It would therefore follow that the action of the trial court must be upheld.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

62 Cal. App. 736

LEEPER et al. v. SUPERIOR COURT FOR
SACRAMENTO COUNTY et al.
(Civ. 2694.)

(District Court of Appeal, Third District, California. July 3, 1923. Hearing Denied by Supreme Court Aug. 30, 1923.)

1. Appeal and error $\S$ 71(4)—Order authorizing sale of defendants' property held appealable as final order.

An order for the sale of defendants' property by a receiver under foreclosure proceedings is in effect final as against defendants, since it will deprive them of their property, and hence is appealable.

2. Prohibition $\S$ 3(3)—Writ denied, when appeal from a final order is possible in lieu thereof; "final order."

Order authorizing sale of defendants' property in foreclosure proceedings being a "final

order," an appeal from which affords a plain, speedy, and adequate remedy, the writ of prohibition to restrain the sale will be denied, in view of Code Civ. Proc. §§ 1102, 1103, and section 963, defining prohibition, excluding it where there is other adequate relief at law, and enumerating cases covered by appeal, respectively.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Order.]

Application for a writ of prohibition by Thomas B. Leeper and others against the Superior Court for Sacramento County and others to restrain a sale under deed of trust and mortgage. Denied.

Thomas B. Leeper and Charles H. Crocker, both of Sacramento, for petitioners.

Devlin & Devlin and T. A. Farrell, all of Sacramento, for respondents.

HART, J. This is an application for a writ of prohibition to prohibit and restrain the defendants from causing to be sold and selling the certain properties described in the petition. An alternative writ or order to show cause was issued, and on the return day thereof the defendants filed both a demurrer and an answer to the petition.

It appears from the petition that on the 13th day of June, 1917, Herbert Shear, George Bonnefoy, and F. R. M. Bloomer were, as copartners, the owners and in the possession of a wood and coal business in the city of Sacramento, known as the Pioneer Wood & Coal Company, and also a lime quarry, which was carried on under the name of the "El Dorado Lime Quarry," said quarry being situated near the town of Shingle Springs, in El Dorado county; that on the said 13th day of June, 1917, said parties and one G. A. Starkweather entered into a written agreement whereby the former transferred to the latter all their right, title, and interest in and to all the properties mentioned, upon the understanding and agreement that said Starkweather should and would, for the term of one year from the date of said agreement, conduct and manage said properties and businesses for the benefit of said copartners. The said agreement contains many details as to the manner of the management of said properties, and provides that at the end of the term of the same that Starkweather may, at his option, either form two separate and distinct corporations, the one involving or consisting of the wood and coal business and the properties thereof, and the other the quarry properties and business, or return the assets of said business remaining in his hands, after the payment of all debts and liabilities existing against either, to the above-named owners thereof or their assigns. It was further provided that Starkweather was to have sole and exclusive control of the properties

and the businesses connected therewith for the term during which the agreement was to exist, and that he "shall have absolute discretion to make contracts, borrow money, buy and sell property, pay off indebtedness, and to do any other act and thing that he may deem necessary for the conduct of said business," etc.

It is made to appear by the petition that, after the making of the above-mentioned agreement, Starkweather organized a corporation under the name of "El Dorado Lime & Minerals Company," to which subsequently he caused to be transferred the quarry properties and business; that thereafter and on the 1st day of May, 1918, said corporation executed in favor of and delivered to the California National Bank, at Sacramento, a trust deed to secure a loan in the sum of \$100,000, said deed of trust covering the properties of the lime and quarry business; that on the 15th day of April, 1921, the El Dorado Mines & Minerals Company executed and delivered to said National Bank a mortgage in the sum of \$40,000 upon the property of said corporation; that on the 3d day of May, 1921, the California National Bank brought an action in the superior court of the county of Sacramento against the petitioners and others "to foreclose said trust deed and the said mortgage." In said action the complaint alleged that the situation with respect to the properties above referred to and the businesses thereof was such as to call for the appointment of a receiver to take charge, pendente lite, of said properties and businesses, and upon an ex parte hearing of the application for the appointment of such receiver said superior court made an order appointing one J. H. Bell a receiver to take charge of the properties of both the lime business and the wood and coal business. Subsequently, and after several legal attacks were made by the petitioners in the superior court against the order allowing and appointing a receiver, the said superior court, upon an application being made therefor, made an order authorizing and appointing the said receiver to sell the property and the businesses of the wood and coal company, and fixed in said order a day certain for hearing the report of the receiver as to such sale and for the confirmation or rejection thereof. It is against the last-mentioned order, in so far as it authorizes the sale of the said properties, that the attack herein is aimed; it being the contention, as is to be implied from the nature of this proceeding, that in making said order the superior court transcended its lawful jurisdiction.

[1, 2] No appeal was taken from the order appointing the receiver, nor from the order directing the sale of the properties. The petition herein was filed on the 29th day of May, 1923. The writ of prohibition "arrests the proceedings of any tribunal, corporation,

COPP v. RIVES et al. (Civ. 4174.)

(District Court of Appeal, Second District, Division 1, California. July 5, 1923. Hearing Denied by Supreme Court Aug. 30, 1923.)

1. Appeal and error ⇨781(2)—Questions involved in appeal held not to have become moot by reason of respondent's acts since perfection of appeal.

The fact that, since the perfection of an appeal in an action to foreclose a mortgage, respondent had filed a claim, based on the mortgage sought to be foreclosed, and on which judgment was rendered in respondent's favor, and from which judgment the appeal was taken, with the special administrator of the estate of deceased defendant, and that the claim was allowed by such administrator, *held* not to show that the question involved in the appeal had become moot, where the special administrator was not a party to the appeal.

2. Husband and wife ⇨247—Law in force when community property was acquired determines rights of parties therein with respect to disposition or incumbrance of property.

Law in force at the date community property was acquired determines the rights of the parties therein, and any amendment thereto such as Civ. Code, § 172a, as added by St. 1917, p. 829, § 2, requiring both husband and wife to join in the execution of an instrument by which property is leased, conveyed, or incumbered, must be confined to community property acquired after the passage of such amendment.

3. Trial ⇨389—Stipulation held to have waived findings of fact.

Stipulation by counsel *held* to have waived findings of fact.

4. Appeal and error ⇨925(1)—Presumed that trial court rendered opinion in usual manner.

Where a recital in the judgment showed the trial court rendered an opinion but the record does not disclose the form in which it was rendered, it will be presumed it was rendered in the usual manner, which would be either by filing a written opinion or by an entry thereof in the minutes of the clerk.

5. Judgment ⇨12, 273(5)—Entry of judgment for plaintiff after defendant's death held proper.

Where the trial court, before defendant's death, rendered its opinion ordering judgment for plaintiff, it had the right, under Code Civ. Proc. § 669, after defendant's death to order the findings filed *nunc pro tunc* as of the date of the opinion and to enter judgment upon such findings after defendant's death, but, where the case was submitted upon an agreed statement of facts, no findings were required, so that under those conditions the court could render judgments after defendant's death.

6. Judgment ⇨220—Recital in judgment that order was made substituting special administrator for deceased defendant held sufficient to sustain judgment, in absence of contrary proof.

A recital in a judgment, as required by Code Civ. Proc. § 670, that an order had been made

board, or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." Code Civ. Proc. § 1102. "It may be issued by any court, except police or justices' courts, to an inferior tribunal or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law." Code Civ. Proc. § 1103. If the petitioners have a plain, speedy, and adequate remedy by appeal, the writ will not issue. An appeal lies from an order appointing a receiver. Code Civ. Proc. § 963. In California, etc., *Ass'n v. Superior Court*, 8 Cal. App. 711, 97 Pac. 769, an application was made for a writ of prohibition to restrain the superior court and its receiver from selling certain property of the petitioner therein. The appellate court said:

"An order for such sale would be so far independent of suit itself as to make the order therefore substantially a final decree for the purpose of an appeal. *Los Angeles v. Los Angeles City Water Co.*, 134 Cal. 123, 66 Pac. 198. An appeal lying from such an order, there can be no need of a writ of prohibition, and it will not lie."

In *Title Ins. & Trust Co. v. Calif. etc., Co.*, 159 Cal. 484, 491, 114 Pac. 838, 840, after reviewing the decisions upon the subject, the court said:

"From these decisions the following rules are clearly deducible. Where the order requires the payment of money by the party complaining (*Los Angeles v. Los Angeles City Water Co.*, 134 Cal. 121, 66 Pac. 198; *Anglo-California Bank v. Superior Court*, 153 Cal. 753, 756, 96 Pac. 803), or the doing of an act by or against him, the order is in effect final as against such party and may be appealed from by him."

For the further history of the case and the decisions relevant thereto, see 164 Cal. 58, 127 Pac. 502, and 171 Cal. 227, 152 Pac. 564. See, also, *Hildebrand v. Superior Court*, 173 Cal. 86, 89, 159 Pac. 147, and *Luckenbach v. Krempel*, 188 Cal. 175, 204 Pac. 591, 592.

The order for the sale of defendants' property is certainly an order for "the doing of an act * * * against" them, because, if carried into execution, it will deprive them of the property ordered sold, and the order "is in effect final as against such party and may be appealed from." The writ of prohibition prayed for in this case, therefore, will not lie, because an appeal affords a plain, speedy, and adequate remedy.

The demurrer to the petition is sustained, the writ discharged, the restraining order vacated, and the petition denied.

We concur: FINCH, P. J.; BURNETT, J.

substituting a special administrator as defendant in the place of deceased defendant *held* sufficient to sustain judgment, in the absence of proof to the contrary.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Andrew J. Copp, Jr., against James C. Rives as special administrator of the estate of James G. Hale, deceased, and another. Judgment for plaintiff, and defendant Bessie Hale appeals. Affirmed.

Gesner Williams, John L. McGonigle, and Hal Hughes, all of Los Angeles, for appellant.

Andrew J. Copp, Jr., and Syllas S. Meyer, both of Los Angeles, for respondent.

CURTIS, J. [1] Respondent suggested, at the oral argument of this appeal, that, since the perfection of this appeal, certain proceedings had been taken which would render a decision on this appeal the decision of a moot question of law, and therefore that the appeal should be dismissed. In support of his suggestion respondent has filed an affidavit herein to the effect that since the perfection of said appeal respondent has caused to be filed a claim based upon the mortgages sought to be foreclosed in this action, and upon which judgment was rendered in respondent's favor, and from which judgment this appeal was taken, with the special administrator of the estate of James G. Hale, deceased, with the powers of a general administrator, and that said claim was allowed by said special administrator. Said administrator is not a party to this appeal, and we are of the opinion that, conceding all the facts set forth in said affidavit to be true, still they do not show that the question involved in this appeal has become a moot question.

This action was instituted to foreclose two mortgages, executed by James G. Hale to plaintiff. One of said mortgages was dated January 15, 1918, and recorded on the same day, and the other was dated and recorded on January 22, 1918. At the time of the execution of said mortgages the said James G. Hale and appellant, Bessie Hale, were husband and wife, and the real property described in said mortgages was their community property; the same having been acquired prior to the adoption of section 172a of the Civil Code on April 27, 1917. The appellant, Bessie Hale, did not join in the execution of either of said mortgages. The action was submitted to the trial court upon an agreed statement of facts. After the submission of said action upon said agreed statement, and before judgment was rendered, James G. Hale, one of the defendants in said action, died, and James C. Rives, special administrator of the estate of James G. Hale, deceased, was substituted as defendant in place

of said James G. Hale, deceased. Thereupon judgment was rendered in plaintiff's favor, in which judgment said mortgages were declared to be valid and a lien upon the whole of the mortgaged premises, and the same were ordered sold, and the proceeds applied to the payment of the amount found due plaintiff. The defendant Bessie Hale appeals.

[2] Appellant first contends that the mortgages were void, or were at least invalid as against her and her interest in the mortgaged property, for the reason that said property was community property, and she did not join in the execution of said mortgages as required by section 172a of the Civil Code, as added by St. 1917, p. 829, § 2. Said section is as follows:

"The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or incumbered. * * *

This section was in effect at the date of the execution of each of said mortgages, but the real property described in said mortgages had been acquired by appellant and her husband prior to the adoption of said section 172a. Before the adoption of said section the husband had the absolute right of disposition of the community property, other than testamentary, as he had of his separate property, provided he could not make a gift of it or convey it without a valuable consideration, without the written consent of the wife. There is no contention that the mortgages in question were not given for a valuable consideration. The only question for decision, therefore, is whether the law in effect at the date the property was acquired, or that in effect at the date of the execution of the mortgage, controls as to the rights of the parties to convey or mortgage the community property. The question was squarely before the Supreme Court in the case of *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, and it was there held that the law in effect at the date the community property was acquired determines the rights of the parties therein, and any amendment thereto must be confined to community property acquired after the passage of such amendment.

[3] It is next contended by appellant that the court had no authority to render judgment in said action after the death of the defendant James G. Hale, for the reason that no decision had been made by the trial court prior to the death of said defendant. Section 669 of the Code of Civil Procedure provides:

"If a party die after a verdict or decision upon any issue of fact, and before judgment, the

court may nevertheless render judgment thereon."

In the case of *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 478, 41 Pac. 328, the defendant Hobart died after the trial of the action, and after the court had filed a written opinion, announcing its conclusion and directing counsel to prepare findings and judgment, but before any findings of fact or conclusions of law had been filed or any judgment rendered by the court. The court thereafter ordered findings and a judgment thereon to be entered against Hobart, nunc pro tunc, as of the date of its written opinion. The Supreme Court approved the action of the trial court in ordering findings filed nunc pro tunc, but set aside the judgment which had been rendered nunc pro tunc as of the date prior to the death of Hobart, and directed the court to enter judgment against Hobart as of the date of the judgment against the codefendants of Hobart, which was after the death of Hobart. In this case the court said:

"In the present case, therefore, it was proper for the court to direct that its findings of fact and conclusions of law thereon should be filed as of a date anterior to the death of Hobart. By so doing the decision became in all respects as effective as if actually made before his death, and by the provisions of section 669 the judgment thereon could be entered after his death."

As we have already seen, this action had been submitted upon an agreed statement of facts prior to the death of Hale. In this statement of facts was the following stipulation:

"It is stipulated that judgment may be entered in favor of the plaintiff and against the defendant, James G. Hale, for the aggregate amount of principal and interest on said two promissory notes, to wit, the aggregate sum of \$1,083.04, together with interest thereon according to the terms and conditions of said promissory notes respectively, aggregating the sum of \$261.40, computed to the 1st day of July, 1921, and in addition thereto reasonable attorney's fees in the sum of \$100, if the court finds plaintiff is entitled thereto; and furthermore, if the court finds that the two writings denominated mortgages are valid mortgages and create a valid and subsisting lien upon the real property therein described, whether restricted to the interest of James G. Hale therein or covering the community interests of said James G. Hale and Bessie H. Hale, then, that the usual decree of foreclosure of said mortgages may be duly rendered and made herein in accordance with the prayer of plaintiff's complaint."

Under such an agreed statement of facts findings were waived. City of Los Angeles

v. L. A. Farming & Milling Co., 152 Cal. 645, 93 Pac. 869, 1135.

[4, 5] The judgment contained the following recital:

"The court orders that judgment be entered in favor of the plaintiff and against the defendants, as prayed for in plaintiff's complaint on file herein. It being made further to appear to the court that the defendant James G. Hale having left this life subsequent to the order of this court ordering judgment in favor of the plaintiff as aforesaid."

From this recital in the judgment it would appear that the court had, prior to the death of Hale, rendered its opinion and directed judgment in plaintiff's favor. The record does not disclose the form in which this opinion was rendered, but from the recital in the judgment we must presume that it was rendered in the usual manner, which would be either by filing a written opinion in the action, or by an entry thereof in the minutes of the clerk. After the rendering of this opinion the court, under the authority of *Fox v. Hale & Norcross S. M. Co.*, supra, had the right, after the death of Hale, to have ordered findings filed, nunc pro tunc, as of the date said opinion was filed, and upon such findings to have entered judgment after the death of Hale. The case, however, having been submitted upon an agreed statement of facts, no findings were required. The court, therefore, in our opinion, was authorized under these conditions to render the judgment after the death of the defendant Hale.

[6] The third ground advanced by appellant as a reason why the judgment should be set aside is that the judgment roll does not contain any order substituting James C. Rives, as special administrator, as a defendant in the place of James G. Hale, deceased, as required by section 670 of the Code of Civil Procedure. The judgment recites that such an order was made. This recital was sufficient to sustain the judgment without some proof to the contrary, and no such proof is found in the record.

"The mere absence from the roll of a paper—for example, the return of the officer showing a service of the summons—cannot invalidate the judgment when the judgment itself recites the fact that the defendant was duly served with process." *Whitney v. Daggett*, 108 Cal. 232-235, 41 Pac. 471.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

62 Cal. App. 740

SHERWOOD v. TURNER et al. (Civ. 2690.)

(District Court of Appeal, Third District, California. July 3, 1923.)

1. Exchange of property ⇨8(4)—**Testimony as to what mortgagor did with money advanced by mortgagee after execution of contract for exchange of land subject to mortgage held immaterial, in action against vendee for difference between agreed and actual amount of mortgage.**

In an action on a land exchange contract for the difference between the agreed and actual amount of a mortgage assumed by defendant, objection to a question asked plaintiff on cross-examination as to what he did with money advanced to him by mortgagee after the contract was executed, was properly sustained, where plaintiff made no claim that he used it for the benefit of defendants or any one but himself; the only material question being whether he had the right to receive it.

2. Exchange of property ⇨8(1)—**Instruction to award difference between specified amounts held not erroneous, in view of undisputed evidence.**

In an action on a land exchange contract for the difference between the agreed and actual amount of a crop mortgage assumed by defendants, where the amount due on the mortgage when the property was conveyed was shown by undisputed evidence, an instruction to award plaintiff the difference between such amount and the agreed amount of the mortgage, if defendants were credited therewith, was not erroneous.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by E. E. Sherwood against Charles Turner and another. Judgment for plaintiff, and defendants appeal. Affirmed.

C. W. Braswell, of Lindsay, for appellants.
Guy Knupp, of Porterville, for respondent.

FINCH, P. J. The defendants appeal from the judgment herein in favor of plaintiff. Several causes of action are stated in the complaint, but appellants attack but one of them on this appeal.

Relative to such cause of action, the complaint alleges that the parties entered into a contract for the exchange of certain lands owned by them respectively; that at the time of the execution of the contract—

“the crops of fruit growing upon the real property agreed to be conveyed to the defendants by the plaintiff and his said wife was subject to a crop mortgage in favor of the Producers’ Fruit Company of California, and it was expressly understood and agreed by and between the parties to said contract, and provided in said contract, that said real property should be taken subject to a crop mortgage in favor of said Producers’ Fruit Company of California in the sum of \$20,000, and in computing and determining the payments to be made under said

contract, and at the time said payments were actually made and the instruments of conveyance executed by the plaintiff and his said wife to the defendants, said crop mortgage was computed and estimated at \$20,000, and said defendants received credit on the purchase price of the real property conveyed to them by the plaintiff and his said wife in the sum of \$20,000, and did not amount to any sum in excess of \$19,644.57, and that by reason of the discrepancy between the agreed amount of said crop mortgage * * * and the actual amount thereof * * * there is due, owing, and unpaid from said defendants to said plaintiff the sum of \$355.43.”

The answer expressly admits the execution of the contract, the existence of the alleged crop mortgage, and that—

“it was expressly understood and agreed by and between the parties to said contract, and provided in said contract, that the said real property, should be taken subject to a crop mortgage and in favor of said Producers’ Fruit Company of California in the sum of \$20,000; deny that in computing and determining payments to be made under said contract, said crop mortgage was computed and estimated at \$20,000; deny that it was computed and estimated to be any greater sum than \$14,000; deny that said defendants received credit on the purchase price of said real property conveyed to them by the plaintiff and his said wife in the sum of \$20,000.”

The answer further alleges that the lands were conveyed to defendants subject to a crop mortgage of \$14,000 only. The case was tried before a jury. Both parties introduced evidence tending to support their respective contentions, and the jury rendered a verdict in favor of the plaintiff as prayed for in the complaint.

[1] It is contended that the court erred in sustaining objection to a question propounded to plaintiff on cross-examination. The answer alleges and respondent seems to concede that the crop mortgage referred to was given for the principal sum of \$10,000, with a provision for future advances to the amount of \$10,000 additional. At the time the contract to exchange properties was executed future advances had been made to the amount of \$7,502.27. Thereafter and prior to the exchange of deeds the mortgagees advanced to the plaintiff the additional sum of \$2,142.30. Referring to the last-stated sum counsel for defendants asked the plaintiff: “What did you do with the money you drew from the Producers’ Fruit Company?” The court sustained plaintiff’s objection to the question, saying: “He claimed it as his own, so what he did with it is immaterial.” The ruling was clearly right. Plaintiff made no claim that he had used the money for the benefit of defendant, or for any one but himself. The only material question was whether plaintiff had the right to receive the money. It was immaterial what use he made of it.

[2] Appellant urges that the court erred in giving the following instruction:

"It is provided in the contract of April 19, 1921, that the real property to be conveyed by the plaintiff and his wife to the defendants shall be taken by the defendants subject to a crop mortgage in favor of the Producers' Fruit Company in the sum of \$20,000. It is admitted by the defendants that the amount due on the crop mortgage at the time the real property was conveyed was the sum of \$19,644.57. If you find from the evidence that the defendants were credited with the sum of \$20,000 on the purchase price of said real property because of the said crop mortgage, then you shall award plaintiff, on his third cause of action, the difference between the credit so received, namely, \$20,000 and the amount actually due on said mortgage, \$19,644.57, or the sum of \$355.43."

The instruction correctly states the issues raised by the pleadings and the amount due upon the crop mortgage at the time the property was conveyed to defendants, as shown by undisputed evidence. No erroneous statement of law therein is pointed out, and it seems to present the case fairly to the jury. The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

63 Cal. App. 1

**MILLER et al. v. SUPERIOR COURT IN
AND FOR LOS ANGELES COUNTY
et al. (Civ. 4426.)**

(District Court of Appeal, Second District, Division 1, California. July 7, 1923. Hearing Denied by Supreme Court Sept. 5, 1923.)

1. Certiorari — On writ of certiorari to review order of lower court, reviewing court may examine evidence as relates to jurisdiction.

On application for a writ of certiorari to review an order of the lower court, the reviewing court may examine the evidence on which the order is based, in so far as the evidence applies to or affects the question of jurisdiction.

2. Receivers — Appointed subsequent to sheriff's possession under replevin writ may not question sheriff's possession by contempt proceedings, but only by suit.

Where a sheriff in replevin has taken possession of property, a receiver appointed over all the property of the replevin defendant, who is subsequent in time as to his right or claim, may not attack the sheriff's possession, nor can the court do so by contempt proceedings in the receivership case, but can only authorize the receiver to sue for the possession.

3. Receivers — Appointment of receiver does not operate ipso facto as a possession of property, without any actual possession or attempt to possess being made.

Where a sheriff in replevin has taken possession of property, a mere showing that a re-

ceiver appointed over all the property of the replevin defendant was in fact appointed before the sheriff took possession would not entitle him to possession, where he did not take possession until after the sheriff had acted.

Application by W. N. Miller and another for a writ of certiorari to review an order of the Superior Court of Los Angeles County and Ralph H. Clock, a Judge thereof. Order annulled.

Joseph C. Burke and Robert B. Camarillo, both of Los Angeles, for petitioners.

Cooper, Collings & Shreve, of Los Angeles, for respondents.

CONREY, P. J. This is a proceeding in certiorari to review an order of the superior court whereby the petitioners were adjudged guilty of contempt, and were ordered to return to a receiver certain property taken by them (so the court held) from his possession. The proceeding in the superior court against the petitioners was initiated by the filing of affidavits charging that petitioners by certain acts willfully interfered with Willard L. Goodwin in the discharge of his duties with respect to property in his charge and possession as receiver of said property in certain actions then pending in said superior court.

In three certain actions, wherein the Hogan Drilling Company, a corporation, was defendant, Goodwin was, on the 28th day of May, 1923, appointed receiver of property of the defendant, and was directed to take possession of certain real property and of all personal property located thereon. Goodwin qualified as such receiver on the 29th day of May. Thereafter, on the 4th day of June, affidavits of Goodwin, of H. B. Pierce, and of L. D. Collings were filed charging the facts of the alleged contempt. Based upon those affidavits and the records and files of the said three actions, the court made its order citing respondents to show cause why they should not be adjudged guilty of contempt for the commission of the acts complained of, and to further show cause why they should not be enjoined and restrained from in any manner interfering with the receiver concerning the property in controversy.

The affidavit of Goodwin, after setting forth his appointment and that he qualified as receiver on the 28th day of May, states that on that day he, as such receiver, took possession of said property, including five boilers, together with other connections, equipment, and accessories adjacent thereto; that thereafter, on May 30, he caused to be posted upon the premises certified copies of the order of his appointment, together with a notice that this property was then in the hands of the receiver; that on the 1st day of June Goodwin caused to be served upon the sheriff by leaving with one of his depu-

ties certified copies of the order appointing receiver in said actions, and demanded that the sheriff and his deputies refrain from interfering with the possession of the receiver in and to said property or any part thereof; that on the 1st day of June, 1923, the receiver caused to be placed on said premises certain guards and caretakers for him as such receiver; that on the 2d day of June, disregarding the order of the court appointing Goodwin as such receiver, Juan Murrietta, the deputy sheriff to whom said notices had been delivered, signed an order directing the removal of one of the boilers (which for convenience, and in accordance with the evidence, we will call boiler No. 3) on the said premises; that on the 3d day of June said boiler No. 3 was removed from said premises by S. L. Pugh, W. N. Miller, H. D. Smith, and Robert Gill, together with the aid and assistance of certain workmen. The affidavits of Pierce and Collings give further details of fact, which need not be particularly stated at this time. Among other things, they show that on the real property described there are three uncompleted oil wells, together with derricks and other equipment, including a battery of five boilers, among which is included said boiler No. 3. These allegations, in substance, were by the court found to be true, except that the receiver did not qualify until May 29th. It further appears that on the 26th day of May, 1923, the Pugh-Miller Drilling Company, a corporation, commenced in said superior court an action in replevin against the Hogan Drilling Company to recover possession of said boiler No. 3; that summons was issued, and the necessary affidavit, together with an indorsement in writing thereon, requiring the sheriff to take possession of said boiler, was executed and delivered to the sheriff, together with a good and sufficient undertaking then and there approved by the sheriff; that thereafter, on the 4th day of June, the sheriff in said action of replevin made his return, certifying that on the 28th day of May, he executed said order by taking possession of said personal property, to wit, the said boiler, and by serving on the defendant Hogan Drilling Company, by leaving with G. F. Stamps, as vice president thereof, a copy of the affidavit and order and undertaking. The sheriff further certified that, the defendant having failed to except to the surety in the undertaking, and having omitted to require a return of the property, and no other persons than the defendant having made claim thereto, the sheriff, did, on the 4th day of June, deliver the said property so taken to the plaintiff.

W. N. Miller, S. L. Pugh, and the Pugh-Miller Drilling Company were not parties to any of the actions in which the receiver was appointed. In its order, the superior court found, among other things, that Goodwin qualified as receiver on the 29th day of May, and on that day, as receiver, took actual pos-

session of said premises and the personal property thereon, and posted notices, etc.,

"and as well called the same to the attention of Deputy Sheriff H. D. Smith and Deputy Sheriff Fleming, the sheriff's keepers stationed thereon in charge of said property under and by virtue of certain writs of attachment hereinafter referred to; that at the time said receiver went upon said property, together with his attorney, Lewis D. Collings, said receiver and his attorney inquired of the keepers for said sheriff under and by virtue of what authority they held said property, or any part thereof, and the said keepers at that time informed the said receiver and his said attorney that they were holding said property, or a part of said property, under and by virtue of certain writs of attachment which had issued out of the superior court in an action against the Hogan Drilling Company, the defendant herein, which attachments had issued and were levied prior to the appointment of the receiver herein. That upon the 1st day of June, 1923, Willard L. Goodwin, receiver, caused to be served upon William I. Traeger, sheriff of Los Angeles county, by leaving with Juan Murrietta, deputy sheriff in charge of the civil department of the sheriff's office, certified copies of the order appointing the receiver in the above-entitled actions, and demanded at said time and place that said sheriff and his deputies refrain from interfering with the possession of said receiver in the property hereinbefore described, or any part thereof; that at said time and place said William I. Traeger, sheriff, by his duly authorized deputy, Juan Murrietta, advised the receiver, through his attorney, Lewis D. Collings, that the sheriff of Los Angeles county was holding said property hereinbefore described under and by virtue of writs of attachment, and not otherwise; * * * that at the time the said receiver went on the property on the 29th day of May, 1923, and took actual possession and control of all the properties described herein, there was on said property five boilers inclosed in brick and masonry and attached to the realty, together with all necessary piping connections, pop valves, blow-off valves, water columns, and smokestacks; that thereafter, on the 30th day of May, 1923, when the receiver went on said property, he found certain persons thereon attempting to remove one of said boilers, together with the pop valves, blow-off valve, water column, and smokestack, which persons were agents and representatives of the respondents S. L. Pugh and W. N. Miller herein, and thereupon said receiver informed said persons of his authority, and thereupon said persons desisted from removing said boiler and appliances and left said premises; that thereafter, on the 1st day of June, 1923, the said receiver placed on said premises guards and caretakers, operatives of Charles A. Jones National Detective Agency to guard and protect said property for and on behalf of said receiver; that prior to this time, and on the 26th day of May, 1923, the respondents S. L. Pugh and W. N. Miller had commenced in the superior court of Los Angeles, California, an action for claim and delivery against the Hogan Drilling Company for one boiler, and thereafter on said day they filed an affidavit and bond and demand with the sheriff that said sheriff remove said boiler; that thereafter, and on the 2d day of June, 1923, dis-

regarding the order of this court appointing said receiver, dated May 28, 1923, the said Juan Murrietta, as deputy sheriff, signed an order from the said sheriff's office of Los Angeles county ordering one of the boilers on the premises released from said attachment and turned over to the respondents S. L. Pugh and W. N. Miller; that thereafter, and on the 3d day of June, 1923, in violation of the orders of this court, Robert Gill, S. L. Pugh, and W. N. Miller went on said premises, assisted by laborers and workmen, and unlawfully removed from said premises one of the boilers, together with two pop valves, one blow-off valve, one water column, and one smokestack; that in removing said property they tore down and dug out brick, concrete, and other masonry surrounding said boiler and disconnected water and steam piping and other connections therewith, from which facts the court concludes:

"That at the time of the appointment of the receiver herein certain of the personal property was in the possession of the sheriff by writ of attachment above referred to, and not otherwise; that upon the 28th day of May, 1923, the receiver by virtue of his appointment took possession of the property referred to in his appointment, and thereafter, on the 29th day of May, 1922, he took actual and physical possession of said property, and at said time notified said sheriff of his appointment and posted said property so that any one interested therein might know that said property was in the possession of the court by virtue of this receivership; that thereafter on the 1st day of June, 1923, the sheriff received actual notice of said appointment and the possession claimed by said receiver; thereafter, and before said boiler was taken from said premises, respondents S. L. Pugh and W. N. Miller likewise received actual notice of said appointment and possession claimed by said receiver; that thereafter, on the 3d day of June, 1923, Juan Murrietta, Robert Gill, S. L. Pugh and W. N. Miller, unlawfully and in violation of the order of this court, removed from said property the boiler and equipment above referred to, which act was done with the knowledge of William I. Traeger, sheriff of Los Angeles county, by reason of the fact that said act was done by his authorized deputies. * * *

On behalf of petitioners, it is contended that the undisputed evidence at the hearing in the court below proves that the sheriff had actual possession of boiler No. 3, and was holding the same for the Pugh-Miller Company, plaintiff in the replevin case, before the receiver had taken his oath of office, and therefore prior to the time when there could have been any taking of possession by the receiver; that the condition of the replevin action at that time, and of the matters related thereto, was such that the plaintiff in replevin was entitled to have possession of boiler No. 3 on the 3d day of June, unless prior to that time the defendant in replevin executed the bond necessary to obtain a return of such property. Petitioners therefore claim that, as against the receiver, the plaintiff in replevin stood in the position of an adverse third party in possession of the property in question, and that as

such adverse third party the Pugh-Miller Drilling Company, plaintiff in replevin, cannot be required to surrender its rights on the mere demand of the receiver or the mere order of the court which appointed the receiver, but that in such case the receiver must enforce his demand by a separate action, if it is to be enforced at all. Counsel for respondents, on the other hand, contend that the said affidavits in the contempt proceeding alleged facts sufficient to give jurisdiction therein, and that the facts thus alleged are confirmed by the findings contained in the order of the court made after a hearing in that proceeding. From these premises they argue that the jurisdiction of the superior court is conclusively established, and that, since the writ of review is confined to matters of jurisdiction, we are now precluded from examining or considering that part of the record of the lower court which consists of the evidence received on the hearing of the order to show cause.

[1] Nevertheless a transcript of that evidence has been produced, and it was stipulated that, if we deem it necessary and appropriate to consider such evidence as a part of the return to the writ, this transcript contains the said required evidence. Assuming that both the affidavits and the order are sufficient in their contents to sustain the jurisdiction of the court in that proceeding, nevertheless, on writ of certiorari, the reviewing court may examine the evidence upon which the order was based, in so far as such evidence applies to or affects the question of jurisdiction; for it might be that the jurisdictional facts as recited in the order of the court did not exist, and it might be that the evidence positively and without conflict therein proved that such facts did not exist. Under such circumstances, it must be that the entire record, including the evidence, may be considered. *Strain v. Superior Court*, 168 Cal. 216, 223, 142 Pac. 62, Ann. Cas. 1915D, 702.

[2] The facts as they actually occurred, so far as they are necessary to the determination of the question of jurisdiction, are shown by the evidence, which as to those facts is without conflict. In connection with the testimony of Deputy Sheriff Murrietta, the sheriff's returns on the writs of attachment were read in evidence. In *Cooper v. Hogan Drilling Company*, the return shows that on April 23d, he attached—

"the following described personal property in the possession of the defendant: Derricks, boilers, rotary equipment, drilling outfits, machinery, and all other personal property belonging to the defendant, located on Lambert wells No. 1, 2, and 4, located at Signal Hill, * * * and attached the same by taking into my possession and putting a keeper in charge."

There were other attachments, but we need not refer to them, since it appears that, if the sheriff was holding under attachment the

boiler which was delivered on the claim and delivery demand, he at least held it under the Cooper attachment. This being so, it becomes necessary to consider the effect of the acts of the sheriff when, on the 28th day of May, he honored the demand of the plaintiff in replevin by placing a man in charge of said boiler No. 3 as a keeper for the purposes of that action. If it be the law that the sheriff cannot hold in possession under attachment property of the defendant in one action, and at the same time take possession of that property on behalf of a third party demanding the same as plaintiff in an action of replevin, yet we think it would not follow that the plaintiff in replevin acquired no rights under the process as actually executed in his behalf in that case. Where a sheriff, acting in good faith, has satisfied himself that he is wrongfully holding under attachment personal property that is not the property of the defendant in attachment, it appears to be within his power (subject to his liability to the attaching plaintiff if the release proves to have been wrongful), to release such property from the attachment. Concurrently with such release, the sheriff would likewise have authority to seize the same property under the order in claim and delivery.

But the prior right of the plaintiff in replevin, as against a subsequently acquired right of possession, does not depend upon the release of the attachments. The sheriff must "serve all process and notices in the manner prescribed by law." Pol. Code, § 4157, subd. 9. When he has done so, as in the present case, he has a double possession cast upon him by law, which gives him a position analogous to that of a stakeholder between adverse claimants. Service of process and orders by the coroner is not provided for by the statute, except when the sheriff is a party to the action or proceeding, and by an elisor (so far as the question arises here) only when both sheriff and coroner are parties. Pol. Code, §§ 4172, 4173; *Buckeye Refining Co. v. Kelly*, 163 Cal. 14, 124 Pac. 536, Ann. Cas. 1913E, 840.

In the present instance, then, it is clear that the sheriff, in the claim and delivery proceeding in the replevin action, had taken possession of boiler No. 3 before there was any receiver. The receiver, being subsequent in time as to his right or claim, is not in position to attack the validity of that possession; nor can the court do so by contempt proceedings in the receivership cases. If, at the time when the receiver qualified and attempted to take possession of the property in question, this boiler had passed to the actual possession of the Pugh-Miller Drilling Company, the plaintiff in replevin, clearly it would have been beyond the power of the court by its mere order to compel such party in possession to surrender the property to the receiver. Its only power would have

been power to authorize its receiver to sue for possession of that property. *Stuparich Mfg. Co. v. Superior Court*, 123 Cal. 290, 55 Pac. 985; *Tapscott v. Lyon*, 103 Cal. 297, 305, 37 Pac. 225; *Havemeyer v. Superior Court*, 84 Cal. 327, 387, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; *Havemeyer v. Superior Court*, 87 Cal. 267, 270, 25 Pac. 433, 10 L. R. A. 650.

For the purposes of the present case, we are of the opinion that, upon the actual facts, the possession of the sheriff in the claim and delivery proceeding on and after May 28th was the same in effect as if the plaintiff in replevin had been in actual possession. By virtue of the pendency of the claim and delivery proceeding, and by virtue of the statute authorizing the same, the plaintiff in replevin was in possession through the sheriff as its agent, subject only to the right of the defendant Hogan Drilling Company (within the time prescribed by section 514, Code of Civil Procedure) to obtain redelivery of the property by requiring the same upon giving to the sheriff the necessary redelivery undertaking. And it may be assumed that the receiver, upon his appointment and qualification, became subrogated to the same right of the defendant Hogan Drilling Company to obtain such redelivery by giving said undertaking.

[3] Respondents claim that when Goodwin qualified as receiver, and attempted to take possession of the property in question, his right to possession related back to the time of the order appointing the receiver; that therefore the court, in the proceeding here under review, had authority to enforce that right of possession by direct order, even as against a claimant not a party to the receivership cases, if such claimant obtained possession after the time of appointment of the receiver, though prior to the time when the receiver qualified as such and took, or attempted to take, possession of the property. This contention cannot be sustained. In *Bank of Woodland v. Heron*, 120 Cal. 614, 619, 52 Pac. 1006, this question was discussed and determined. It was there contended that the mere order of the court appointing the receiver constituted ipso facto a possession of the property independent of any actual possession by the receiver, or of any attempt by him to take possession. But the court held that in a case where the receiver was not appointed to conserve liens upon, or other pre-existing rights in the property for which the receivership was instituted, the rule contended for did not exist. On the contrary, it was held that the proceeding was analogous to a writ of attachment, and would be effective, only after possession taken by the receiver, as the writ of attachment would be only after levy. Moreover, in the case here, it was not shown by any evidence that the order of May 28, appointing the receiver, was prior in time to the execution, by the sheriff,

of the claim and delivery order on the same day.

We are of the opinion that, in making the order in question, the superior court exceeded its jurisdiction.

The order is annulled.

We concur: CURTIS, J.; SHENK, Justice pro tem.

62 Cal. App. 691

DE ANGELES v. COTTA et al. (Civ. 2630.)

(District Court of Appeal, Third District, California. June 28, 1923. Hearing Denied by " " Court Aug. 27, 1923.)

1. Appeal and error — 927(4) — Where evidence of facts sought to be proved excluded, appellate court must assume such facts would have been established by the excluded evidence.

Where the court has required plaintiff to state what he expected to prove, and based on such statement sustained objections to practically all evidence offered, so that the record on appeal precludes the appellate court from determining the case on the merits, it must be assumed that plaintiff, if permitted, would have been able to prove all the facts embraced in his statement.

2. Landlord and tenant — 76(1) — **Covenant not to sublet or assign held joint and several.**

Where a lease was executed to four lessees reciting that they covenanted not to sublet or assign, such covenant was joint and several, and consequently breached by assignment by two to their cotenants, who in turn assigned to strangers.

3. Landlord and tenant — 104 — **Unauthorized assigning of lease — warrant forfeiture.**

Where two of four lessees, who had covenanted not to underlet or assign the lease without written consent of lessor, assigned their interest to the other two lessees, who in turn assigned all interest to third parties, without consent, *held*, the covenant not to assign being both joint and several, lessor was entitled to recover possession, notwithstanding Civ. Code, § 1442, requiring condition of forfeiture be strictly interpreted against the party to be benefited.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by G. De Angeles against Joe D. Cotta and others. From a judgment for those defendants not defaulting, plaintiff appeals. Reversed.

T. B. Scott, of Modesto, for appellant.

H. K. Landram, of Merced, for respondents.

FINCH, P. J. This is an action of unlawful detainer, brought to recover possession of certain lands on the alleged ground that the defendants had broken their covenant not to assign the lease under which they held.

Defendants Luiz C. Amaro, Luiz Deniz, and George Silva failed to answer, and default judgment was entered against them. The other defendants were given judgment, and plaintiff has appealed.

The complaint alleges:

That "defendants Joe D. Cotta, Luiz Deniz, Frank Deniz, and Luiz C. Amaro, without the consent of first party in writing, * * * or without his consent in any other manner given, and without his knowledge, did assign all their right, title, and interest in and to said lease and the premises therein described to George S. Silva and Frank M. Tosta, defendants above named, on or about the 3d day of January, 1921; that plaintiff had no knowledge of said assignment until a few days prior to the time of filing this complaint; that pursuant to said assignment the said George S. Silva and Frank M. Tosta went into the actual possession of said premises, and ever since said 3d day of January, 1921, have been and now are in possession of said premises."

The complaint contains other allegations appropriate to an action of unlawful detainer, and a copy of the lease is attached thereto. By the terms of the instrument, which is dated June 19, 1918, plaintiff leased the lands to defendants Joe D. Cotta, Frank Deniz, Luiz Deniz, and Luiz C. Amaro for a term of five years, with the option of an extension of five years additional. Among other terms the lease provided:

"If default shall be made in any of the covenants herein contained, that it shall be lawful for the said party of the first part to re-enter the said premises, and remove all persons therefrom. And the said parties of the second part do hereby covenant, promise, and agree * * * not to let or underlet the whole or any part of the said premises nor assign this lease, voluntarily or involuntarily, without the written consent of the said party of the first part."

The answers of the defendants deny that "Joe D. Cotta, Luiz Deniz, Frank Deniz, and Luiz C. Amaro did assign all or any" of their right, title, or interest in or to the lease or the premises therein described. The court found in accordance with such denials, and further that:

"Joe D. Cotta, Luiz Deniz, Frank Deniz, and Luiz C. Amaro did not at any time jointly assign or transfer their interest in and to said lease and the premises therein described to George S. Silva and Frank M. Tosta, or either of them."

The finding that the lessees did not "jointly assign" the lease suggests the only controversy on this appeal. The trial court said, in effect, that if the lessees all made individual assignments of their respective interests under the lease, without any understanding among them that they should do so, such acts would not work a forfeiture of the lease, "even though, in spirit, it is absolutely brok-

en; that won't do, it has got to be in the letter absolutely."

[1] The plaintiff endeavored to prove the facts upon which he relied, but the court required him first to state what he expected to prove, and, based upon such statement, objections were sustained to practically all of the evidence offered. In consequence of such procedure, the record on appeal does not enable this court to dispose of the case on its merits, but it must be assumed that plaintiff would have been able to prove all the facts embraced in his statement. In obedience to the requirement of the court, counsel for plaintiff proposed to prove that, about three years prior to the trial, Luiz Amara assigned his interest in the lease to Joe D. Cotta, and Luiz Deniz assigned his interest therein to Frank Deniz, the assignees going into possession; that on the 3d of January, 1921, Joe D. Cotta assigned his interest to George S. Silva, and on the 3d day of February, 1921, Frank Deniz assigned his interest to Frank M. Tosta, and that Tosta and Silva went into possession under the assignments; "that the said Cotta and said Frank Deniz, at the time of the transfer of their interest in said lease to said Silva and said Tosta, arranged and conspired with said Silva and said Tosta to arrange the payment of the rent, the management of the dairy, in such a way that the said De Angeles, the plaintiff herein, would not know that any assignment had been made by said Cotta and said Frank Deniz to said Silva and said Tosta; that the dairy on said ranch was conducted by said Silva and said Tosta as partners."

[2, 3] The trial court based its interpretation of the law upon the case of *Randol v. Scott*, 110 Cal. 590, 42 Pac. 976, where it was held that a covenant by two lessees not to assign the lease was not broken by the assignment by one of them of his undivided half interest therein to his assignee in insolvency. The court said that the lessees were tenants in common of the land, and that—

"neither could, therefore, dispose of the interest of the other; nor could either prevent the other from disposing of his interest. * * * When, therefore, under these circumstances, it was covenanted merely that the 'lessees' should not assign 'the lease'—the lease, as an entirety—the meaning of the parties is presumed to be that the lease should not be assigned in the only way in which it could have been assigned, namely, by the joint act of the lessees. * * * The covenant does not provide that the lease should be forfeited upon the assignment by one of the tenants in common of his interest."

Respondent attaches too great importance to the word "joint" as used in the foregoing quotation. The language used cannot be understood to mean that the two lessees could assign their lease only by joining in the execution of a single instrument of transfer,

or by executing separate instruments pursuant to an understanding between them that they would do so, because, manifestly, the lease could be assigned by the execution of independent transfers by the lessees, each even being in ignorance of the act of the other. In *Spangler v. Spangler*, 11 Cal. App. 321, 104 Pac. 995, it was held that an assignment by one of two lessees to the other is not a breach of the covenant against assignment. No case has been cited or discovered, however, holding that separate assignments by the lessees of the respective interests of all of them do not constitute a breach of a covenant not to assign. In other jurisdictions it has been held that an assignment by one lessee to another is such a breach. *Tober v. Collins*, 130 Ill. App. 333; *Saxeney v. Panis*, 239 Mass. 207, 131 N. E. 331; *Miller v. Pond*, 214 Mich. 186, 183 N. W. 24, 17 A. L. R. 179, and note; *Loveless v. Fitzgerald*, 42 Can. Sup. Ct. 254, 16 Ann. Cas. 316, 2 B. R. C. 809, and notes. In *Tober v. Collins* it is said:

"To the extent of the interest transferred it is obvious that the lease is assigned. To hold otherwise would often defeat the purpose of covenants against assignments without consent. By the assignment of individual interests at different times to different persons, an entirely different tenant, or set of tenants, could be readily substituted for the original tenant or tenants without the consent of the lessor, thus thrusting upon him undesirable or objectionable tenants, notwithstanding he has, by the covenants of the lease, guarded against such contingency."

"Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.'" *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379, 387, 8 Sup. Ct. 1308, 1309, 32 L. Ed. 246, 248.

Owners of property are justly solicitous as to the character of its occupants and restrictions upon the right of a lessee to substitute another tenant without the lessor's consent are reasonable covenants which ought to be rationally construed.

"A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Civ. Code, § 1442.

This does not mean that courts must resort to scholastic subtleties to save tenants from the consequences of their deliberate breach of their covenants.

"It has been said * * * that covenants against assignment or underletting are not favorably regarded by the courts and are liberally construed in favor of the lessees. But this means only that the scope of the term 'assignment' will not be enlarged by the courts, and that the covenant will not be considered as violated by any technical transfer that is not

fairly and substantially an assignment." *White v. Huber Drug Co.*, 190 Mich. 212, 157 N. W. 60.

"This does not mean that the courts may make for the parties a different contract from what they have agreed upon or resort to a strained and unnatural construction to defeat or nullify their clearly expressed purpose or intention." *Troughton v. Eakle* (Cal. App.) 208 Pac. 161, 165.

Two of the lessees acquired the interests of the others, and then, by separate assignments, conveyed the entire leasehold to persons who were strangers to the original lease. After Joe D. Cotta and Frank Deniz had acquired the entire interest in the lease, they continued to be bound by the covenant not to assign as the four lessees were in the beginning. The covenant not to assign was joint and several.

"Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several." Civ. Code, § 1659.

"In the absence of evidence showing a contrary intention, the presumption stated in said section 1659 must control." *Gummer v. Mairs*, 140 Cal. 535, 537, 74 Pac. 26, 27; *Los Angeles County v. Luscher* (Cal. App.) 209 Pac. 899.

When all the lessees, in violation of their joint and several promise, had thrust upon the lessor new tenants without his consent, it is not perceived on what principle of justice he can be compelled to accept them as tenants. The covenant against assignment was deliberately broken in the most literal and substantial manner. The assignees, of course, were chargeable with notice of the stipulation against assignment. *Tiffany on Landlord and Tenant*.

The judgment is reversed.

We concur: BURNETT, J.; JONES, Justice pro tem.

(62 Cal. App. 758)

PEOPLE v. GRAHAM. (Cr. 966.)

(District Court of Appeal, Second District, Division 2, California. July 3, 1923.)

1. Criminal law § 747—Conflicts in evidence settled by jury.

Whatever discrepancies or conflicts existed in the testimony of witnesses were for the jury's determination, in passing on the weight of the evidence and credibility of witnesses.

2. Homicide § 244(1)—Evidence held sufficient to negative plea of self-defense.

Evidence showing malicious intent of defendant and the tendency of deceased to withdraw after the first chance meeting held to negative the plea of self-defense, though both defendant and deceased at the second and fatal meeting used violence.

3. Homicide § 112(4)—Deceased, attempting assault with weapon while on highway, held not so to interfere with defendant's use of highway as to justify his arming himself.

The act of deceased, when unexpectedly met by his enemy and requested "to fight the thing out," in getting a weapon from his buggy to defend himself, thus causing defendant to flee, did not justify defendant's arming himself and returning, on the ground that his right to use the public highway had been interfered with; the happening of the controversy there being a mere coincidence.

4. Homicide § 112(5)—Self-defense plea not available to one creating necessity to defend self.

Self-defense is not available to one who sought a quarrel with a design to force a deadly issue, and thus, through his own fraud, contrivance, or fault, to create a real or apparent necessity for killing.

5. Homicide § 120—Self-defense plea in pursuit and killing depends on good faith and sole object of winning safety and preserving life.

To justify pursuit and killing, such pursuit must not be in revenge, nor after the necessity for defense has ceased, but must be prosecuted in good faith, to the sole end of winning his safety and securing his life.

6. Criminal law § 834(3)—Requested instruction justifying defendant in arming against "fresh assaults" was properly qualified to "unprovoked fresh assaults."

A requested instruction that, if defendant, after being assaulted by deceased, had reasonable cause to fear "fresh assaults," he had a right to arm himself, was properly qualified to "unprovoked fresh assaults"; the question of provocation being vital to the case.

7. Criminal law § 1178—Requested instructions, erroneously refused, must be supported by authority and argument on appeal.

Errors in rulings on requested instructions, specified in briefs, but without citations of authority or arguments to sustain them, will not be noticed.

8. Criminal law § 829(5, 9, 18)—Requested instructions, covered by those given, are properly refused.

Where the court fully and correctly instructed the jury on the law of self-defense, burden of proof, and the doctrine of reasonable doubt, requested instructions on these issues were properly refused.

9. Criminal law § 829(2), 834(2)—Defendant entitled to have substance of proper requested instructions given, not own phraseology.

When the substance of a refused instruction is given, defendant is not entitled to a repetition of the same matter, or the adoption by the court of his own phraseology.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Paul Graham was convicted of murder in the second degree, his motion for a new trial was denied, and he appeals. Affirmed.

D. E. Perkins, of Visalia, Karl A. Mache-tanz, of Exeter, Patterson D. Nowell, of Tulare, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

SHENK, Justice pro tem. Appellant was convicted of murder in the second degree, and appeals from the judgment and from the order denying his motion for a new trial.

The deceased, E. W. Mort, died from a gunshot wound inflicted by the defendant on the 21st day of August, 1922. There is no dispute as to this fact, but it is contended that the killing was necessary to the self-defense of the defendant under the circumstances shown in evidence. The deceased lived near the town of Earlimart, in Tulare county. Ill feeling had existed between him and the defendant for some time. In August, 1921, the deceased had occasion to approach a hay-baling outfit operating about two miles from Alpaugh for the purpose of inquiring if the hay then in process of baling was for sale. The defendant was working on the baler, and when he noticed the presence of the deceased he berated him for having accused him at some prior time of stealing hogs. A physical encounter ensued, in which the deceased was thrown to the ground and severely beaten by the defendant. Defendant was undoubtedly a more powerful man than the deceased, and as an indication of his disposition it was in evidence that when he had thrown the deceased to the ground he struck and kicked him, and when told by a fellow workman that "he had whipped him enough" and to let him up the defendant replied: "You fellows go back out of this; this is my fight." The existing enmity affords a background in viewing the actions of the parties a year later.

Defendant was in the town of Earlimart on the afternoon of the day of the killing, and was heard to say that he was waiting for a man to come to town in a few minutes; that he was looking for him, did not want to miss him, and that then "he guessed he would get him." About 16 witnesses who observed the affray testified at the trial. One witness for the prosecution testified that about a quarter of 6 he saw the deceased drive up in his automobile and stop in front of Vaughan's store, which was a combination general store and post office; that the deceased alighted from his car, walked around the front end of the car to the sidewalk, and started for the store door, where he met the defendant face to face; that defendant then said to the deceased, "Come down in the street and we'll settle this;" that Mort said, "All right," turned around, and reached into his car for a club or billy; that when the defendant saw that the deceased had a weapon in his hand he ran down the street and turned the corner; that Mort followed him for a short distance, then turned

back to a place near the front of the store, and put the club in his hip pocket; that he saw the defendant approach his own car, yelling and making motions with his hands; that he saw him take a 30-30 rifle from his car and go toward the Vaughan store; that the deceased had entered the store, and was about two-thirds of the way back, talking to the clerk; that the defendant proceeded to a position in front of the store, where he called the deceased many opprobrious names and told him to come outside and he would fix him; that deceased remained in the store until the defendant repeated his command, and then went outside; that a bystander importuned the defendant to desist, saying, "Put that gun up, you are too good a man to do anything like this;" whereat the defendant said to the bystander, "You get out of the way or I will poke you, too," and cursed him; that defendant then addressed Mort, saying, "You ——— liar, you know I never stole those hogs;" that Mort replied, "You know you stole those hogs;" that the defendant then said, "If you say I stole those hogs, you are a ——— liar," and repeated the epithet with variations, at the same time pointing the rifle directly at the deceased, with less than a foot intervening between the muzzle of the rifle and Mort's body; that Mort seized the muzzle of the gun with his left hand, shoved it to one side, reached into his right hip pocket for his billy, and struck the defendant three or four blows; that the defendant received most of the blows on his left arm, which was upraised for protection, but received one blow on the head; that the defendant then jerked the gun away from the deceased's grasp, staggered back a few steps to catch his balance, and fired; that the deceased whirled around, fell to the ground, and said, "He got me, boys, he got me;" to which the defendant replied, "You are ——— right, I got you," turned around, and walked away.

The bullet pierced the chest of the deceased, shattering the fifth rib, and carrying a portion of the rib into the lung cavity. He died about an hour later. It was in evidence that defendant put the rifle in his car, went to a near-by gas filling station, and engaged in conversation with a man to whom he said "I just shot him down there." When asked why he had done so, he replied, "He hit me over the head with a club; I have got self-defense."

Another witness testified that he saw the defendant take the rifle from his car, that he was about 10 feet from the defendant when he saw this, and that as the defendant reached into his car for the gun he said, "I'll get him;" that shortly thereafter he heard the shot. A clerk in Vaughan's store testified that it was the custom of the deceased to stop at the store in the evening to get his mail and the groceries he had or-

dered in the morning, and that he came to the store for that purpose about a quarter of 6 on the evening of the tragedy.

Another witness testified that, when the defendant took the gun from his car, he saw him make motions as if he were loading it; that the defendant walked toward the front of Vaughan's store and called out, "Come out now, you ———, I will fight you;" that the defendant pointed the rifle directly toward Mort's stomach; that Mort grabbed the rifle barrel, pushed it aside, and began beating the defendant with a billy; that the defendant jerked the gun loose from Mort's grasp and fell backward on his buttock; that Mort lost his grasp on the gun he appeared to be frightened, ran backward toward him (the witness), and seemed to be looking for something to get behind for protection; that the deceased was between 10 and 15 feet from the end of the rifle when it was fired.

[1] There were slight discrepancies in the testimony of the several witnesses, but it may be said that they were no more pronounced than is usual in the description of the same exciting scene by different eye-witnesses. There was, however, a direct conflict in the evidence as to whether the defendant or the deceased spoke first after the deceased came out of Vaughan's store. Some witnesses stated that the defendant spoke first, calling the deceased vulgar names; others testified that the deceased spoke first, accusing the defendant of stealing hogs. Whatever discrepancies or conflicts existed were for the determination of the jury in passing upon the weight of the evidence and the credibility of the witnesses. *People v. Musumeci*, 51 Cal. 2d 454, 197 Pac. 129.

[2] From the evidence adduced the jury was justified in finding that on the day of the homicide the defendant arrived in the town before the deceased, and with malice and revenge in his heart was waiting for him to appear; that so far as the deceased was concerned the meeting of the two in Earlmart on that day was a chance meeting; that after the first quarrel the deceased abandoned further controversy, and went into the store attending to his own business; that thereafter the defendant obtained his rifle with the intent to employ deadly means, if the occasion were presented; that the deceased engaged in further controversy only after a challenge to fight had been twice repeated by the defendant in a belligerent and boisterous manner; that before the shot was fired the deceased, being without firearms, realized his unequal and perilous situation, and endeavored to seek protection by retreat; and that at the fatal moment the deceased was in no position to inflict upon the defendant death or great bodily harm. From these facts it was proper to conclude

that the defendant was the aggressor, and that the taking of life under the circumstances was not necessary to the self-defense of the defendant. No other conclusions are reasonably deducible from the evidence.

[3] It is contended that "the right of the defendant to walk the streets had been violated," and that, "acting under the sting of his humiliation, his first thought was probably to vindicate that right, and to arm himself for that purpose." The case of *People v. Batchelder*, 27 Cal. 70, 85 Am. Dec. 231, is strongly relied upon as a precedent in justification of defendant's conduct. In that case it appeared that the Farallone Egg Company was engaged in gathering and marketing the eggs deposited by wild birds on one of the Farallone Islands in the Pacific Ocean. The defendant endeavored to land on the island, ostensibly for the same purpose. He was met with armed resistance on the part of guards stationed by the company at the landing; he departed, but returned shortly thereafter, with companions fully armed, and sought a landing. He was first fired upon by the company's guards, and in the return fire by the defendant, or by one of his companions, the deceased was killed, and the homicide was held to be justifiable. It appeared that the island was a part of the public domain. It was declared that the defendant had the right, in common with the deceased and all others, to go upon the island to accomplish his lawful purpose, just as one would have the right to roam the mountains in the public domain for the purpose of hunting and fishing, and to do so unmolested and unhindered by others having an equal, but no greater, right. The equal right of all to go upon public property was involved in that case, and it was held in effect that, when the defendant had been fired upon, he could, under the circumstances shown, meet that force with like force in order to protect his life.

[4] In this case there was no showing to justify the conclusion that the deceased was interfering in any way with the use by the defendant of the public highway. The fact that the controversy took place on a public street was merely a coincidence. The situation of the parties would have been the same if the affair had taken place on the gas station grounds or on other private property. The case of *People v. Hecker*, 109 Cal. 457, 42 Pac. 307, 30 L. R. A. 403, is also relied upon as embodying the rules in justification of defendant's course of action. That case contains a general discussion of the law of self-defense, both as to what the defendant may do to warrant the taking of life and as to what he may not do in a contest with an adversary. It is declared that the acts which a defendant may do, and justify under the plea of self-defense, depend primarily upon his own conduct, and secondarily upon the conduct of the deceased. The

first rule laid down in that case may well apply to the facts presented to the jury in this case. That rule was embodied in one of the instructions of the court in this case and is stated as follows:

"Self-defense is not available as a plea to a defendant, who was sought a quarrel with a design to force a deadly issue, and thus through his own fraud, contrivance, or fault to create a real or apparent necessity for killing."

[5] The right of pursuit after the first quarrel, as contended for by the defendant, was not available to him under the facts shown. That right is subject to the limitation also stated in the Hecker Case in the following language:

"But the pursuit must not be in revenge, nor after the necessity for the defense has ceased, but must be prosecuted in good faith, to the sole end of winning his safety and securing his life."

[6] The following instruction was offered by the defendant and refused by the court:

"You are instructed that if, from the testimony, you find that E. W. Mort had made threats against the defendant, and these threats were communicated to the defendant, thereby placing him under constant fear of bodily harm, as a result of these threats he considered his life in danger when he met the said Mort, and if you further find from the evidence that the defendant was in lawful pursuit of business or pleasure in the town of Earlimart on the 21st day of August, 1922, and while in such pursuit he was accosted by said Mort who was armed with a deadly weapon, and driven from his ground, then under the law the defendant had a right to immediately arm himself for the purpose of self-protection against any fresh assaults with a deadly weapon from said E. W. Mort."

The refusal to give this instruction is assigned as error. Counsel states that this instruction goes to "the very heart of the defendant's case." The term "fresh assaults," employed in the instruction, would include a provoked as well as an unprovoked fresh assault. The question of provocation was involved in this case, and without some qualification the instruction fell short of stating the full right and duty of the defendant under the circumstances. This qualification was incorporated in an instruction also requested by the defendant and given as follows:

"The defendant claims that he shot in his own self-defense and to repel an unprovoked assault, which the deceased was making upon him. The right of self-defense, that is, the right of one attacked or assaulted by another, to repel such an assault and fully protect himself, is founded on the laws of nature. This right is expressly recognized by the laws of our own state."

The court further instructed the jury as follows:

"One who has received information of threats against his life or person made by another, is justified in acting more quickly and taking harsher measures for his own protection in the event of assault either actual or threatened, than would be a person who had not received such threats; and if in this case you believe from the evidence that the deceased made threats against the defendant, and that the defendant because of such threats made previously to the transaction complained of, and communicated to the defendant, had reasonable cause to fear greater peril in the event of an altercation with the deceased than he would have otherwise, you are to take such facts and circumstances into your consideration in determining whether the defendant acted in a manner in which a reasonable man would act in protecting his own life or bodily safety."

The instructions thus given sufficiently covered the subject.

[7] It is next contended that the court erred in refusing six different instructions tendered by the defendant, also relating to the law of self-defense, and two instructions on the question of reasonable doubt. No argument or citation of authority is presented in support of these contentions, and no further notice need be taken of them. *Gray v. Walker*, 157 Cal. 381, 108 Pac. 278, and cases cited.

[8] The refusal to give the following instruction is assigned as error:

"You are instructed that no mere words of accusation and insult, however profane or severe, justify an assault under the law. Therefore Mort was not justified by any words spoken by Graham to him or regarding him in assaulting Graham."

The court instructed the jury on this subject as follows:

"Mere words of insult or of reproach, however grievous, will not justify an assault, a blow, or a threatening demonstration with a deadly weapon."

The refusal to give the following instructions, relating, as counsel states, to the law of reasonable doubt as applied particularly to the plea of self-defense, is assigned as error:

"You are instructed that, when a person charged with murder sets up self-defense as a defense to the charge, the law does not require that he prove self-defense beyond all reasonable doubt, and to a moral certainty; but, if it appears from all the testimony that there is a doubt that the defendant acted in self-defense, then I instruct you that such doubt should be construed in favor of the defendant and that, you should by your verdict acquit the defendant."

"You are instructed that the defendant has interposed the plea of self-defense as a defense to the charge of murder in the information filed against him, and if after a consideration of

all the testimony in the case there is a reasonable doubt in your minds whether the defendant was justified in acting in self-defense under the immediate circumstances surrounding the shooting, then I charge you that under your oaths you are bound to give the defendant the benefit of such doubt, and by your verdict acquit him."

"You are instructed that the burden is on the prosecution to establish the guilt of the defendant by proof beyond every reasonable doubt and to a moral certainty. This rule applies to the whole and every material part of the case, and unless every fact essential to conviction, whether it is as to the act of killing, or the reason for or manner of its commission, shall be proved beyond every reasonable doubt, you must acquit the defendant. If, after considering the whole case and all the evidence, any one of your number shall entertain a reasonable doubt whether the homicide is excusable or justifiable, or whether the defendant acted in lawful self-defense, then it is the duty of such juror so entertaining such reasonable doubt to vote to acquit the defendant."

Counsel states that these instructions are founded upon the principles announced in *People v. Bushton*, 80 Cal. 160, 22 Pac. 127, 549, and *People v. Roe* (Cal. Sup.) 209 Pac. 560. Those cases affirm the rule that the burden of proving circumstances of mitigation, or that justify or excuse the commission of a homicide, does not mean that the defendant must prove such circumstances by a preponderance of the evidence, but that he is only required to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt as to the offense charged. It is not suggested that the court transgressed this rule in the instructions given. On the contrary, it was expressly recognized and applied in the following instruction which was given:

"When, upon a trial for murder, the commission of the homicide by the defendant has been proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justified or excusable. It is not necessary that the defendant prove circumstances of justification, mitigation, or excuse by a preponderance of the evidence, it is only necessary that from the whole case, from all the evidence submitted, either by the prosecution or the defense, that there exists in the minds of the jury a reasonable doubt as to whether or not the defendant was justified or excusable in the killing, and if after consideration of all the evidence in the case such reasonable doubt exists in the minds of the jury then they should acquit the defendant."

An examination of the record discloses that the court very fully and correctly instructed the jury on the law of self-defense, burden

of proof, and on the doctrine of reasonable doubt in substance and effect as outlined in the refused instructions, as well as on all other questions of law involved in the case.

[9] When the substance of the refused instruction was given, the defendant was not entitled to a repetition of the same matter, or to the adoption by the court of his own phraseology. *People v. Feld*, 149 Cal. 464; 86 Pac. 1100; *People v. MacPhee*, 26 Cal. App. 218, 146 Pac. 522, 8 Cal. Jur., sec. 366.

The evidence was sufficient to support the verdict, and, no error appearing, the judgment and order are affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

191 Cal. 591

In re WATKINSON'S ESTATE. (S. F. 9937.)

(Supreme Court of California. Aug. 15, 1923.)

1. Taxation ◊895(7)—State inheritance tax law construed as language imports—to prohibit deduction of federal tax paid in valuing estate subject to tax.

Inheritance Tax Act 1917, § 2, subd. 10, providing that, "in determining the market value of the property transferred, no deduction shall be made for any inheritance tax or estate tax paid to the government of the United States," means what its language apparently imports—prohibition of any deduction of the federal tax in valuing an estate subject to the state tax.

2. Constitutional law ◊283—State inheritance tax law held not to violate due process clause; "property tax."

The provision in Inheritance Tax Act 1917, § 2, subd. 10, against deduction of federal taxes paid in valuing the estate subject to the state tax, does not violate the due process clause in Const. U. S. Amend. 14, since the inheritance tax is not a "property tax," but a tax on the statutory privilege of testamentary transfer or succession, subject to limitations on by the state as it deems proper in the way of burdens on its exercise, and the devisee or legatee of an estate affected does not become entitled to his portion of the estate until it has already been burdened with its inheritance tax.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property Tax.]

3. Taxation ◊859(1)—Inheritance tax law as to deduction of federal tax in valuing estate held not to violate Constitution as to taxing property in proportion to value.

Inheritance Tax Act 1917, § 2, subd. 10, against deduction of federal taxes paid in valuing an estate subject to the state tax, does not violate Const. art. 13, § 1, requiring property to be taxed in proportion to its value, since the inheritance tax is not a property tax, but a tax on the statutory privilege of testamentary transfer or succession, subject to limitation by the state as it deems proper in the way of burdens on its exercise.

4. Eminent domain ◊2(11)—Inheritance tax law, providing for deduction of federal tax paid in valuing estate, held not to take property for public use without compensation; "taking of property."

The provision in Inheritance Tax Act 1917, § 2, subd. 10 against deduction of federal taxes

paid in valuing the estate subject to the state tax, does not violate Const. art. 1, § 14, forbidding taking of property for public use without just compensation, since the inheritance tax is not a property tax, but a tax on the statutory privilege of testamentary transfer or succession, subject to limitation by the state as it deems proper in the way of burdens on its exercise.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Taking.]

5. Statutes ⚡71—Inheritance tax law provision held not to violate Constitution as to uniformity of operation of general laws.

The provision in Inheritance Tax Act 1917, § 2, subd. 10, against deduction of federal taxes paid in valuing the estate subject to the state tax, is not void as violative of Const. art. 1, § 11, providing that all laws of a general nature shall have uniform operation.

6. Statutes ⚡82—Inheritance tax law held not void as local or special law changing law of descent or succession.

The provision in Inheritance Tax Act 1917, § 2, subd. 10, against deduction of federal taxes paid in valuing the estate subject to the state tax, is not void as violative of Const. art. 4, § 25, subd. 30, forbidding local or special laws changing the law of descent or succession.

7. Taxation ⚡5—Inheritance tax law provision for deducting federal tax paid in valuing estate held not to violate Constitution as to exempting United States property.

The provision in Inheritance Tax Act 1917, § 2, subd. 10, against deduction of federal taxes paid in valuing the estate subject to the state tax, does not burden the portion of the estate already appropriated by the federal government in the form of its inheritance tax, nor does it lessen the amount thereof, and it increases the burden solely on those whose interest has already been charged with the federal tax by forbidding deduction on account thereof, and therefore it does not constitute an attempt to subject United States property to taxation, and does not violate Const. art. 13, § 1, exempting such property from state taxation.

8. Taxation ⚡859(2)—Inheritance tax act held not discriminatory and void in forbidding the deduction of federal tax paid in determining value of property transferred.

Inheritance Tax Act, § 2, subd. 10, providing that, in determining the market value of the property transferred, no deduction shall be made for an inheritance tax or estate tax paid federal government, operates uniformly, since it applies to all residuary legatees, and any disparity between net amounts received by different legatees by reason thereof must be deemed to be chargeable to the testator, rather than to the law, which he is deemed to know, and therefore, when, in making his will, he names one as a specific legatee and another as a residuary legatee, he must be deemed to have intended that the latter should be charged with the federal tax paid, and hence the act is not discriminatory and void as requiring residuary

legatees to pay a larger tax than other legatees in the same degree of relationship.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Henrietta Pierce Watkinson, deceased. From an order of the superior court confirming the report of the inheritance tax appraiser in accordance with the contention of Ray L. Riley, State Controller, Lucy Ward Stebbins and Frank J. Hurley, executrix and executor, appeal. Affirmed.

Edward C. Harrison, Maurice E. Harrison, and Harrison & Harrison, all of San Francisco, for appellants.

Heller, Ehrman, White & McAuliffe, Joseph G. De Forest, Wm. M. Madden, Lloyd M. Robbins, Luther Elkins, and Carey Van Fleet, all of San Francisco, amici curiæ, for appellants.

Ralph W. Smith, of Sacramento, H. C. Lucas, of San Francisco (A. C. Stanton, of Sacramento, and A. W. Brouillet, of San Francisco, of counsel), for respondent.

PER CURIAM. A rehearing was granted in this matter in order that the appellants and the several amici curiæ might give the court the benefit of oral argument upon the points urged in their respective petitions for rehearing. Upon such argument and submission of the cause the court adheres to its former conclusions as expressed in the opinion of Mr. Justice Richards pro tem., which opinion, with the insertion of certain more recently cited authorities, reads as follows:

"This appeal is from an order of the superior court confirming the report of the inheritance tax appraiser with relation to the state inheritance tax to be fixed and paid from said estate. Under the provisions of the United States Revenue Act of 1918, the executors of the estate were required to pay, and did pay, to the federal government, as and for the federal inheritance tax upon said estate, the sum of \$128,730.08. The state inheritance tax appraiser in thereafter making his appraisal and report upon said estate refused and failed to deduct any part of this payment in arriving at the value of the estate subject to the state inheritance tax. The report thereon, as to the state tax due, was consequently \$26,205.75 greater in amount than such tax would have aggregated had such deduction been made. The court, over the objection of the executors, confirmed said report as to this particular portion thereof, and from its order so made and entered this appeal has been taken.

[1] "The statutory authority upon which the inheritance tax appraiser relied in making his report to the effect above stated is to be found in subdivision 10 of section 2 of the Inheritance Tax Act of 1917 (Stats. 1917, p. 883), which provides as follows: 'In determining the mar-

ket value of the property transferred, no deduction shall be made for any inheritance tax or estate tax paid to the government of the United States.' With respect to the interpretation to be placed upon this apparently plain and simple direction of the statute touching the subject with which it deals, the appellant herein, and also the various amici curiæ who have presented briefs and arguments herein, make two main contentions. First, that the foregoing provision of the statute, when read in the light of legislative intent and purpose in the enactment of the inheritance tax act of 1917, read as a whole, is not to be given the meaning and effect which its language apparently imports. Second, that, if it is to be given such meaning and intent, it is for various reasons unconstitutional and void. As lending support to the first of these contentions, both the appellant and several amici curiæ strongly rely upon certain language used by this court in the matter of the Estate of Kennedy, 157 Cal. 517, 108 Pac. 280, 29 L. R. A. (N. S.) 428, in dealing with deductions to be made prior to the inheritance tax appraisal under the provisions of the inheritance tax act in force at the time of the death of the decedent, the language of this court thus relied on reading as follows: 'The provisions of our tax act clearly show that the tax imposed thereby is one solely upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir. It would appear to be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee, or legatee to certain property of the decedent, where the very property to which he is so held to succeed is lawfully diverted by the probate court to other purposes and never can be distributed to him.'

The foregoing language of this court was repeated and approved in Estate of Miller, 184 Cal. 674, 195 Pac. 413, 16 A. L. R. 694. It is to be noted, however, that the expression of this court as above set forth was used with reference to the terms and interpretation of the inheritance tax laws of this state as they stood prior to the changes therein worked by the passage of the Inheritance Tax Act of 1917, and particularly of the provision of this later act first hereinabove set forth, and which appears upon its face to have been intended to change the policy of the state with respect to the deduction to be made on account of the federal inheritance taxes imposed or paid prior to the action of the state inheritance tax appraiser and of the court thereon.

"In determining the scope and effect of the inheritance tax laws of this state as finally embodied in the Inheritance Tax Act of 1917, the most recent utterances of this court in interpreting and applying the same are, we think, conclusive upon the first branch of this discussion. In the Matter of the Estate of Charlotte Bowditch, 208 Pac. 282, 23 A. L. R. 735, this court, in defining the theory upon which the state proceeded in the imposition of inheritance taxes, said: 'Of prime importance in all cases concerning the determination of the jurisdiction to impose an inheritance tax is the fundamental proposition that a tax of that character is a tax upon the right or privilege of succeeding

to property. "The so-called right of inheritance, and also the right of testamentary disposition, are not inherent rights of the individual, nor are they safeguarded or secured in futuro by any provision of our Constitution. They are both subject to legislative control, and are creatures of legislative will. Consequently the Legislature has the power to take away both rights, and to make the state the successor to all property upon the death of the owner. The right and power to impose a succession tax rests on this principle." Estate of Potter, 188 Cal. 55, 204 Pac. 826. In other words, the tax is imposed and is sustainable upon the theory that a state which confers the privilege of succeeding to property may attach thereto the condition that a portion of the property shall be contributed to that state. In re Wilmerding, 117 Cal. 281, 284, 49 Pac. 181.'

"This declared theory and policy of the state of California with respect to this form of taxation removes from this case the necessity for much of the discussion of the questions involved herein, arising out of the conflicting views of the courts of other jurisdictions, due in part to the fact that in certain of these states there exists no express statutory direction that no deduction shall be made on account of the prior imposition of the federal tax, and due also in some measure to differences in the form and scope of the various statutes under review in these decisions. A very fair and full review and analysis of the laws of several of the leading states and of the most important state and federal cases construing their provisions upon this subject is to be found in the recent case of In re Fish's Estate, 219 Mich. 369, 189 N. W. 177. If, as this court holds in the Estate of Bowditch, supra, 'a state which confers the privilege of succeeding to property may attach thereto the condition that a portion of the property shall be contributed to that state,' it follows necessarily that the state has full power to declare by statute what burdens or incumbrances, which by law or by the act of the decedent had become affixed to the interest of any particular heir, devisee, or legatee, shall or shall not be excluded from the computations of the inheritance tax appraiser in reporting the amount of the inheritance tax to be imposed by the state thereon; and it also follows necessarily from the views above expressed by this court in Estate of Bowditch, supra, and from the last above deduction, that the amendment to the prior inheritance tax measures effected by the statute of 1917, and requiring that no deduction should be made on account of the federal inheritance taxes in determining the market value of the property to be charged with the state inheritance tax, is not inconsistent, with the other or formerly existing provisions of said statute, nor in any wise doubtful as to the interpretation to be given to its plain and simple terms. We find no merit, therefore, in the first contention urged by the appellant and by amici curiæ herein.

[2-6] "The second contention urged by appellant and his associates in the discussion of this appeal is that the provision of the act of 1917 first above quoted herein, if given this interpretation, is for various reasons unconstitutional and void. These reasons, briefly summarized, are that said provision is in violation

of section 1 of the Fourteenth Amendment of the federal Constitution, providing that no state shall deprive any person of life, liberty, or property without due process of law, and is also violative of section 1 of article 13 of the Constitution of California, providing that all property shall be taxed in proportion to its value, and of section 11 of article 1 of the same Constitution, providing that all laws of a general nature shall have a uniform operation, and of subdivision 30 of section 25 of article 4 of the said Constitution, providing that the Legislature shall not pass local or special laws changing the law of descent or succession, and of section 14 of article 1 of said Constitution, providing that property shall not be taken for public use without just compensation, and, finally, that said provision is void as an attempt to tax property of the United States exempt from state taxation under section 1 of article 13 of the state Constitution. The fundamental answer to the most of these constitutional objections is to be found in the proposition above set forth, that an inheritance tax is not a property tax, but is essentially a tax upon the statutory privilege of testamentary transfer or succession, and that the state in extending the privilege may place such limitations upon it as it deems proper in the way of burdens upon its exercise. This court said as much in the Matter of the Estate of Wilmerding, 117 Cal. 281, 284, 49 Pac. 181, 182, in the following words: 'The right of inheritance, including the designation of heirs and the proportions which the several heirs shall receive, as well as the right of testamentary disposition, are entirely matters of statutory enactment, and within the control of the Legislature. As it is only by virtue of the statute that the heir is entitled to receive any of his ancestor's estate, or that the ancestor can divert his estate from the heir, the same authority which confers this privilege may attach to it the condition that a portion of the estate so received shall be contributed to the state, and the portion thus to be contributed is peculiarly with the legislative discretion.'

"In this view of the provision of the statute under consideration it cannot be held violative of the terms of the federal Constitution, since the devisee or legatee of the estate affected by this provision does not become entitled to his portion of the property of the said estate until it has already been burdened with its inheritance tax, and hence by no part of said scheme of taxation can he be held to have been deprived of property without due process of law. U. S. v. Perkins, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287; Matter of Penfold, 216 N. Y. 163, 110 N. E. 497, Ann. Cas. 1916A, 783; Booth's Ex'r v. Commonwealth, 130 Ky. 88, 113 S. W. 61; Maxwell v. Edwards, 89 N. J. Law, 446, 99 Atl. 138; Bankers' Trust Co. v. Blodgett, 96 Conn. 361, 114 Atl. 104. As to the several sections of the state Constitution referred to in the foregoing objections, it must be held that these taxes upon the privilege of testamentary transmission and succession, since they are not property taxes, cannot be held subject to the

limitations placed by the Constitution upon property taxation. In 26 R. C. L. p. 167, this proposition is quite clearly set forth as follows: 'An inheritance tax in any of its customary forms is not a tax on the property of the decedent with respect to which it is levied, but is an excise imposed on the privilege of transmitting or receiving property upon the death of the owner, and consequently is not subject to any of the constitutional limitations upon taxes on property found in the state Constitution'—citing cases. See, also, In re Frick's Estate, 277 Pa. 242, 121 Atl. 35, 39; In re Sanford's Estate, 188 Iowa, 833, 175 N. W. 506; In re Kirkpatrick's Estate, 275 Pa. 271, 119 Atl. 269; New York Trust Co. v. Eisner, 256 U. S. 348, 41 Sup. Ct. 506, 65 L. Ed. 963, 16 A. L. R. 660; Chanler v. Kelsey, 205 U. S. 479, 27 Sup. Ct. 550, 51 L. Ed. 882.

[7] "As to the appellants' final contention that the provision of the statute under review constitutes an attempt to subject United States property to taxation, and is therefore violative of section 1 of article 13 of the state Constitution, exempting such property from state taxation, we find it to be without merit. The provision in question does not attempt to lay any burden upon that portion of the estate of the decedent which the federal government has already appropriated in the form of its inheritance tax, nor does it in any degree lessen said amount, its increase of the burden being laid solely upon those whose interest in the estate has already been charged with such federal tax, by forbidding any deduction on account of such tax. U. S. v. Perkins, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287. The appellants cite no authorities in support of said contention and we are satisfied none exist."

[8] In their petitions and briefs upon rehearing and upon oral argument thereon, appellants and amici curiæ earnestly insisted that the act in question was discriminatory, and therefore void, in that it required residuary legatees to pay a larger inheritance tax in proportion to the value of the estate to which they succeeded than was required of other legatees, even though they be all of the same degree of relationship to the testator. The answer to this contention is two-fold, the first being that the act does have a uniform operation, since it applies alike to all residuary legatees, and the second being that any disparity between the net amounts received by different legatees by reason of the operation of the act must be deemed to be chargeable to the testator rather than to the law. The testator is deemed to know the law, and therefore, when in making his will he names one as a specific legatee and another as a residuary legatee, he must be deemed to have intended thereby that the latter should be charged with the amounts required to be paid for the federal tax.

The order is affirmed.

63 Cal. App. 11

In re MENDES' ESTATE.

MANDES v. MENDES.

(Civ. 4575.)

(District Court of Appeal, First District, Division 2, California. July 9, 1923.)

Homestead § 142(1) — Not continuing after death of husband and remarriage and death of wife.

Where, after filing of homestead declaration on community property, the husband died and the wife remarried and died, *held* that, under Civ. Code, § 1265 (Code Civ. Proc. § 1474), vesting homesteads selected from community property absolutely in the surviving spouse, the homestead became the absolute property of the wife, and on her death passed free from its homestead character to her heirs at law, and the court did not err in setting it apart under Code Civ. Proc. § 1465, as a homestead to the surviving stepfather and children, as against the claim of the guardian of the children that the homestead should have been set aside to them exclusively.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

In the matter of the estate of Maria Mendes, also known as Maria Carolino Sequeria, deceased. From an order of the superior court granting the petition of A. R. Mendes, as surviving husband and administrator, to set aside a homestead, Felip Mandes, guardian of the minor children, appeals. Affirmed.

b. Wood, of Oakland, for appellant.

Lou Jonsalves, of Oakland, for respondent.

LANGDON, P. J. This is an appeal by the guardian of the persons and estates of Albert B. Sequeria and Louis B. Sequeria, minor children of the above-named decedent, from an order of the probate court setting aside a homestead in certain real property in the city of Oakland, Cal., for the use and benefit of the surviving husband of deceased and said minors. This order was made pursuant to the provisions of section 1465, Code of Civil Procedure.

By stipulation the decree setting apart the homestead comprises the record upon appeal. It recites the filing of a petition by the guardian of said minors to have the property involved here set aside to them as a homestead and a petition by A. R. Mendes, surviving husband of deceased and administrator of her estate, to have the same property set apart to him and to said minors, jointly as a homestead. In said decree the court finds the facts to be: That the real property sought to be set aside as a homestead was formerly the community property of M. B. Sequeria, who, up to the time of his death on the 17th day of March, 1917, was the husband of

Maria Mendes, since deceased, and the father of the said minors; that at the time of the death of M. B. Sequeria said real property was impressed with a homestead theretofore duly declared, acknowledged, and recorded while said property was community property as aforesaid; that after the death of said M. B. Sequeria his widow intermarried with said A. R. Mendes, and she died on the 20th day of October, 1918, being still the wife of said Mendes; that, after the death of said M. B. Sequeria, Maria Mendes did not convey, incumber, nor homestead the said real property in any manner; that the estate of said M. B. Sequeria is now and ever since shortly after his death has been in course of probate, but no proceedings looking to the setting apart of said property as a homestead in the matter of his estate have been instituted, except a petition filed by said guardian to have said property set apart to said minors, which petition was denied. The decree then recites the facts of minority of the wards, appointment of the guardian, filing of inventory, and appraisement in the matter of the estate of Maria Mendes, deceased.

Upon these facts the court decreed that the property be set apart until the 1st day of January, 1923, to A. R. Mendes, Albert B. Sequeria, and Louis B. Sequeria, jointly; thereafter, until said Albert B. Sequeria shall attain the age of 21 years, to said Albert E. Sequeria and Louis B. Sequeria jointly, and thereafter to said Louis B. Sequeria until he shall have attained the age of 21 years.

Appellant contends that the court erred in not setting the property aside to the minors exclusively. The only question involved in the appeal is as to whether or not the fee-simple title to community property, impressed with a homestead during the existence of the community, vests in the surviving spouse free from all rights of heirs at law of the deceased spouse. Section 1265 of the Civil Code provides:

"If the selection [of a homestead] was made by a married person from the community property * * * the land so selected, on the death of either of the spouses, vests in the survivor. * * *"

Section 1474 of the Code of Civil Procedure provides:

"If the homestead selected by the husband and wife, or either of them, during their coverture * * * was selected from the community property * * * it vests, on the death of the husband or wife, absolutely in the survivor. * * *"

Under these sections it seems clear that upon the death of M. B. Sequeria the title to the homestead community property vested in his surviving wife, and upon her death vested in her heirs at law, subject to debts and expenses of administration, etc., and subject

to the right of the court to set it apart as a homestead under section 1465, Code of Civil Procedure, which right has been exercised in the decree from which this appeal is taken. If authority is required to interpret the clear provisions of the Code upon the question involved here, it is to be found in the recent case of *Estate of Wrenn* (Cal. App.) 215 Pac. 909. That case is directly in point, and decides that, where property is impressed with a homestead during the existence of the community, the title becomes vested absolutely in the surviving spouse, merely retaining some characteristics of a homestead in being exempt from execution, etc.

The order appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

63 Cal. App. 14

In re SEQUERIA'S ESTATE.

MANDES v. MENDES.

(Civ. 4576.)

(District Court of Appeal, First District, Division 2, California. July 9, 1923.)

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

In the matter of the estate of M. B. Sequeria, also known as Manuel Bas Sequeria, deceased. Petition of Felip Mandes, as guardian of two minor heirs, to set apart a homestead, opposed by A. R. Mendes, individually and as administrator of the estate of Maria Mendes, deceased. From an order denying the petition, the guardian appeals. Affirmed.

Fry & Wood, of Oakland, for appellant.
Louis Gonsalves, of Oakland, for respondent.

LANGDON, P. J. This appeal is by the guardian of the persons and the estates of Albert B. Sequeria and Louis B. Sequeria, minors, from an order denying his petition to have certain real property set apart to said minors as and for a homestead. By stipulation of the parties the matter is submitted to us upon the record before this court in the Matter of the Estate of Maria Mendes, also Known as Maria Carolino Sequeria, Deceased (No. 4575 of the records of this court) 217 Pac. 1077. The decision of this court in the last-mentioned appeal is controlling here. The same property is involved in both matters, and it was decided in the Matter of the Estate of Maria Mendes, supra, in an opinion filed this day, that the title to the property in controversy, which had been homesteaded during the period of marriage between Manuel Bas Sequeria and Maria Carolino Sequeria (Maria Mendes), vested in the survivor, Maria Carolino Sequeria (Maria Mendes), upon the death of her husband. It follows that the court had no power in this proceeding to set apart said property to the minor children of Manuel Bas Sequeria.

The order appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

62 Cal. App. 702

GOODMAN et al. v. ANGLO-CALIFORNIA TRUST CO. et al. (Civ. 4349.)

(District Court of Appeal, First District, Division 2, California. June 28, 1923.)

1. Trial $\hookrightarrow$ 404(2)—Recitals of ownership, possession, and wrongful detention of property held conclusions of law and not findings of facts.

In replevin for automobile, recitals in the findings that the plaintiffs were not at any time the owners, nor entitled to the possession of the automobile, and that the defendant bank, at all times mentioned in the complaint, was the owner of the property and entitled to the possession of the same, and that the automobile was not wrongfully detained by the defendants, were conclusions of law and not findings of fact.

2. Livery stable and garage keepers $\hookrightarrow$ 8(1)—Have lien for repairs to automobile at request of conditional purchaser.

Under Civ. Code, § 3051, one repairing an automobile at the request of a purchaser in legal possession under a conditional sales contract has a lien for the value of his services.

3. Livery stable and garage keepers $\hookrightarrow$ 8(3)—Conditional purchaser's agreement to transfer interest in automobile to repairmen until bill was paid insufficient to retain lien as against seller's assignee.

A written agreement by the conditional purchaser of an automobile, to transfer his interest to repairmen until their bill was paid, in consideration of his being allowed to take the car, held insufficient to retain the lien as against the seller's assignee, in view of Civ. Code, § 2913.

4. Bailment $\hookrightarrow$ 18(2)—Lien acquired by work done, whether by claimant or agent.

Under Civ. Code, §§ 3051, 3052, a lien on personalty is acquired by work done, whether by claimant or his agents.

5. Livery stable and garage keepers $\hookrightarrow$ 8(4)—Rights of innocent purchaser from vendee at lien sale not affected by lien claimant's mistaken demand for amount of prior lien lost by surrender of property.

The rights of an innocent purchaser from vendee at a lien sale, of an automobile in lien claimants' possession, held not prejudiced by the latter's mistaken demand on the record owner's assignee for the amount of a prior lien, which had been lost by surrendering possession of the car in the absence of any tender of the actual amount due.

6. Records $\hookrightarrow$ 9/2, New, vol. 12A Key-No. Series—Innocent purchasers from vendee at lien sale held entitled to possession as against assignee of conditional seller to lienor.

Innocent purchasers of an automobile from vendee at a lien sale for the value of repairs held entitled to possession as against the assignee of one by whom it was conditionally sold to lienor, notwithstanding their failure to secure and file with the motor vehicle department an assignment of the certificate of registration, as required by Motor Vehicle Act, § 8, as amended.

by St. 1917, p. 388, § 7, and St. 1919, p. 199, § 7; they being equitable owners, on whom actual possession had been conferred by the lien claimants, who were rightfully in possession before the sale, and vested with a power of sale and absolute transfer under Civ. Code, §§ 3051, 3052.

7. Replevin ⇨8(3)—May be maintained by one having qualified property if he has right to possession.

Replevin may be maintained by one having a qualified property in the goods, if he has the right to possession.

8. Partnerships ⇨64—Partners' right to recover automobile not affected by not filing certificate as to names when suit or answer filed, where filed before trial.

That the certificate as to names and residences required by Civ. Code, § 2466, was not filed by partners suing for possession of an automobile when the action or answer was filed, does not affect their right to recover, where they properly filed the certificate before trial.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Louis Goodman and others against the Anglo-California Trust Company and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Joseph A. Brown, of San Francisco, for appellants.

F. A. Denicke and H. S. Young, both of San Francisco, for respondents.

LANC. N. P. J. This action was brought to recover a Hudson automobile or its value from the defendants. From a judgment against them, the plaintiffs appeal.

[1-3] Plaintiffs alleged ownership and right of possession in themselves, and that the defendants were wrongfully detaining the automobile; that the actual value of the same was \$1,000. The answer denied the allegations of the complaint. The findings are really conclusions of law. They recite that the plaintiffs were not at any time the owners, nor entitled to the possession of the automobile, and that the defendant bank, at all times mentioned in the complaint, was the owner of the property and entitled to the possession of the same, and that the automobile was not wrongfully detained by the defendants. It becomes necessary for us to go back to the evidence and to state the undisputed facts. Some time about October, 1920, James S. Brian was in possession of the automobile in dispute by virtue of a certain conditional sales contract which had been assigned by the original vendor to the defendant bank. Messrs. Green and Gohl were in the business of repairing automobiles in the city and county of San Francisco. Brian brought the automobile to their place of business to have it repaired. They re-

paired the same, and the charges for their services were \$110. Section 3051 of the Civil Code would create a lien under these circumstances, as Brian was the legal possessor of the property and the repairs were made at his request. *Davenport v. Grundy Motor Sales Co.*, 28 Cal. App. 409, 410, 152 Pac. 932. However, Green and Gohl permitted Brian to take the automobile out of their possession after he had signed an agreement transferring all his right, title, and interest in the same to them for their protection until the repair bill should be paid. We shall pass the question as to the sufficiency of this writing to retain the lien by evidencing an agreement of the parties that it should continue in effect, because, even though this writing be held sufficient to evidence such an intention upon the part of the parties thereto, nevertheless, it would not have that effect as to the bank, the real defendant here. Section 2913, Civ. Code; *Thourot v. Delahaya Import Co.*, 69 Misc. Rep. 351, 125 N. Y. Supp. 827; *Rehm v. Viall*, 185 Ill. App. 425; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467. We may disregard, therefore, that writing.

Brian took the car away and damaged it and returned it to Green and Gohl for further repairs. It appears in evidence that on this second occasion Brian "threw the counterbalance through the car." Green and Gohl, thereupon, sent the case out to be welded and had bearings put in and paid the bills for such work, amounting to \$55. These bills were admitted in evidence and appear uncontradicted. The car never left the possession of Green and Gohl after they paid these bills for welding, etc., until after it was sold under the lien. Green and Gohl purchased the automobile at the lien sale for \$175, and later sold it to the present plaintiffs.

[4] We shall pause here to consider the effect of the payment by Green and Gohl of the bills for welding, etc. Respondents contend that no lien could arise in favor of Green and Gohl for work done upon the car which was not done directly by them. In that contention, we think, respondents are in error. In the case of *Quist v. Sandman*, 154 Cal. 748, 754, 755, 99 Pac. 204, it was held that the right to a lien under sections 3051 and 3052, Civil Code, must be interpreted according to common-law principles. Some of the common-law rules regarding this question, with relation to liens upon personal property by virtue of work done, are: A lien is acquired by virtue of the work done, and it is immaterial whether the work be done by the claimant or his agents. *Hall v. Tittabawassee Boom Co.*, 51 Mich. 377, 402, 16 N. W. 770. An artisan has a lien for work done in the way of his trade by another than himself outside his shop. Thus, where a chronometer was left with a watchmaker

to be repaired, and the watchmaker, finding that he could not make the repairs, sent it to another city to be repaired, it was held that the watchmaker had a lien for the charges paid by him for the repairs done. *Webber v. Cogswell*, 2 Canada Sup. Ct. 15. And we are not without authority upon this point in our own state. The case of *Quist v. Sandman*, supra, is not only an authority for the proposition that section 3051 of our Civil Code is to be interpreted in the light of common-law principles, but it is direct authority for the proposition that a subcontractor may not assert a lien, but the lien must be asserted by the party with whom the owner has contracted.

[5] Now to proceed with our story. Green and Gohl called at the office of the defendant bank and explained that there was \$165 due upon the car, and that it was in their possession, and they were holding it for a lien. Conceding to the respondents that the claim of lien was for too large an amount, because the lien for the first work, amounting to \$110, had been lost, and the only lien existing at the time of the demand was one for \$55, the rights of the lien claimants were not prejudiced in any way by this mistaken demand, in the absence of any tender by the bank of the actual amount due. *Folsom v. Barrett*, 180 Mass. 439, 62 N. E. 723, 91 Am. St. Rep. 320; 17 R. C. L. 606.

Green and Gohl gave notice of a sale under the lien, and duly and regularly purchased the car at the sale. The question of their right to retain only \$55 instead of \$165 out of the proceeds of such sale is not involved upon this appeal. We are concerned only with the rights of an innocent purchaser from the vendee at the lien sale.

Upon the facts so far recited we think the purchasers at the lien sale received title to the automobile and consequently their vendees, the present plaintiffs, have a good title, and were entitled to recover possession of the automobile or its value from the bank.

[6] However, two technical obstacles are raised by the respondents as to the right of the appellants herein to recover: One is that they failed to comply with section 8 of the so-called Motor Vehicle Act (Act 2331b, [Deering's Gen. Laws Supp. 1917-1921] approved May 10, 1915, as amended by Stats. 1917, p. 382, and by Stats. 1919, p. 191), because they failed to secure an assignment of the certificate of registration issued in the name of James S. Brian and file the same with the motor vehicle department of the state of California. The other contention is that the plaintiffs did not file with the county clerk of the city and county of San Francisco a certificate required by section 2466, Civil Code, stating the names in full and the places of residence of the persons transacting business under the name and style of Goodman Bros.

As to the first objection, the Motor Vehicle

Act (section 8 thereof) provides that, in case of transfer of ownership of a motor vehicle by operation of law, or otherwise than by the voluntary act of the registered owner, the notice of transfer, as well as the joint statement provided for by the act, shall be signed by the sheriff or other representative or successor in interest of the registered owner in lieu of such owner. Other provisions of said act are that, until the registration certificate is transferred in the manner provided in the act, delivery of said motor vehicle shall not be deemed to have been made, and title thereto shall be deemed not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose.

Giving the above-quoted provisions of the act their full value, it follows that the plaintiffs did not have the legal title to the car, and the attempted transfer to them by bill of sale was incomplete. However, they were the equitable owners, for they had paid the full purchase price of the car, and they had the right to demand of the lien claimants the documents required by said Motor Vehicle Act to complete their title. The lien claimants were the "successors in interest of the registered owner" within the meaning of the Motor Vehicle Act, and had the power to make the assignment or the affidavits required by such act for a complete transfer of title to themselves as purchasers at the lien sale. If they failed to thus perfect their own legal title after they had purchased at the lien sale, such failure only delayed the completion of the transfer to them, and did not give third persons, with no claim to the property, the right to step in and deprive them or their vendees of its possession. When Green and Gohl purchased at the lien sale and paid the purchase price, they, individually, became the equitable owners of the property, with a right, as lien claimants and successors in interest of the registered owner, to complete the transfer to themselves, individually, of the legal title. This equitable title, coupled with the right to have the legal title perfected, devolved upon the present plaintiffs when they purchased the automobile from Green and Gohl. They acquired all the right, title, and interest in the automobile which Green and Gohl had. Therefore, while plaintiffs did not have a complete legal title because of the above-quoted provisions of the Motor Vehicle Act, they had an equitable title and a right to receive the full legal title, and they had actual possession conferred upon them by the persons entitled to the possession, i. e., the lien claimants who were rightfully in possession of the property prior to the lien sale and were vested with a power of sale and absolute transfer under sections 3051 and 3052, Civil Code. On the other hand, the seizure of the automobile by the defendant bank was entirely without right. The bank had no

shadow of a claim to the automobile, because its rights were cut off by the lien sale. It had been informed of the existence of a valid lien and had failed to make any tender to discharge the same; it had been notified of the contemplated sale under such lien, and had failed to take any steps to protect its interest in the car. The plaintiffs had become at least the equitable owners of the automobile, and were entitled to its possession under such equitable claim and also by reason of having been placed in possession of the lien claimants who were rightfully in possession and vested with a power of sale. *Chucovich v. S. F. Securities Corp.* (Cal. App.) 214 Pac. 263; *Boles v. Stiles*, 188 Cal. 304, 204 Pac. 848.

[7] Plaintiffs were entitled to recover possession of the automobile from the defendants. They were the equitable owners and had been in rightful possession by those who had the power to transfer to them the complete legal title and the possession of the property. Replevin may be maintained by one who has a qualified property in the goods, provided he has the right to the possession. *Lazard v. Wheeler*, 22 Cal. 139.

[8] As to the other objection of the respondents with respect to the filing of the certificate required by section 2466, Civil Code, it is sufficient to point out that, although the certificate was not filed at the time of the filing of the action or at the time the answer was filed, it had been regularly filed prior to the trial of the action. The question is settled against the respondents by the recent case of *Rudneck v. So. Cal. M. & L. Co.*, 184 Cal. 274, 282, 193 Pac. 775. In speaking of the requirements of the section of the Civil Code under consideration, our Supreme Court said in said last-cited case:

"We have no hesitation in extending this rule so as to make it sufficient if there be a compliance with the statute before trial upon the issue."

There are no other matters requiring discussion, and the judgment is reversed.

I concur: NOURSE, J.

62 Cal. App. 763

CONTANT v. WALLACE. (Civ. 3674.)

(District Court of Appeal, Second District, Division 2, California. July 5, 1923.)

1. Brokers ⇨49(1)—Obliged either to produce valid, enforceable contract to purchase, or to bring parties together so that vendor may secure contract.

The contract of a broker is to negotiate a sale, that is, to produce a valid contract to purchase which can be enforced by the vendor if his title is perfect, or, if he does not pro-

cure such contract, to bring the vendor and proposed purchaser together, so that the vendor may secure the contract unless he is willing to trust to an oral agreement.

2. Brokers ⇨58—Broker bringing vendor and purchaser together does not lose commission if vendor makes unenforceable contract with purchaser.

Where a broker procures a contract from the purchaser, it is necessary that the paper be one which is valid, and the terms of which the vendor may enforce; but where the vendor himself formulates the contract with the purchaser, the broker does not lose his commission if an invalid or unenforceable agreement is entered into between the vendor and purchaser through mistake or ignorance of the former.

3. Pleading ⇨112—Denial of something not asserted in complaint held not to raise issue as to matter denied.

Where, in an action by a broker for commission, the answer denied that the prospective purchaser was willing to buy, but such matter was not alleged in the complaint, the denial did not make an issue, and did not amount to an affirmative allegation that the prospective purchaser was not ready to buy.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action by Alice Contant against John Wallace, executor of the estate of Jacob Sholley, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward H. Bautzer, of San Pedro, and Kemp & Clewett, of Los Angeles, for appellant.

S. C. Schaefer, of San Pedro, for respondent.

WORKS, J. This cause was tried, the appeal was perfected, and the briefs on appeal were filed in the lifetime of Jacob Sholley, the original defendant. The suggestion of his death and the substitution of his executor in his stead were made in this court.

Plaintiff, a real estate broker, brought the action for the purpose of recovering a broker's commission. The complaint alleges that Sholley employed her as his agent to sell a certain parcel of real property, that she found a purchaser, and that Sholley "accepted the proposal of the purchaser so secured * * * and entered into a written agreement of purchase and sale relating to said real property with said purchaser." Plaintiff had judgment, and Sholley appealed.

[1, 2] That the above-mentioned allegations were all true was established at the trial by uncontradicted evidence, at least to the extent that it was shown that a purported agreement was entered into between Sholley and the purchaser, but appellant contends that the "agreement" was incomplete and unenforceable. Without passing upon this

claim, it is enough to say that the point is immaterial.

"The contract of the broker is to negotiate a sale; that is, to procure a valid contract to purchase, which can be enforced by the vendor if his title is perfect; or *if he does not procure such contract* [italics ours] to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract, unless he is willing to trust to an oral agreement." *Gunn v. Bank of California*, 99 Cal. 349, 33 Pac. 1105.

See, also, *Mott v. Minor*, 11 Cal. App. 774, 106 Pac. 244; *Cone v. Keil*, 18 Cal. App. 675, 124 Pac. 548; *Massie v. Chatom*, 163 Cal. 772, 127 Pac. 56; *Twogood v. Monnette* (Cal. Sup.) 215 Pac. 542.

It is true that in the opinions in some of the cases cited there are dicta which indicate that, where an agreement of sale is executed between one desiring to sell and a prospective purchaser presented to the seller by a broker, the latter does not earn his commission unless the agreement is valid and binding. Such a rule would place brokers in an intolerable position, as it would make their compensation for services depend upon circumstances beyond their control. Where the broker procures the contract from the purchaser it is of course necessary that the paper be one which is valid and the terms of which the seller may enforce, but where the seller himself formulates the contract with the purchaser the situation is different. It cannot be the law that a broker loses his commission, after bringing seller and purchaser together, if an invalid or unenforceable agreement is entered into between seller and purchaser through the mistake, inadvertence, or ignorance of the former. Where the seller himself negotiates the terms of the contract the responsibility for its form and contents is on him, and it is necessary only that it be satisfactory to him when executed. The fact of execution by him is sufficient evidence that he is satisfied, in the absence of fraud, duress or the like. When the seller takes into his own hands the completion of the agreement of sale, the affair is so much in his hands and the broker is so completely discharged from responsibility in the premises that the seller is estopped to contend against the broker's claim for commission that the purchaser was not ready, able, or willing, to make the purchase. *Wood & Tatum Co. v. Basler*, 37 Cal. App. 381, 173 Pac. 1109; *Sobaje v. Schubert*, 37 Cal. App. 709, 174 Pac. 364. See, also, *Johnson v. Krier* (Cal. App.) 210 Pac. 966. Plainly, it is as much the seller's duty to formulate a valid and enforceable contract as it is to ascertain for himself that the purchaser is ready, able, and willing to buy. We are satisfied that respondent earned her commission.

[3] Appellant's only other point is that the evidence was insufficient to support a finding

made by the trial court that the purchaser was ready and willing to buy the property which was the subject of the seller's contract with the broker. This finding was, however, upon an immaterial matter, as the pleadings make no issue as to the readiness or willingness of the purchaser to buy. The complaint presents no allegation on the subject, although the answer contains a denial that the purchaser was ready, able, or willing to buy. This denial of what is not asserted in the complaint did not make an issue. Surely, it does not amount to an affirmative allegation that the prospective purchaser was not ready, able, or willing to complete the transaction.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

62 Cal. App. 721

RUNDELL v. McDONALD et al. (Civ. 3869.)

(District Court of Appeal, Second District, Division 2, California. July 2, 1923.)

1. Appeal and error $\S$ 1097(1)—Decision on previous appeal conclusive only as to facts remaining unchanged at second trial.

A decision on a previous appeal of a case is conclusive only as to those points which are not affected by different state of facts disclosed at the second trial thereof.

2. Frauds, statute of $\S$ 142—Equity may enforce parol agreement to devise or bequeath property; rule stated.

Though a parol agreement to devise or bequeath property is within the statute and is at law a complete nullity under Civ. Code, $\S$ 1624, subd. 7, and Code Civ. Proc. $\S$ 1973, subd. 7, such rule does not preclude a court of equity from enforcing such an agreement; the rule being that, where there has been a part performance by one party under such circumstances as to render it inequitable to allow the other party to repudiate the contract on the ground that it is not in writing, he is estopped from so doing.

3. Frauds, statute of $\S$ 129(3)—Agreement to devise held taken out of statute by part performance.

Where plaintiff, pursuant to an agreement with defendant, who was his aunt and stepmother, conveyed property in which she had a life estate to her with the understanding that she would devise it to him, *held*, that his conveyance to her constituted such a part performance as to take the transaction out of the statute and entitle him to have the property in the hands of her personal representative impressed with a trust in his favor.

4. Specific performance $\S$ 86—Husband who married without knowledge of wife's previous agreement to devise certain property to nephew held not to have rights superior to nephew.

In an action against the administrator of plaintiff's aunt, who was also his stepmother

and widow of his father, to impress certain real property with a trust in his favor by reason of an agreement by deceased to devise the property to him, the fact that decedent subsequent to her agreement had remarried without disclosing her agreement to her husband *held* not to vest in him rights superior to plaintiff's, as respects plaintiff's right to specific performance of the agreement.

5. Parties $\Leftrightarrow$ 84(1)—Defect of parties defendant held waived.

Where, in action against surviving husband as administrator of his deceased wife's estate and of her other heirs to enforce agreement between plaintiff and deceased that she would devise property to him, plaintiff dismissed as to all defendants except the surviving husband, objection that decree against him was invalid for defect in parties defendant was waived by failure to object under Code Civ. Proc. § 434, unless such heirs were indispensable to final determination.

6. Specific performance $\Leftrightarrow$ 106(3) — Heirs of deceased held not indispensable parties in action to enforce agreement to devise property.

In an action against surviving husband as administrator of his deceased wife's estate to enforce agreement between plaintiff and deceased that she would devise property to him, *held*, that heirs of deceased other than husband were not indispensable parties.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Albert M. Rundell against Albert W. McDonald, individually and as administrator of the estate of Mary Ann McDonald, deceased, and another. Judgment for plaintiff, and named defendant appeals. Affirmed.

Richards, Heaney & Price, Fred H. Schauer, and Francis Price, all of Santa Barbara, for appellant.

Coleman E. Stewart, of Santa Barbara, for respondent.

FINLAYSON, P. J. This is an action to enforce performance of an oral contract made by plaintiff with his aunt—who, as his father's widow, was likewise plaintiff's stepmother—whereby the latter promised to devise to plaintiff, by her last will and testament, the parcel of land in controversy. It is sought to impress the property with a trust in favor of plaintiff and thus to secure to him the benefit of the contract pursuant to which he deeded the land to his stepmother on the strength of her promise to give it back again by devising it to him. She did, indeed, make a will whereby she devised the land to plaintiff as she had agreed—a holographic will duly executed by her on May 7, 1914—but this will, by reason of the provisions of section 1300 of the Civil Code, was revoked by her subsequent marriage to appellant and was never thereafter republished. The name of the stepmother

at the date of the conveyance from her stepson was Mary Ann Rundell, she being at that time the surviving wife of plaintiff's deceased father. Subsequently she married the defendant and appellant, Albert W. McDonald. Judgment passed for plaintiff, and the defendant McDonald appeals.

This is the second time the cause has been before this court. The first appeal was upon a judgment entered against plaintiff after an order sustaining a general demurrer to his complaint. 41 Cal. App. 175, 182 Pac. 450. That appeal resulted in a reversal of the judgment, and on the going down of the remittitur the defendant Albert W. McDonald, personally and as the administrator of the estate of his deceased wife, answered plaintiff's complaint. A trial was had, resulting in findings in favor of plaintiff upon all the material issues. The principal facts in the case are stated in the opinion filed in the first appeal. It therefore will not be necessary to restate them or to do aught but point out certain additional facts developed by the evidence adduced on the trial.

It now appears that the contract between plaintiff and his stepmother, in pursuance whereof he executed the deed to her, rested in parol. Prior to and at the time of the execution of that instrument the stepmother was vested with a life estate in the land, plaintiff having deraigned his title through a deed from his father whereby the latter conveyed the land to plaintiff subject to a life estate reserved unto himself "and to his wife, Mary Ann Rundell, and to the survivor of them." The deed whereby plaintiff's father reserved this life estate was executed February 22, 1906. The father died a few months thereafter, whereupon his widow, as the survivor, became the sole owner of the life estate. On February 20, 1912, the date of plaintiff's deed to her, the stepmother was in the exclusive possession of the land as such life tenant. Subsequently, June 6, 1914, which was more than two years after plaintiff executed the deed to her, plaintiff's stepmother married the defendant and appellant, Albert W. McDonald. The trial court found, contrary to the uncontradicted evidence, that plaintiff's stepmother, prior to her marriage to appellant, informed the latter that she had devised the land to plaintiff. The evidence shows without contradiction that appellant had no knowledge of the oral agreement pursuant to which plaintiff executed the deed to his stepmother in consideration of her promise to give it back to him on her death by devising it to him.

[1] On the former appeal this court assumed that the agreement between plaintiff and his stepmother was in writing, there being nothing to the contrary stated in the complaint. That assumption was indulged because that appeal, as we have stated, was

from a judgment entered on an order sustaining a general demurrer to the complaint. It also was said on that appeal that it did not appear from the complaint that the defendant McDonald did not have knowledge of the agreement at the time of his marriage to Mary Ann Rundell. The decision on that appeal is conclusive only as to those points which are not affected by the different state of facts disclosed by the record on this appeal.

Appellant's main contentions are: (1) That the contract between plaintiff and his stepmother was not taken out of the statute of frauds; (2) that appellant, having married respondent's stepmother in ignorance of the latter's agreement to devise the property to respondent, is possessed of intervening superior equities by reason whereof a court of equity should refuse to grant the relief sought hereby; and (3) that because respondent dismissed the action as against all of the stepmother's heirs other than her surviving husband, the judgment is against only one of several necessary parties defendant and should therefore be reversed.

[2] It is, of course, readily conceded that a parol agreement to devise or bequeath property is within the statute of frauds and is at law a complete nullity. Civ. Code, § 1624, subd. 7, and Code Civ. Proc. § 1973, subd. 7. But though the statute is a bar at law, we do not understand appellant to contend that a court of equity may not enforce a parol agreement to make a devise or a bequest of property if there has been sufficient part performance. His contention, if we rightly understand it, is that the facts of this case are not sufficient to take the case out of the statute. Therefore, for the purpose of this decision we shall assume that, as in the case of a parol agreement to convey real property, an oral agreement to make a devise or a bequest may be taken out of the statute of frauds in all cases where there has been such part performance on the part of the person seeking to enforce the contract that it would be a virtual fraud to interpose the statute as a bar to a completion of the contract. In cases of parol agreements for the conveyance of real property by deed, fraud inhering in the consequences of setting up the statute is the foundation of the doctrine that such parol agreements, if partly performed, may be enforced by courts of equity notwithstanding the requirement of the statute. The rule as to the effect of part performance is based entirely on equitable considerations. In cases of oral contracts for the conveyance of lands the general rule is that where there has been a part performance by one party to the oral agreement under such circumstances as to make it inequitable to allow the other party receiving the benefit to repudiate the contract on the ground that it is not in writing, he is

estopped from doing so. *Pearsall v. Henry*, 153 Cal. 314, 318, 95 Pac. 154, 159. As an application of this equitable doctrine, it is generally held that where there is an oral contract for the exchange of lands, a conveyance by one on the faith of the agreement to exchange properties constitutes such part performance as will in equity take the case out of the operation of the statute. *Pearsall v. Henry*, supra.

[3] In principle the case at bar cannot be distinguished from *Pearsall v. Henry*, supra. In the case of an oral agreement to exchange lands, the party who has made a conveyance under the agreement is to receive in return a different parcel of land; in a case such as that presented by the record before us the party who makes the conveyance on the faith of the other's parol agreement to return it to him by devise is to get back, not other land, as in the case of an agreement to exchange, but the very property which he conveyed to the other on the strength of the latter's promise to give it back in the form of a devise. In so far as the statute of frauds is concerned, there does not appear to be any distinction, in principle, between a case where a party who has performed his part of the oral agreement is to get back the same land under the form of a devise and a case where he is to receive other land under the form of a deed of conveyance. It seems clear, therefore, that the principle of such cases as *Pearsall v. Henry* is applicable to the instant case, and that respondent's conveyance to his stepmother took the case out of the statute of frauds.

It is true that in the instant case the grantee was in possession when she received her stepson's deed. But even so, she made use of the title granted to her by mortgaging the land to secure the repayment of a loan made to her because she was able to give such mortgage security. She could not so use the title conveyed to her by respondent without estopping herself and her heirs from setting up the statute of frauds.

For these reasons we think the conveyance of the real property by plaintiff placed him in a position to compel compliance with his stepmother's promise to revest him with the title on her death by devising the land to him. Other than this promise there was no consideration for respondent's deed to his stepmother. To permit appellant or any of the heirs of respondent's grantee to keep the property which comes to them as heirs of their intestate, and for which no consideration was given other than their intestate's promise to devise the land to her grantor, would enable them to take a fraudulent advantage of respondent's generosity to his stepmother and would work a travesty on justice, wholly inconsistent with the great principles by which courts are universally controlled in administering equitable relief.

[4] There is no merit in the claim that appellant, because he was ignorant of his wife's promise to devise the land to respondent, is an innocent third party vested with superior intervening equities. Appellant cites us to *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369. There are material points of distinction between the equities which appear in the case at bar and the equities as shown in *Owens v. McNally* and in the other cases cited by appellant. In *Owens v. McNally*, the case mainly relied upon by appellant, the promisor at the time of his death had accumulated an estate in excess of \$20,000 in value, to no part of which had the plaintiff contributed. In that case the agreement between the plaintiff and her uncle did not make certain either the length of time which the plaintiff was to spend in living with and caring for her uncle or the kind or character of services which she was to render. While in her uncle's household Miss Owens took and occupied the station of a daughter. She therefore undoubtedly received such support and maintenance as naturally would fall to a daughter's lot. This in itself was some compensation for the services which she agreed to render. The contract which she alleged her uncle had made with her contemplated the taking by her of all his estate, to the exclusion of any future wife or child. These are marked dissimilarities which readily distinguish that case from this. In the present case respondent only claims that which in his generosity he had conveyed to his stepmother. On the strength of her promise that on her death he would receive it back in kind, free from conditions or incumbrances. The life estate which the stepmother held and which came to her under the deed executed by respondent's father on February 22, 1906, terminated with the expiration of the stepmother's life. Had respondent not deeded the property to her, and had he retained his title until his stepmother's death, he then would have owned all of the title to the property and not merely an estate in remainder. The result is that he is seeking to regain no more than what would have been his had his stepmother not been made the recipient of his bounty. The instant case presents an entirely different situation from that which arises where one promises to leave, at death, his own and indefinite estate, accumulated by his own efforts, for an unliquidated obligation for services rendered or to be rendered. We think it clear, therefore, that even if appellant did enter into the marriage relation with respondent's stepmother in ignorance of her oral agreement to devise the land to respondent, there does not inhere in his right of heirship or right of succession an equity which can be said to be superior to respondent's equities. There is nothing "harsh, oppressive and unjust" in returning the property to the one who, by virtue of contract

and good conscience, is entitled to it, instead of passing it on, by succession, to one who, as was aptly said by Mr. Justice Sloane when the case was last here, "is only related to it by marriage."

[5] There remains for consideration only the contention that the judgment should be reversed because at the time when it was entered all the heirs of Mary Ann McDonald, plaintiff's grantee, were not before the court. All the heirs were parties to the suit until plaintiff dismissed as to the defendants other than the surviving husband, Albert W. McDonald. That dismissal was made prior to the time when appellant filed his answer. Indeed, it was made prior to the time when the first appeal was taken, and is alluded to in the opinion handed down on that appeal. Without doubt appellant had actual knowledge of the dismissal when he answered the complaint. He filed his answer and participated in the trial of the action, speculating on the possibility of a favorable judgment, without in any way calling the attention of the lower court to the fact that these other heirs no longer were parties to the suit. If therefore there was a defect of parties defendant at the time when the judgment was entered, appellant waived the right to complain (section 434, Code Civ. Proc.), unless the other heirs were indispensable parties without whose presence a complete determination of the controversy could not be had without prejudicing their rights (section 389, Code Civ. Proc.). It is only where the court cannot determine the controversy between the parties before it without prejudicing the rights of others that other parties must be brought in. *Lytle Creek Water Co. v. Perdew*, 65 Cal. 447, 455, 4 Pac. 426. If it is only an appellant's rights which may be injuriously affected by reason of the absence of other parties, it is his duty appropriately to call the trial court's attention thereto with a request that they be brought in. Failing to do so, he cannot be heard to complain in this court. *Smith v. Cucamonga Water Co.*, 160 Cal. 611, 617, 117 Pac. 764; *Alison v. Goldtree*, 117 Cal. 545, 550, 49 Pac. 571.

[6] In passing upon appellant's contention that there is a fatal defect of parties defendant, it will not be necessary to decide whether an agreement to dispose of property by will may be enforced against the promisor's estate or personal representative, or whether it is enforceable against the heirs only. If it be enforceable against his estate or against his personal representative, then this appellant, who is sued as the administrator of his deceased wife's estate as well as individually, represents, in his capacity as administrator, the estate and the interests of all the heirs. If, on the other hand, as appellant contends, an action such as this can be maintained only against the heirs, appellant nevertheless is in no position to complain of any defect of

parties defendant, since the decree cannot injudiciously affect the other heirs. Though the heirs succeeded to the legal title as tenants in common, they held their respective undivided moieties by several and distinct titles. The principle upon which courts of equity undertake to enforce the execution of an agreement to dispose of property in a particular way by last will and testament is one which is referable to the subject of specific performance. But a court has no power to compel a person to execute a last will and testament carrying out an agreement to bequeath or devise his property, for this can be done only in the lifetime of the testator. No breach of the agreement can be assumed so long as he lives, and after his death he no longer is capable of doing the thing agreed to be done by him. The theory on which the courts proceed, therefore, is to fasten a trust on the property in favor of the promisee, and to enforce such trust against the heirs of the deceased. Under this theory each heir holds the title to which he has succeeded in trust for the promisee. In the instant case the effect of the judgment against appellant as the surviving husband was to fasten a trust on the title to which he succeeded and to compel a conveyance of that title to respondent. If, as appellant contends, an action such as this lies only against the heirs of the deceased promisor and not against his estate or personal representative, then the judgment cannot be pleaded against any of the heirs as to whom the action was dismissed. It follows, therefore, that the decree in no wise affects the rights of appellant's coheirs, and that they were not indispensable parties to the action.

The other points made by appellant do not merit consideration. Indeed, they are in effect disposed of by what we have said in our discussion of his three principal points.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

63 Cal. App. 17

GENERAL MOTORS ACCEPTANCE CORPORATION v. HOLMAN et al.
(Civ. 4708.)

(District Court of Appeal, First District, Division 2, California. July 16, 1923.)

Appeal and error §787—Appeal dismissed, in absence of notice of motion for new trial, bill of exceptions, transcript, or request therefor, or allowance of additional time.

Where no notice of a motion for new trial has been filed, and no proceedings therefor are pending, the notice of appeal contains no request for a transcript under Code Civ. Proc.

§ 953a, and no transcript thereunder or any bill of exceptions under section 650 has been filed, or any additional time allowed or draft of bill served, the appeal will be dismissed on appellee's motion.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the General Motors Acceptance Corporation against Jack Holman and Herbert Simmons. Judgment for plaintiff, and defendant Simmons appeals. On motion to dismiss appeal. Appeal dismissed.

F. G. Eby, for appellant.

Haswell & Pierce, of San Francisco, for respondent.

LANGDON, P. J. This matter comes before us upon a motion to dismiss the appeal of the defendant Herbert Simmons. Notice of said motion was duly served upon the attorney of record for said appellant.

It appears from the certificate of the county clerk of the city and county of San Francisco, filed herein in support of the motion, that a money judgment of the superior court in and for the city and county of San Francisco in favor of plaintiff and against defendants herein was duly made and entered on the 14th day of April, 1923; that notice of entry of said judgment was duly served upon the attorney for the defendants on the 29th day of May, 1923; that on the 12th day of June, 1923, the defendant Herbert Simmons filed a notice of appeal from the said judgment; that there has been no notice filed of motion for a new trial in said action, and no proceedings for a new trial are pending therein; that said notice of appeal contained no request for a transcript under section 953a of the Code of Civil Procedure of the state of California, and that no bill of exceptions has been filed under section 650 of the said Code of Civil Procedure, nor transcript under said section 953a, Code of Civil Procedure; that no additional time within which to prepare and serve a draft of a bill of exceptions has been allowed by the said superior court or any judge thereof.

The motion is also supported by the affidavit of the attorney for the plaintiff and respondent that no draft of any bill of exceptions nor a copy thereof has been served upon the plaintiff in this action nor upon the attorney for said plaintiff.

It appears, therefore, that the appellant has failed to comply with the essential requirements of either method of appeal from a superior court judgment provided for in this state.

The appeal is dismissed.

We concur: NOURSE, J.; STURTEVANT, J.

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4. Master and servant ⇨385(16)—Expenses of medical treatment authorized by Compensation Act.

The intent of Workmen's Compensation, Insurance and Safety Act, § 9 (a), requiring the employer to provide medical treatment, and making an employer neglecting to do so liable for the expense incurred by the employee, is that the employer shall, in the first instance, have the right to designate and select physicians who are to give treatment to the employee, and the latter is authorized to make his own selection at the expense of the employer only where the employer has neglected to provide the necessary service.

5. Master and servant ⇨385(16)—Expenses incurred by employee for medical treatment held recoverable under Compensation Act.

Consent of an employer, either affirmatively given, or inferred from his inaction, to the employee to procure his own medical treatment, renders the employer liable under Workmen's Compensation, Insurance and Safety Act, § 9 (a), for the reasonable expenses thus incurred.

In Bank.

Application by W. E. Myers for a writ of review to annul an order of the Industrial Accident Commission awarding compensation to Joseph G. Renteria for injuries. Affirmed.

Philip S. Ehrlich, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

WASTE, J. The petitioner seeks in this proceeding to annul the action of the Industrial Accident Commission in awarding compensation to Joseph G. Renteria for injuries found by the respondent to have been sustained by the employee in the course of and arising out of his employment at the winery of the petitioner near Livermore. While working about a vat of boiling sherry wine, Renteria was severely burned by an explosion, caused by alcoholic fumes from the vat becoming ignited from a lighted candle which Renteria was using in his work.

The petitioner contends that there is no evidence in the record supporting the finding that the applicant sustained his injuries in the course of and arising out of his employment, and that he was, at the time, reasonably engaged in the performance of his work. The evidence taken before the Commission shows that Renteria was working around petitioner's winery as a laborer. He seems to have had no especial duties to perform, but did whatever he was told to do by Mr. Jaffe, the foreman in charge of the place. The interior of the winery was dark, and much of the work had to be carried on by the aid of artificial light. There were electric lights in and about the place, but these did not afford sufficient illumination to en-

191 Cal. 673

MYERS v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 10508.)

(Supreme Court of California. Aug. 23, 1923.
Rehearing Denied Sept. 20, 1923.)

1. Master and servant ⇨405(4)—Finding of compensable injury to workman taking temperature of boiling wine sustained.

In a proceeding to recover compensation for injuries to a laborer taking temperature of boiling sherry wine in a tank, who was injured by the explosion of alcoholic fumes which escaped from the tank and came in contact with a lighted candle, *held*, that the evidence supported a finding that he sustained injuries in the course of and arising out of his employment, and that he was at the time reasonably engaged in the performance of his work, notwithstanding the foreman's testimony that claimant was ordered to measure the contents of the tank, and not to take its temperature as claimant testified.

2. Master and servant ⇨417(7)—Finding on evidence in compensation case final.

Where there is competent testimony to support a finding of the Industrial Accident Commission, it will not be reviewed by the court.

3. Master and servant ⇨417(7)—Finding on question of willful misconduct of compensation claimant held final.

In a proceeding to recover compensation for injury to a winery employee, burned by exploding alcoholic fumes lighted by a candle which he was using, *held*, that the questions whether his action in using the candle rather than an electric light which had been provided amounted to willful misconduct, or whether he was ignorant, uninformed, or knowingly forgot, or whether he disobeyed orders made for his protection, were matters for determination by the Commission, and the appellate court could not say that the finding that the injury was not caused by serious and willful misconduct was justified by the evidence.

able employees to carry on their work in some locations. For this purpose candles were supplied by the petitioner and used by the workmen. It was necessary, from time to time, to take the temperature of the wine in the various tanks and vats in the winery. This was ordinarily done by reading the thermometers affixed to the sides of the tanks. There was one tank used for boiling sherry wine which had no such attachment. A thermometer had been provided, and a workman had been ready to put it on the tank. He was told by both petitioner and his foreman Jaffe to do other work and put the thermometer on later, as "they didn't need it." Without such an appliance, the temperature in the tank could be ascertained either by allowing some of the wine to run into a cup, or by dropping a thermometer on a line into the tank from the top.

[1, 2] On the day of the accident, Jaffe gave an order to Renteria concerning the tank containing the boiling sherry wine. Jaffe testified that he told Renteria to measure the contents of the tank. Renteria declared that he was ordered to take the temperature of the wine. He had never done that work in this particular tank. He proceeded to get a candle, and a thermometer on a line, and went on to the top of the tank. He found the thermometer too large to go through the bunghole in the top of the tank, and removed the cover from the manhole. He lowered the thermometer into the wine in the tank and drew it up. While he was attempting to read it, the fumes of alcohol escaping from the tank were exploded by coming in contact with the lighted candle. Renteria was hurled to the ground, his clothing afire, and was very seriously burned. If Renteria's testimony is true, he was, at the time of his injury, performing an act which he had been ordered by petitioner's superintendent to perform, and was, as found by the Commission, "reasonably in the performance of his work." He was then performing service growing out of and incidental to his employment, and was acting within the course of his employment. *Engels, etc., Mng. Co. v. I. A. C.*, 183 Cal. 714, 717, 192 Pac. 845, 11 A. L. R. 785. Assuming it was Jaffe who spoke the truth, and that the employee misunderstood his order, he was still working in the petitioner's service and not doing anything personal to himself. As argued by respondent:

"He was doing an act which he had done before at the instance of the employer, but in another way, and for the employer's benefit, and which he could reasonably expect to be told to do again."

What he was doing had a direct connection with petitioner's business. Whether the applicant should be believed, or whether Jaffe's testimony should be accepted, was a matter resting solely with the Industrial

Accident Commission. There being competent evidence to support its finding, it will not be reviewed by this court. *Dearborn v. I. A. C.*, 187 Cal. 591, 594, 203 Pac. 112.

[3] Petitioner's further attack is directed to the finding of the Commission that the injury to Renteria was not caused by the serious and willful misconduct of the employee. Having shown that there was available a safe artificial light at the time Renteria attempted to take the temperature of the tank with a lighted candle, he argues that the employee chose a dangerous instrumentality in disregard of his own safety and the safety of others, and that the finding fails of support. Section 21 of article 20 of the state Constitution, as amended November 5, 1918, prescribes that compensation shall be provided the employee to the extent of relieving him from the consequences of any injury sustained in the course of his employment, "irrespective of the fault of any party." The applicant and other witnesses testified that petitioner kept candles around the winery for use about the tanks and in other dark places generally, and that they were never forbidden to use candles, and were never cautioned about their use or the danger arising from alcoholic fumes coming in contact with a flame. Renteria said he did not know the sherry tank was liable to explode, and had never heard of such an explosion before. On the other hand, Jaffe, the foreman, testified that he had repeatedly told the men to be careful about the use of candles, and had on one occasion told Renteria not to use lighted candles around the fortified wine tanks. The fact was well established, however, that candles were in common use about the winery to supply light in dark spots, and when the electric power was off, and for the purpose of testing tanks for the presence of carbon dioxide gas before the men went inside to clean them. An electric light on a cord of sufficient length to have been used by Renteria was near the tank.

When injured, the applicant was a common laborer, twenty-three years of age. It was for the Commission to determine the facts from all the surroundings and attendant circumstances as they existed at the time of the injury. Whether the action of the employee amounted to willful misconduct as used in the act, and as defined in *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 186, 149 Pac. 35, or whether it did not amount to that, was for the Commission to determine. Whether he was ignorant and uninformed, or, knowing, forgot, or whether he was or was not warned, or whether he disobeyed orders made for his protection—these were all matters for it to consider. *U. S. Fidelity & Guar. Co. v. I. A. C.*, 174 Cal. 616, 621, 163 Pac. 1013; *Western Pac. R. Co. v. I. A. C.*, 180 Cal. 416, 418, 181 Pac.

787. We cannot say, as a matter of law in opposition to its judgment of the facts, that the finding of the Commission was not justified by the evidence.

[4] The injured employee was very badly burned by the explosion. The Commission awarded him the sum of \$2,528.98 for the reasonable medical and hospital treatment rendered necessary in his case. Petitioner attacks this allowance upon the ground that it was beyond the jurisdiction of the respondent to make it, in that the expenses were incurred in a manner not authorized by him. His contention is that he made suitable provision for the injured employee's care and attention, which was not accepted by Renteria; that there was no neglect or refusal on his part entitling the employee to make his own arrangements. There is no merit in the point. Section 9 (a) of the Workman's Compensation, Insurance and Safety Act (St. 1917, p. 831) provides that, where liability for compensation under the act exists, such medical and hospital treatment as may reasonably be required to cure and relieve from the effects of the injury shall be provided by the employer. In case of his neglect or refusal reasonably to do so, the employer shall be liable for the reasonable expense incurred by or on behalf of the employee in providing the same. The intent of this provision is that the employer shall, in the first instance, have the right to designate and select the physicians who are to give treatment to the employee. The latter is authorized to make his own selection at the expense of the employer only where the employer has neglected or refused to provide the necessary service. *Leadbetter v. I. A. C.*, 179 Cal. 468, 470, 177 Pac. 449. There is a direct conflict as to what occurred in this case immediately following the explosion which caused the injuries to Renteria. The man was very seriously burned. He was in great pain and suffered intensely. There was in the town of Livermore at the time a sanitarium sometimes called "the emergency hospital," but privately owned and having no connection with the municipality. It was run by a registered nurse, Miss McKenzie, and adjoined the office of Drs. Warner and Dolan. Dr. W. L. Meyers, Renteria's family physician, also lived in and had his office in Livermore. Testimony offered for the petitioner is that Jaffe, the manager, directed that Renteria be taken "to the emergency hospital." Renteria denied this, and swore positively that he requested to be taken immediately to his family physician for treatment, which was agreed to by Jaffe.

The fact is he was taken to Dr. Meyers, who gave him a hurried "first aid" treatment, and directed that he be taken at once to a private sanitarium maintained by Mrs. Aylward, also in Livermore. Through a misunderstanding, the party charged with taking Renteria to the Aylward sanitarium took him to Miss McKenzie's place. There Dr. Dolan and Dr. Warner proceeded to put on a temporary dressing. Dr. Meyers arrived shortly after, and Renteria was immediately removed to Mrs. Aylward's sanitarium.

[5] No arrangement was ever made by petitioner with Dr. Dolan to furnish treatment at his expense, and, so far as the record discloses, no one was ever retained by him or instructed to attend Renteria. On the other hand, Mr. Jaffe visited Renteria at the Aylward sanitarium the morning after the explosion, and a number of times after that. He was solicitous about Renteria's condition, and expressed himself as satisfied with the treatment the young man was receiving. It is plain from a reading of the Compensation Act that it is the first duty of an employer to furnish medical aid and hospital service to an injured employee, and not merely to reimburse the latter after the service has been procured elsewhere. The Commission was entitled to accept as true the evidence of the applicant that his request that he be treated by his family physician, Dr. Meyers, was satisfactory to petitioner's manager. That was done. By tacit permission, and with the express approval of Jaffe, the treatment was continued by Dr. Meyers, and the employee was cared for at the Aylward sanitarium. Consent of an employer, either affirmatively given, or inferred from his inaction, to the employee to procure his own treatment, renders the employer liable for the reasonable expenses thus incurred. *Trustees, etc., v. Lehigh Valley Coal Co.*, 267 Pa. 474, 110 Atl. 255; *Ripley's Case*, 229 Mass. 302, 118 N. E. 638; *Bucyrus Co. v. Reisinger* (Ind. App.) 133 N. E. 516. The reasonableness of the bills was by stipulation submitted to Dr. Gibbons, the physician and surgeon of the Commission, who filed his approval of the accounts. The jurisdiction of the Commission to make the award for reasonable value of the medical and hospital treatment received by the applicant in this case cannot be denied.

The award is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; MYERS, J.; SEAWELL, J.; LENNON, J.; RICHARDS, Justice pro tem.

191 Cal. 629

TITLE INS. & TRUST CO. v. DUFFILL et al. (L. A. 6814.)(Supreme Court of California. Aug. 20, 1923.
Rehearing Denied Sept. 17, 1920.)**1. Judgment ⇨735—Held not res judicata.**

A judgment requiring specific performance by a former husband of agreement to convey to one of plaintiffs, as trustee for his former wife and son, a one-fourth of any property he might acquire in his mother's estate upon her death, the income from such one-fourth to be paid to the former wife, *held* not to estop, in a subsequent action, consideration of the question as to what constituted "corpus" of the estate and what "income" in the hands of the trustee, that question having not been involved in the first action.

2. Trusts ⇨112—Intention of settlor governs construction.

In construing a trust, the intention of the settlor governs.

3. Trusts ⇨112—Doubt or uncertainty construed most favorably to beneficiary.

Doubt or uncertainty in language of trust will be construed, if possible, most favorably to beneficiary.

4. Trusts ⇨272(1)—Trust agreement in contemplation of divorce construed; "income."

Where a husband, by a trust agreement made in contemplation of divorce, agreed to convey to a trustee, for the benefit of his then wife, a one-fourth of any property or interest he might receive from his mother's estate, which agreement provided that the wife should be entitled only to the income from such one-fourth interest, and where subsequently the husband's mother by will placed all her property in the hands of a trustee so he received only the income thereof, one-fourth of which he paid to his divorced wife's trustee, *held*, that the portion so received by the trustee was "income" to which the wife was entitled, and not corpus of the husband's interest which was required to be reinvested, notwithstanding Civ. Code, § 863, providing that beneficiaries under express trusts in real property take no interest, but may enforce performance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Income.]

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Title Insurance & Trust Company against Martha Duffill and others. From an adverse decree, the named defendant appeals. Reversed and remanded, with directions.

Kemp, Mitchell & Silberberg, and Alex. W. Davis, all of Los Angeles, James P. Sex, of San Jose, and Mulford & Dryer, of Los Angeles, for appellant.

Hunsaker, Britt & Cosgrove and Mattison B. Jones, all of Los Angeles, for respondents.

WASTE, J. The plaintiff, as trustee under the terms of a written agreement, brought this action for the interpretation of the trust, and sought the direction of the court as to the proper application of certain funds in its possession. Judgment was entered in accord with its contentions, and Martha Duffill, one of the defendants, and a beneficiary under the terms of the trust, appealed. On rehearing, we are satisfied with, and adopt the clear and comprehensive statement of, the facts prepared by Hon. Charles A. Shurtleff, a former justice of this court, on the first submission of the case:

"This action was brought by plaintiff as trustee for a decree interpreting a trust created by a certain written contract dated August 26, 1914, in which it is named as trustee, the principal beneficiaries of which trust are the defendants Harry Duffill, Martha Duffill, his divorced wife, and Albert Duffill, a minor, and only child of Harry and Martha Duffill. The contract was entered into between the defendants Harry and Martha Duffill pending an action for divorce brought by Martha against Harry, and embodied the terms of an adjustment of their property rights. The contract was made in view of the fact that orders for alimony for Martha and maintenance for Albert, the minor child, might be made in said divorce action, and was entered into subject to the approval of the court, which approval was subsequently given in and by decrees entered in said action. At the date of this contract Eugenie A. Duffill, the mother of defendant Harry Duffill, was alive and possessed a large estate, and Harry Duffill was her sole heir at law. The contract indicates that at the time of its execution the parties thereto had contemplated, indeed acted upon the assumption, that at his mother's death Harry would come into a large part of her estate. The portions of the agreement material to this discussion are as follows: 'The first party [Harry Duffill] covenants that in the event he shall acquire or receive from Eugenie A. Duffill [his mother], by devise, bequest, inheritance, succession, or from any trust agreement wherein the first party is the beneficiary and his beneficial estate arises after the death of said Eugenie A. Duffill, any property whatsoever, whether real or personal, of any kind and wherever situated, or any interest therein, that, forthwith upon acquiring or receiving each and every of said properties or interests, an undivided one-fourth of each and every such parcel and interest shall become the property of the Title Insurance & Trust Company [plaintiff] as trustee, in trust nevertheless for the uses and purposes hereinafter set forth. So far as is legally possible first party does hereby grant, bargain, sell, convey, assign, transfer and set over unto said trustee, an undivided one-fourth of each and every such property or interest. First party covenants that when, if and as, he shall become possessed of each and every such property or interest, or obtain the right to possession of any of the same, that forthwith and without any demand being made upon him by second party [Martha Duffill] or the trustee, and at his own proper

cost and expense, he will cause title to an undivided one-fourth of each and every said such property and interest to be given, granted, conveyed, assigned and delivered to said trustee and will do all those things necessary or proper to establish the title of said trustee thereto as fully and effectually as could be done were first party seized and possessed of the same at the date of this instrument. * * * All the property, real and personal, held by Title Insurance & Trust Company as trustee hereunder shall be held by it as trustee for the uses and purposes, * * * namely, * * * from time to time to sell all or any part of said property on such terms and in such manner as it may see fit and from time to time to invest and reinvest the proceeds of any such sale or sales or any principal of the trust fund in such securities as are permitted for investment by savings banks under the laws of the state of California. * * * During the natural life of second party the trustee [at stated times] * * * shall pay over to second party [Martha Duffill], for her own use, all of the net income derived from the trust properties, but no part of the principal of said trust shall be expended or paid to second party.' The instrument further provides that upon the death of Martha Duffill the assets of the trust remaining in the hands of the trustee shall become the property of Albert Duffill, the son, and in the event his death shall have occurred prior to the death of Martha Duffill then such assets shall, upon her death, become the property of the lawful issue per stirpes et non per capita of Albert, living at his death, 'and in default of such issue the party of the first part shall have an estate in remainder in said assets, dependent upon the life estate in said assets herein and hereby created, for and during the natural life of the party of the second part.' It was further agreed that the trust 'shall wholly cease and determine upon the death of second party.'

"Eugenie A. Duffill died January 7, 1916, some sixteen months subsequent to the execution of the agreement of August 26, 1914, leaving a will, which will was admitted to probate by an order of the superior court of the State of California in and for the county of Los Angeles, and a decree of distribution was made therein on July 17, 1918. An appeal was taken from this decree to this court [Estate of Duffill, 180 Cal. 748, 183 Pac. 337], which resulted in an affirmance, and the same becoming final in August, 1919. The questions adjudicated and settled in that appeal are of no special moment here, and our reference to the same is for the purpose of showing the finality of such decree of distribution. Under the terms of this decree, property real and personal of large value was distributed to the Los Angeles Trust & Savings Bank, the trustee named in the will, upon the following trusts: To take, hold and have possession of the same 'with full power to sell, lease, improve or exchange, invest or reinvest any or all of said property, * * * to invest, and reinvest and keep invested, said property' * * * and 'shall pay to said Albert Duffill, out of the income derived from the principal of the trust estate, the sum of three thousand dollars (\$3,000.00) per year, at such times and in such amounts as said trustee shall deem expedient,

* * * the sum of four thousand dollars (\$4,000.00) to Harry Duffill' [under like conditions], each of said payments to continue 'until said Albert Duffill shall reach the age of twenty-one years, or in the event of the death of said Albert Duffill, until the date when said Albert Duffill would have attained the age of twenty-one years had he lived.' * * * That one-half of the balance of the income from the principal of said trust estate, after paying the aforesaid [the sums payable to Harry and Albert] and the necessary expense of administration of the estate, shall be accumulated during the minority of Albert Duffill by said trustee, for his use and benefit, * * * and * * * the other one-half of the income from the principal of said trust estate shall be paid to Harry Duffill from time to time * * * after deducting the aforesaid annuities [those specified in the decree] and the necessary expense of administration of the said estate. * * * When said Albert Duffill shall attain the age of twenty-one years, in case said Harry Duffill shall then be living, the trustee shall segregate the corpus of said trust fund (excluding the accumulations for the benefit of Albert) into two equal parts, and shall transfer and convey one of said parts to the said Harry Duffill.' The decree proceeds to provide that in the event of the death of the said Harry Duffill prior to the distribution to him of said part, the trustee shall distribute all of said trust fund to said Albert Duffill upon terms and conditions not material to this inquiry, and that upon the death of Albert while there remains 'undistributed' to him any portion of the trust estate, the trustee shall transfer, convey and distribute such portion as follows: 'To Martha Duffill one-fourth of the entire trust estate then in the hands of the said trustee, including any accumulated income; and the remaining three-fourths of the said trust estate' to Harry Duffill, such distribution to said Harry Duffill to be made at the same time that the said Albert Duffill would have attained the age of twenty-one years.

"The decree of distribution further orders that 'in the event of the death of both Harry Duffill and Albert Duffill while any portion of the trust estate remains in the hands of the said trustee and undistributed, then upon the death of the last survivor of them said trustee shall thereupon distribute said entire trust fund so undistributed * * * as follows: To Martha Duffill one-fourth of the said estate,' and the remaining three-fourths to certain designated persons whose names need not be stated.

"The will of Eugenie A. Duffill also directed the Los Angeles Trust & Savings Bank as trustee to accumulate the surplus income from the trust property until Albert attained or would have attained majority if he lived, and at said time, to pay to Harry Duffill one-half of such accumulated income, and to transfer to him one-half of the corpus of the trust estate. This provision for the accumulation of this one-half of the surplus income was declared to be invalid, not being for the benefit of a minor, and for that reason one-half of such accumulated income was distributed directly to Harry Duffill [Estate of Duffill, supra]. Pending the administration, which was

prolonged by litigation, the income accumulated in a considerable amount. Subsequent to the decree of distribution becoming final the plaintiff, in an action brought against Harry Duffill for that purpose, obtained a decree directing specific performance of that portion of the contract of August 26, 1914, whereby he [Harry] obligated himself to transfer to plaintiff as trustee portions of any interests he might acquire from his mother's estate. In obedience to this decree Harry Duffill, at the time the instant suit was commenced, had paid or transferred, or caused to be paid or transferred to the plaintiff as trustee under the contract of August 26, 1914 (and wherever herein we refer to plaintiff as trustee it has reference to trustee under said last-mentioned contract), cash and properties in lieu of cash amounting to \$12,229.44, which payment represented the proportionate amount of Harry Duffill's yearly annuity of \$4,000 and one-half of said accrued income which was, as already stated, paid directly to Harry. At the same time, and upon the same date, there was also delivered to plaintiff, as such trustee, 150 shares of the common stock of the Grasselli Chemical Company, valued in said decree of distribution at \$190 per share, making a total delivery of \$40,729.44."

Martha Duffill claimed that under the provisions and trusts established by the agreement of August 26, 1914, she was entitled to have all of the cash and properties which had been delivered by Harry Duffill to plaintiff, as trustee, paid to her as income arising from the trust established by the contract, and that any and all other income which might thereafter be paid to plaintiff under the terms of the contract, or the decree of specific performance, and shall accrue from Harry Duffill's portion of the corpus of the estate of Eugenie A. Duffill, also constitutes income in the hands of plaintiff, distributable to her when and as the same is received by it. The plaintiff as trustee, being in doubt as to her interpretation of the trust agreement, brought this action. The trial court sets out in its findings, in *hæc verba*, the contract of August 26, 1914, and so much of the decree of distribution in the matter of the estate of Eugenie A. Duffill as is germane to this controversy. It also "found," in what amounts to a misplaced conclusion of law, "that under the terms and provisions of the contract of August 26, 1914, all sums of money, and all other property which has been, or shall hereafter be, received by plaintiff out of and from defendant Harry Duffill's share and interest in either the income or the principal of the estate of Eugenie A. Duffill, deceased, or of the trust created in and by the decree of distribution in the matter of said estate, constitutes principal or corpus in the hands of plaintiff, as trustee, under said contract of August 26, 1914, and not income; and defendant Martha Duffill is only entitled, under said contract, to receive from plaintiff the net income derived by plaintiff as trustee under said contract from the prop-

erty and moneys so received and so to be received by it, and from the investment thereof, and that no part of any money or other property, which has been so received by it, shall be expended or paid to said Martha Duffill." The conclusions of law conformed to this view, and judgment was entered accordingly. From this judgment the defendant Martha Duffill appeals.

[1] Appellant is confronted at the outset on this appeal with the contention of the respondents that she is estopped by the judgment, in the action in specific performance referred to, from asserting the claims she brings to this court in the present action. She asserts that this question was not raised nor argued in the lower court, and is for the first time advanced here. Even though that be so, we feel inclined to consider briefly the situation in which the parties were left by the decree in specific performance, for the respondents have placed much reliance upon the point, and we do not agree with them in their contention. From the judgment roll introduced by appellant, we learn that the action referred to was brought by the plaintiff here, as trustee, Albert Duffill, the minor, by his guardian ad litem, and Martha Duffill, as plaintiffs, against Harry Duffill and the Los Angeles Trust & Savings Bank, as executor of the estate of, and trustee under the will of, Eugenie A. Duffill, deceased. The complaint sets out in full the agreement of August 26, 1914, and the decree of distribution in the estate of Eugenie A. Duffill; also the various steps in the administration of the mother's estate, substantially as narrated in our statement of facts, and the incurring by Harry Duffill of certain fees and costs in connection with securing his share of the estate under the testamentary trust. It is then alleged that a demand was made on Harry to assign, transfer, set over and convey to the Title Insurance & Trust Company, as trustee under the terms of the contract of August 26, 1914, one-fourth of the annuity and all sums already received by him, and to be received, from the estate of Eugenie A. Duffill, which he refused to do, although "the Title Insurance & Trust Company is entitled to receive under such contract of August 26, 1914, each and all of said properties." The prayer is for a determination of what, if any, fees and costs may be deducted by Harry from the one-quarter interests, under the terms of the August contract, and for a declaration of what interests and properties were properly transferable to the Title Insurance & Trust Company under that agreement, and that the Los Angeles Trust & Savings Bank distribute the same direct to, and that Harry execute proper deeds and transfers conveying and transferring to the Title Insurance & Trust Company, as trustee, such interests and properties "to be conveyed or transferred under the terms

of said agreement of August 26, 1914." Harry Duffill, in answer to the complaint, asserted that the plaintiffs, by reason of alleged opposition to distribution of the estate of Eugenie A. Duffill, had forfeited all right to, and were barred from, participating in, or having delivered to the Title Insurance & Trust Company any of the property ordered distributed in that estate, but that notwithstanding such alleged fact he was willing and ready to execute an instrument in writing transferring to the Title Insurance & Trust Company one-fourth of all property distributed to him or which he might receive, subject only to his right to reduce that portion to a one-fifth interest to offset reasonable costs and attorney's fees incurred by him in relation to the testamentary trust. The other defendants disclaimed any interest in the controversy other than the duty to pay over or distribute all money or properties to the persons entitled thereto. The court adjudicated the matter of the costs and attorney's fees expended by Harry Duffill. It found and decreed that the plaintiffs in the action were entitled to have the agreement of August 26, 1914, between Harry Duffill and Martha Duffill, specifically enforced "upon the conditions and as hereinafter expressed." It directed the proper transfers and conveyances to be made, and decreed that the Title Insurance & Trust Company, as trustee, "under and pursuant to the terms of the agreement of August 26, 1914," between Harry Duffill and Martha Duffill, was entitled to receive from Harry Duffill one-fourth of such interests as he had or could acquire from the estate of Eugenie A. Duffill, after reducing to a one-fifth interest a certain portion of the estate to cover a pro rata amount of costs and attorney's fees incurred in conducting the controversy involving the distribution of the mother's estate, "all upon the trusts, and subject to the terms and conditions of the third subdivision of said agreement of August 26, 1914." The decree directed the execution and delivery of the proper conveyances and transfers to be made to make the judgment of the court effective. Nowhere in the findings, conclusions of law, or in the decree, did the court place, or attempt to place, any construction or interpretation upon the agreement of August 26, 1914. It contented itself with reading into its judgment the "terms and conditions of the third subdivision of said agreement." It is therefore necessary to resort to the agreement to understand what the effect of the judgment in specific performance is, and what is the situation of the parties under it. The issue in the case in which it was rendered was whether or not the plaintiff in the action, the plaintiff here, as trustee, was entitled to receive from Harry Duffill a certain proportion of all he received from his mother's estate. The controversy here is as to what

constitutes principal or corpus of that portion of the estate in trust, once it is lodged in plaintiff's hands. That issue was, so far as the record discloses, never submitted to the court in the other action. When, therefore, respondents say that it was adjudged by the decree in specific performance, that precisely the same property which the appellant here claims to be hers absolutely is property from which, in the hands of, and subject to the management of, the plaintiff, as trustee, she is entitled to the income only, resort must be had to the contract of August 26, 1914, to determine if that be so. It results that whether or not appellant is estopped from asserting the claims she now brings to this court depends upon an interpretation of the agreement between herself and Harry Duffill.

While the ultimate question to be considered is, What constitutes the corpus or principal of the trust estate created by the August agreement entered into by Harry and Martha? the solution of that problem can only be accomplished by determining the nature of the property, or interest in property, which Harry took at his mother's death under the testamentary trust created by her will. In opposition to the theory which was accepted by the trial court, appellant contends the one-half of the income paid and being paid to Harry from the estate of Eugenie A. Duffill, deceased, constitutes income to Harry upon an equitable interest owned by him in his mother's estate, and that inasmuch as it is income to Harry it is income to plaintiff and appellant, and forms no part of the corpus of the trust provided by the contract of August 26, 1914. In the abstract her argument is that Harry Duffill, immediately upon the death of his mother, acquired and became the owner of an equitable estate in the property devised by Eugenie A. Duffill to the Los Angeles Trust & Savings Bank, and has received, and will continue to receive, income therefrom by virtue of his equitable ownership of that interest; that at the same time and by reason of the contract of August 26, 1914, a like equitable estate as to one-fourth of such property and interest vested in plaintiff; that, immediately upon Harry acquiring and becoming the owner of his equitable interest, he held whatever portion he was obligated to transfer to the Title Insurance & Trust Company under his contract in trust for the plaintiff as trustee; that in equity the plaintiff immediately became the owner of such proportionate amount of Harry's equitable estate, which, although the legal title is still in the Los Angeles Trust & Savings Bank, constitutes the corpus of the trust estate created by the agreement between Harry and Martha; that, as a result, any income accruing upon such proportionate interest constitutes income upon an equitable interest or estate

held by plaintiff as trustee in just the same manner that the residue of the income constitutes income upon Harry's equitable interest in the mother's estate; that plaintiff has received, and is receiving, one-fourth of this income in exactly the same capacity as that in which Harry receives the remaining portion. More concretely stated, appellant's contention is that plaintiff, Title Insurance & Trust Company, has stepped into Harry's shoes as to this one-fourth proportionate interest, and consequently as the money paid would, in fact, constitute income on an equitable estate, if paid to Harry direct, it must constitute income on an equitable estate as paid to plaintiff, and should be paid directly to Martha. In answer to this contention, respondents, other than plaintiff, take the position that the right or interest of Harry Duffill in his mother's estate is only a right to receive something by transfer or conveyance from the trustee. Eugenie A. Duffill, they argue, did not choose to be her own conveyancer, but vested title in her trustee, Los Angeles Trust & Savings Bank, it in turn to pass the title by conveyance and transfer to whoever ultimately becomes entitled to it. The only present right or interest to which Harry Duffill is entitled, under their contention, is the right to enforce the trust with respect to the payment of his annuity, and one-half of the net income after all the annuities and the expenses of administration are paid. "While he has a present vested right to receive a share of the income of that [testamentary] trust estate," they say, "and so to enforce that trust, he has no present right in or to any property, or the possession thereof, until there is income which Los Angeles Trust & Savings Bank, as trustee under the will of his mother, is required to pay over to him. When that state of facts comes into existence, and not until then, the right under the contract of August, 1914, arises in the [plaintiff] Title Insurance & Trust Company. And when it does arise," is the point of their contention, "the fruit of that right is principal of the trust in the hands of that company, as trustee," under the plain terms of the contract, and plaintiff may thereupon pay over to Martha, for her own use, all of the net income derived from such trust property in its hands, but no part of the principal of the trust may be expended or paid to her.

What acceptance of one or the other of these two different contentions concerning the trust created by the August agreement means to appellant is at once apparent. If her theory be the right one, and "what is income to Harry is income to Martha," she is entitled to immediate payment by the Title Insurance & Trust Company as trustee of all that it has thus far received, or will receive, from Harry pending the termination of the testamentary trust created by his mother's will; for, until that time he will

receive nothing but income from that source. If, on the other hand, as contended by respondents, what is income to Harry from the testamentary estate becomes principal or corpus of the trust in the hands of plaintiff under the agreement, appellant is only entitled to receive whatever earnings plaintiff is in turn able to produce from the moiety of Harry's income turned over to it. Appellant here attacks what she terms "the inequity and iniquity" of the contention of the respondents. She assumes that in the administration of the contract trust plaintiff may realize 6 per cent. "Supposing a case," she says, "where Eugenie A. Duffill had disposed of her property to a trustee in trust to pay the income thereof to Harry Duffill for the period of his lifetime. If we would apply the contentions of Harry Duffill to such a case, his wife, by virtue of his settlement agreement by which he intended to have paid her one-fourth of his income which he should receive, would receive only 6 per cent. on one-fourth of" that amount.

[2-4] In seeking the true construction of a declaration of trust, the guiding principle must be the intention of the settlor—his intention as expressed. Not, What did he intend to say? but, What did he intend by what he did say? must be the test. *Chater v. Carter*, 238 U. S. 572, 584, 35 Sup. Ct. 859, 59 L. Ed. 1462. The only intention this court is authorized to declare is such as may be deduced from an interpretation of the instrument which was drawn and executed by the parties to express their intention (*Welton v. Palmer*, 39 Cal. 456, 458), which must be gathered from the general purpose and scope of the agreement (*Colton v. Colton*, 127 U. S. 300, 311, 8 Sup. Ct. 1164, 32 L. Ed. 138. If there be any doubt or uncertainty in the language of the trust, it will be construed, if possible, in favor of the beneficiary and against the trustee. *Sprague v. Edwards*, 48 Cal. 239, 247; *Ringrose v. Gleadall*, 17 Cal. App. 664, 667, 121 Pac. 407. The underlying reasons which led to the execution of the agreement of August 26, 1914, and the situation of the parties to it at that time, are clearly set forth by the parties themselves in the preamble to that instrument:

"That whereas, the first party [Harry] and second party [Martha] are at the date hereof, husband and wife, and Albert Duffill is the only child born of their marriage and Eugenie A. Duffill is the mother of the first party; and

"Whereas, an action is now pending in the superior court of the state of California, in and for the county of Los Angeles, wherein second party is plaintiff and first party is defendant, being case No. B-1182, wherein the plaintiff prays, among other matters, for a decree that the bonds of matrimony between first party and second party be dissolved; and

"Whereas, there are involved in said action questions as to the respective property rights of said parties and issues of fact as to proper-

ty which may be the basis of making and enforcing of orders for alimony and maintenance of second party and Albert Duffill; and

"Whereas, the parties hereto are desirous of making a settlement and agreement regarding all of the property rights and interests belonging to them and a division of said properties so that in the event an interlocutory decree of divorce shall be rendered in said action, that the property rights of the parties hereto may be settled and determined by said court in accordance with the intent of the parties as herein expressed; and

"Whereas, this agreement is made subject to the approval of said court and subject to the rendering of said decree for the sole reason that in the event that the parties hereto are to remain husband and wife some other and different division of their respective property rights would be proper and advisable for both of them;

"Now, therefore, the first party does hereby covenant and agree with second party as follows."

Then follow covenants and stipulations, from which it appears that Harry had deeded to Martha an undivided one-half interest in "all the real and personal property described in or referred to in" a separate declaration of trust with which we are not now concerned, and otherwise carried that agreement into execution. These clauses, designated "first" and "second," we may assume dispose of the rights and interests of the parties in whatever property they then possessed; but Harry's mother was possessed of much property, and it was only reasonable to suppose that he would come into a share of her estate upon her death. The "third" provision of the agreement relates directly to that subject. By its terms Harry covenanted with appellant that an undivided one-fourth of each and every parcel and interest of or in any property he should acquire or receive from his mother by devise, bequest, inheritance, succession, or from any trust agreement wherein he was the beneficiary and his beneficial estate arose after his mother's death, should forthwith, upon his acquiring or receiving the same, become the property of this plaintiff as trustee, for the uses and purposes set forth in the agreement. The vocabulary of legal phraseology is well nigh exhausted in the stipulations of the contract in an apparent endeavor to make it plain that so far as is legally possible Harry did, by the agreement itself, vest plaintiff with an undivided one-fourth "of each and every such property and interest," and would "if and as" he should "became possessed of * * * or obtain the right to possession of any of the same," do all things necessary or proper to establish the title of the plaintiff as trustee as fully and effectually as could be done if he were seized and possessed of the property or interest at the date of the instrument.

It seems improbable that the parties to

such an agreement would enter into an arrangement, so far as their own acts and interests were to be governed, that would permit a situation to arise which might almost effectually defeat the scope and purpose of their contract. If a rationally fitting and proper interpretation of an instrument of this character will prevent that result, such exposition should be accepted. The instrument here calls for an exact division between Harry Duffill and his wife of whatever property Harry should acquire or receive from his mother's estate, on the basis of three-fourths to Harry and one-fourth to Martha's use. What each is to receive, and, we think, when each is to receive it, are stated in plain terms. A most reasonable and just construction of the agreement between Harry Duffill and his wife is to hold that it was their manifest intention, which they have clearly expressed in the contract, that just as soon as, and whenever, Harry should enter into the enjoyment of any part or portion of whatever property he should acquire or receive from his mother's estate, Martha Duffill should, at the same time, and coincidentally with Harry's beneficial use, enter into as full and free enjoyment of her allotted portion of that same property as Harry of his remaining share. The injustice of any other conclusion has already been indicated by the appellant in the apt illustration cited by her. It was certainly not the intention of the parties that Harry might enjoy to the fullest extent, other than actual possession, his share of his mother's estate, and that his wife, who was expected to share to the limited extent, should be cut off with a mere pittance as compared with what it was evidently intended she should have. It must not be forgotten that Harry did not vest plaintiff, for Martha's use and benefit, with one-quarter of any "income" he might thereafter receive from a share of his mother's estate held in trust, but with an undivided one-quarter of each and every parcel of "any property whatsoever, whether real or personal, of any kind and wherever situated, or any interest therein," which should forthwith "become the property of the Title Insurance & Trust Company, as trustee," for the purposes of the trust. If Harry has acquired any interest or estate in the property held in the testamentary trust, and has entered into its enjoyment, it must follow that plaintiff, for Martha's use, must share in such use and enjoyment to the extent guaranteed by the August agreement. This we take to mean that, if Harry has now an interest in the corpus of the testamentary trust, a proportionate right and interest in the same corpus has vested in plaintiff. We find no reason for delaying the active operation of the trust for appellant under the August agreement in so far as is possible from the mere fact that plaintiff cannot now obtain

the physical segregation of the trust properties in the hands of the Los Angeles Trust & Savings Bank. It is to all intents and purposes actually in receipt of the income on the share of the corpus of the testamentary trust with which it was vested on Harry's equitable succession to his entire interest. This income is not received by plaintiff from the mother's estate. It is income from property received by Harry from his mother's estate, the portion of which, under the terms of the August agreement, at once passed to plaintiff. In other words, the income receipts to plaintiff are not directly from the mother's estate, but are receipts from the income of its equitable property interest in a portion of the corpus of the testamentary estate. There is no more justification for holding that these receipts are corpus merely because they are in the hands of plaintiff as a trustee than there would be in saying they constituted corpus if the time of possible physical segregation of the trust properties had not been postponed by reason of the testamentary trust, and distribution of the mother's estate had been made. Under those circumstances, one-quarter of Harry's share of the property received (not the income it might produce) would have constituted the corpus of the trust in plaintiff for Martha's use, and she would have been entitled to have paid to her all the net income derived therefrom through plaintiff's administration of the fund. The interposition of the trust for Martha does not act to change the nature of the income. Our former opinion erroneously seemed to imply that it did. We see no reason for making a distinction between income accruing from Harry's property, received through his beneficial interest in the mother's estate, and paid to plaintiff, and income that might accrue to that same property if actually possessed and administered by the plaintiff. We deemed it unnecessary on the former hearing to determine whether or not Harry took an equitable estate in the corpus of the trust created by his mother's will, taking the position that if it did such equitable interest with the income thereon is an interest in property arising out of the mother's estate, and, under the August agreement, part of the corpus of the trust provided for by that instrument. We are now convinced that he took such an equitable or beneficial estate, and, as we have attempted to show, that any income received by him is not in any sense an interest, estate, or property acquired from his mother's estate, but interest derived from his own equitable estate in the property of the testamentary trust. This we think to be the proper theory on which to decide the controversy.

The theory that Harry Duffill received at his mother's death a beneficial interest in the property belonging to her, and that his subsequent receipts, therefore,

are not directly from her, but are receipts from the income of his property, finds support in what we believe to be the status of the equitable interest, and estate of a cestui que trust in property in this state. It is worthy of note that in the distribution of the mother's estate in this very matter Harry Duffill's equitable estate was recognized beyond the provisions of his mother's will. Mrs. Duffill intended that he should receive one-half of the income from the trust created by her, but upon the void condition that it should be accumulated during Albert's minority. As was pointed out by this court, it was undoubtedly the intention of the testatrix that the income should be retained and go with the corpus, to be held by the testamentary trustee and administered as principal, but this intention was frustrated by her unlawful wish for accumulation of that portion of the fund, and it was properly decreed that Harry should enter upon its immediate use and enjoyment. Estate of Duffill, 180 Cal. 748, 761, 183 Pac. 337. While it is beyond dispute that by the terms of the will of Eugenie A. Duffill the legal title to all property constituting the corpus of the testamentary trust created by her vested in the Los Angeles Trust & Savings Bank, as trustee, immediately upon her death, and that such title was declared and confirmed by the decree of distribution of her estate (W. P. R. Co. v. Godfrey, 166 Cal. 346, 349, 136 Pac. 284, Ann. Cas. 1915B, 825), it is equally beyond dispute that on her death there was also vested in Harry Duffill an equitable estate or beneficial interest in her property independent of the legal estate which vested in the testamentary trustee. In England, devises of trust, under this doctrine of an equitable interest, are distinct substantive devises, standing on their own basis, independent of the legal estate which is "nothing but the shadow which always follows the trust res in the eye of a court of equity (Atty. General v. Downing, Wilmut, 1 [Eng.] 22, 97 Eng. reprint, 1). In a still earlier English Case (Burgess v. Wheate, 1 Eden. 177), Lord Keeper Henly (page 251) said that the trust should be considered in equity as the "real estate" and the "trustee should take no beneficial interest that the cestui que trust can enjoy." In the same case, Lord Mansfield said (pages 217, 226):

"Now trusts are considered * * * as the real ownership of the land * * * the same as the land and trustee * * * is in no event to take a benefit."

The generally accepted rule in this country also is that—

"Under the system now prevailing the cestui que trust is regarded as the real owner of the property, the trustee being merely the depositary of the legal title. His is not a property right, but a legal duty founded upon a personal

confidence; his estate is not that which can be enjoyed, but a power that can be exercised." 39 Cyc. 203.

Such estates "are in equity what legal estates are in law; the ownership of the equitable estate is regarded by equity as the real ownership, and the legal estate is, as has been said, no more than the shadow always following the equitable estate, which is the substance, except where there is a purchaser for value and without notice who has acquired the legal estate." 1 Pomeroy, Eq. Juris. (4th Ed.) § 147; Underhill on Trusts and Trustees (4th Ed.) p. 6, art. 2.

Respondents, it will be remembered, contend that Harry Duffill took no estate or interest in his mother's property, but only the right to enforce the performance of the trust. Such contention is largely based on section 863 of the Civil Code, which provides that, except as in the Code provided:

"Every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

Aside from the fact that but little of the property held under the testamentary trust is real property, rendering the Code section of but little moment in this discussion, the construction placed upon its provisions by respondents does not follow. The section was adopted as part of the Civil Code in 1872. It has been construed by this court many times, and the conclusion has been firmly established that—

"The estate which a trustee takes by virtue of section 863 is not necessarily a fee, but only such estate as is required for the execution of his trust." Keating v. Smith, 154 Cal. 186, 192, 97 Pac. 300; Morfiew v. S. F., etc., R. R. Co., 107 Cal. 587, 595, 40 Pac. 810.

This rule that the trustee takes only such an estate in the trust property as is necessary to the discharge of his trust duties refers directly to the quantity of his estate in the property, as, for instance, an estate for years, an estate for life, or an estate in fee. Estate of Pichoir, 139 Cal. 682, 688, 73 Pac. 606. In Gray v. Union Trust Co., 171 Cal. 637, 640, 154 Pac. 306, 308, a substantive "equitable estate" was recognized to exist in one who had a "usufructory interest in the whole estate during her life," notwithstanding there was "conveyed to the trustee the whole legal title, since so much [was] plainly necessary for the purposes of the trust (Civ. Code, § 863)," which general purposes were to give the trustor the beneficial use of the prop-

erty during her life, and upon her death to see that the property went to her nominees under her will. See, also, Estate of Aldersley, 174 Cal. 366, 371, 163 Pac. 206; Weston v. Weston, 125 Mass. 268; Crooke v. County of Kings, 97 N. Y. 421, 446; Patton v. Ludington, 103 Wis. 629, 644, 79 N. W. 1073, 74 Am. St. Rep. 910; Williams v. Williams, 135 Wis. 60, 115 N. W. 342; Estate of Fair, 132 Cal. 523, 550, 571, 64 Pac. 1000, 84 Am. St. Rep. 70.

It were useless, we feel, to carry this discussion to greater length, or to discuss other phases of the matter and probable lines of solution of the problem here presented. Harry Duffill was vested with an equitable estate and beneficial interest in his mother's property immediately upon her death, with only such legal title lodged in the Los Angeles Trust & Savings Bank as is required for the execution of the testamentary trust. That this interest was assignable is beyond controversy. 5 Cor. Jur. p. 854; 3 Pomeroy, Eq. Juris. (4th Ed.) § 1271. See, also, Bridge v. Kedon, 163 Cal. 493, 500, 126 Pac. 149, 43 L. R. A. (N. S.) 404. Whatever may be the duration or quantity of the equitable estate vested in Harry, whether for years or for life, or in mere expectancy, he has received, and is receiving, income thereon. What condition will prevail when the testamentary trust is terminated by lapse of time or death does not now concern us. The accrued and accruing income received by Harry, including the portion paid to plaintiff, is income from Harry's own equitable interest, and is not an interest in property arising out of the mother's estate. It is therefore "income to Martha," and should not be administered as corpus of the trust under the August agreement, but should be accounted for and paid direct to appellant as income.

As the relation of plaintiff to appellant in the matter of the disposition of whatever it has already received from Harry, and will continue to receive until the testamentary trust is dissolved, depends solely upon the interpretation of the agreement of August 26, 1914, there can be no occasion for another trial of the issues presented by this appeal.

The judgment is reversed, and the cause remanded to the lower court, with instructions to enter judgment in accord with this opinion. When so entered, the judgment will stand affirmed.

We concur: WILBUR, C. J.; MYERS, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

191 Cal. 601

ROBERTS v. WEHMEYER. (S. F. 9651.)(Supreme Court of California. Aug. 17, 1923.
Rehearing Denied Sept. 13, 1923.)**1. Husband and wife ⇨267(1)—Wife not required to join in husband's conveyance of community realty acquired after, but paid for by community funds acquired before, enactment of statute requiring wife's joinder.**

Where real estate, conveyed to husband in August, 1917, was paid for out of community funds accumulated before July 27, 1917, on which date Civ. Code, § 172a (St. 1917, p. 829), requiring wife's joinder in deed of community realty became effective, the real estate had status of real estate acquired prior to that date, and the requirement of section 172a did not apply to the husband's conveyance thereof.

2. Constitutional law ⇨277(1)—Legislative regulations of method of transferring property may not contravene due process clause.

The Legislature may regulate and change at will the method of transferring property, but such regulations may not contravene the constitutional guaranty against deprivation of property without due process of law.

3. Husband and wife ⇨265—Wife has no vested future interest in community property; "vested."

While an interest in property may be present or future, and a future interest, entitling the owner to possession at a future period, is vested when there is a person in being having a defeasible or indefeasible right to immediate possession on the termination of the intermediate interest (Civ. Code, §§ 688, 690, 694), a wife has no vested future interest in half the community property, but has only a possible interest in whatever remains on dissolution of the community otherwise than by her own death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vest.]

In Bank.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Suit by Elizabeth V. Roberts against J. F. Wehmeyer. Judgment for plaintiff, and defendant appeals. Reversed.

Hugh R. Osburn, of Oakland, for appellant.
F. P. Feliz, of Salinas, and Carey Van Fleet, of San Francisco, for respondent.

Robbins, Elkins & Van Fleet, of San Francisco, Thomas P. Boyd, of San Rafael, and Claude I. Parker and Samuel M. Shortridge, Jr., both of San Francisco, amici curiæ.

LAWLOR, J. Plaintiff, Elizabeth V. Roberts, and one William A. Roberts were husband and wife. On August 21, 1917, they purchased certain described land in Monterey county, the deed being taken in the name of William A. Roberts alone. The property was paid for out of community funds, substantially all of which had been accumulated before July 27, 1917, on which date sec-

tion 172a of the Civil Code (St. 1917, p. 829), hereinafter considered, became effective. A house, also paid for with community funds, was later built upon the land, and the couple occupied it as a home. As a result of domestic differences, plaintiff, on January 24, 1920, commenced an action for divorce on the ground of extreme cruelty. An interlocutory decree of divorce was granted her February 20, 1920, and she was awarded, among other things, the real estate involved in this action. On January 23, 1920, William A. Roberts executed and delivered to defendant, J. F. Wehmeyer, a conveyance of the premises, which was recorded January 29, 1920, in which plaintiff did not join, and received as consideration therefor defendant's promissory note maturing in one year. Defendant at the time of the transaction knew that plaintiff and William A. Roberts were husband and wife and that they were occupying the house as their family home.

This proceeding was instituted by plaintiff to have the deed from William A. Roberts to appellant declared null and void and to have the title to the property declared to be in her, on the ground that a conveyance of community property by a husband is void under section 172a of the Civil Code, unless his wife joins in its execution. The action was commenced on February 21, 1920, within one year of the date of the recordation of the conveyance, and also before a final decree of divorce was granted. The finding is that the land was purchased with community funds "substantially all earned and acquired prior to July 27, 1917," and we shall therefore assume that the funds were all acquired before that time. Judgment was rendered for plaintiff, from which defendant takes this appeal.

Prior to the amendment of 1917 (Stats. 1917, p. 829) section 172 of the Civil Code provided:

"The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto; and provided, also, that no sale, conveyance or incumbrance of the furniture, furnishings and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife."

By the amendment referred to the operation of section 172 was limited to community personal property and a new section (172a) was added to provide for the control of community real property. That section is as follows:

"The husband has the management and control of the community real property but the

wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or incumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or incumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

1. It is contended by appellant that section 172a has no application to the case at bar, for the reason that, under the decisions of this state, the husband has always been regarded as the owner of the community property, and that to apply the section to transfers of property acquired before the section was adopted would deprive the husband of a vested interest in such property by restricting his power of alienation; that the realty in question is to be regarded as prior-acquired property, because, although transmuted into realty after the section was adopted, it was purchased with personalty accumulated before that time.

[1] Deferring until later the consideration of what the respective rights of husband and wife in the community property are, we are of the opinion they could not be changed by a conversion of the property from personalty into realty. There was no distinction made between realty and personalty at the time the money in the case at bar was acquired. Whatever its form, the property had the status of community property and the rights of the spouses were fixed in it as such. It might be transmuted from personalty into realty and again into personalty without effecting any change in those rights, and no legislation subsequently passed could take away any of the vested rights of either of the parties in either form of property. This being so, no distinction could be drawn between the ownership of realty and of personalty, nor any condition imposed on the right of either spouse to acquire realty, which would deprive either of a vested right enjoyed in the whole of the community property prior to the enactment of the restriction. It follows that in this case the transmutation of the property into realty after the passage of section 172a could not effect any vested right of the husband in it as community property. For the purpose of determining whether any such right is disturbed, the realty must be regarded as though it had been acquired before the adoption of the section. Respondent contends that when the husband, having personalty of the community under his control after the passage of section 172a, voluntarily exchanged it into realty, he exercised his constitutional right of alienation and took the realty subject to

the restriction on his right of disposal. But, in view of our conclusion that the whole of the community property was acquired subject only to the limitations in force at the time of its accumulation, this claim is without support.

[2] It is true, as said in *Peck v. Walton*, 26 Vt. 82, that the Legislature may prescribe regulations concerning the method of transferring property and change them at will, but such regulations may not contravene the constitutional guarantee that one may not be deprived of his property without due process of law. Prior to the adoption of section 172a, a husband in this state had the unqualified right to sell the community realty. By that enactment his right to sell it is so far limited that it can be exercised only with the consent of his wife. Whether or not such a restriction is unconstitutional as applied to property acquired before its enactment depends on the nature of the husband's rights in such property.

2. It is claimed on behalf of respondent that, although the courts of this jurisdiction have said that title to community property rests in the husband and that a wife's interest therein is a mere expectancy, she has in reality a vested interest in it, which she conveys by joining in the transfer or incumbrance. This, it is stated, has been recognized by the courts of all the other states wherein systems of community property exist, and by the Supreme Court of the United States (*Beals v. Ares*, 25 N. M. 459, 185 Pac. 780; *Kohny v. Dunbar*, 21 Idaho, 258, 121 Pac. 544, 39 L. R. A. [N. S.] 1107, Ann. Cas. 1913D, 492; *La Tourette v. La Tourette*, 15 Ariz. 200, 137 Pac. 426, Ann. Cas. 1915B, 70; *In re Williams*, 40 Nev. 241, 161 Pac. 741, L. R. A. 1917C, 602; *Warburton v. White*, 176 U. S. 484, 20 Sup. Ct. 404, 44 L. Ed. 555; *Arnett v. Reade*, 220 U. S. 311, 31 Sup. Ct. 425, 55 L. Ed. 477, 36 L. R. A. [N. S.] 1040), and it is urged that this court has recognized in a wife many rights over community property which are inconsistent with the view that she has no vested interest in it. Thus, it is pointed out, a wife's rights in such property have been held to constitute a valuable consideration for an agreement or transfer (*Estate of Brix*, 181 Cal. 667, 186 Pac. 135), and on the dissolution of the community by divorce the wife's half of the community property immediately vests in her as tenant in common with her husband (*De Godey v. Godey*, 39 Cal. 158).

[3] It is also argued that, as an interest in property may be either present or future (Civ. Code, § 688), a future interest entitles the owner to possession of the property at a future period (Civ. Code, § 690), and a future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the termination of the intermediate interest (Civ. Code,

§ 694), a wife has a vested future interest in the one-half of the community property which a husband cannot dispose of by will and which goes to the wife upon the husband's death. This position is not maintainable, in view of the decision in *Estate of Burdick*, 112 Cal. 387, 44 Pac. 734, wherein it was held that the wife has but a possible interest in whatever community property remains upon a dissolution of the community otherwise than by her own death, which interest does not constitute an estate within the meaning of section 700 of the Civil Code.

This court has often considered the respective rights of a husband and wife in the community property. In *Spreckels v. Spreckels*, 172 Cal. 775, 158 Pac. 537, the conclusions reached in the various decisions are thus epitomized:

"Under the statute prior to the addition of the first proviso in 1891, it was the established doctrine in this state that during the marriage the husband was the sole and exclusive owner of all the community property, and that the wife had no title thereto, nor interest or estate therein, other than a mere expectancy as heir, if she survived him [citing authorities]. The limitation upon the husband's testamentary power contained in the Code was not understood to vest in the wife, during the marriage, any interest or estate whatever in the community property, but merely to constitute a restriction upon the husband's power."

It was further held in that case that the proviso added in 1891 (Stats. 1891, p. 425), imposing the limitation on a husband's right to make gifts of the community property, did not change this rule. These principles are thoroughly established in our law, and have been rigidly adhered to at least from the early case of *Van Maren v. Johnson*, 15 Cal. 308.

However, it is contended that the whole system of community property in this state rests upon a misconception of the Spanish law embodied in *Van Maren v. Johnson*, supra. Counsel point out that that case was decided upon the authority of *Guice v. Lawrence*, 2 La. Ann. 226, and assert that, while the Spanish law of community property was adopted in California and presumably in Louisiana, the rule laid down in *Guice v. Lawrence*, supra, is an innovation from the French law which has no place in our system. Further, *Guice v. Lawrence*, supra, is claimed to have been overruled in *Succession of Marsal*, 118 La. 212, 42 South. 778. Much the same question was raised and decided in *Estate of Moffitt*, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207, but, in view of the earnestness with which counsel have pressed the point, which is conceded to be opposed to the decision in that case, we have examined the Louisiana authorities and the commentators upon the Spanish law.

The Civil Code of Louisiana provides that a marriage shall superinduce a partnership

or community of acquêts or gains (Merriek's Rev. Civ. Code of La., art. 2399 [2369]) and that the husband is the head and master of such property, with power to alienate it, subject to certain limitations upon his right of making gifts and to the wife's right of action in case he fraudulently disposes of the property to her injury (Id., sec. 2404 [2373]). This provision was held in *Guice v. Lawrence*, supra, to be an embodiment of the Spanish law. The court there said:

"The rule of the Spanish law on that subject is laid down by Febrero with his usual precision. The ownership of the wife, says that author, is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife must not say that she has gananciales, nor is she to prevent the husband from using them, under the pretext that the law gives her one-half. But, soluto matrimonio, she becomes irrevocably the owner of one undivided half, in the manner provided by law for ordinary joint ownership. The husband is, during marriage, real y verdadero dueño de todos, y tiene en el efecto de su dominio irrevocable [citing authorities]. * * * The proviso of art. 2373 [2404] cannot be construed as giving or recognizing a title to or in the wife."

From subsequent cases it does not appear that the courts of Louisiana have departed from this view of the law, but rather that they have uniformly followed it. *Tourne v. Tourne*, 9 La. 452; *Succession of Boyer*, 36 La. Ann. 506; *Landreaux v. Louque*, 43 La. Ann. 234, 9 South. 32. Nor were the earlier cases overruled by *succession of Marsal*, supra. That case involved the legality of an inheritance tax sought to be collected upon a usufruct given by a statute providing in effect that, where one spouse died without disposing by will of his or her share of the community property, the surviving spouse, in addition to his or her own share of the community property, should take a usufruct in the half of which the other might have disposed. The court held that by this language of the statute it was not intended that the wife should take the usufruct by inheritance, for it was provided the property in which the usufruct was allowed should be inherited by decedent's issue. Quoting from *Succession of Teller*, 49 La. Ann. 281, 21 South. 265, it was said:

"The child of the marriage *inherits* the share in the community of his deceased parent *subject to the usufructuary right of the surviving parent.*" (Italics by present writer.)

This holding is not inconsistent with the theory that the husband owns the community property, for the usufruct is created in the estate of her heir, not in that of the community while it exists. Such an enactment provides for the disposal of the property on the dissolution of the community. That the endowment of a wife with this usufructuary right does not vest title to the estate in her

during the continuance of the community is shown by the later case of *Peck v. Board of Directors*, 137 La. 334, 68 South. 629, wherein it is declared:

"Differently from the wife, whose interest in the community property is residuary, the husband, as head and master of the community, owns its property during its existence, with full power of alienation, and after its dissolution by the death of the wife continues to own one-half with full power of alienation."

And the recent case of *Jacob v. Falgoust*, 150 La. 22, 90 South. 427, stating that—

"The wife's title, during the existence of the community, is inchoate. *McDonough v. Tregre*, 7 Mart. (N. S.) 68; *Brassac v. Ducros*, 4 Rob. 335. The title remains in the meantime in the husband, as head and master of the community."

Moreover, the view of the Spanish law adopted in *Guice v. Lawrence*, supra, is agreed by the text-writers to be correct. The following quotation from *Febrero* appears in *Ballinger on Community Property*, § 32 (1 Feb. Mej. 225, §§ 19, 20):

"The wife is clothed with the revocable and feigned dominion and possession of one-half of the property acquired by the husband during the marriage; but, after his death, it is transferred to her effectively and irrevocably, so that, by his decease, she is constituted the absolute owner in property and possession of the half which he left her. The husband needs not the dissolution of the marriage to constitute him the real and veritable owner of all the gananciales, since, even during the marriage, he has in effect the irrevocable dominion, and he may administer, exchange, and, although there be neither castrenses nor quasi castrenses acquired by him, may sell and alienate them as he pleases, provided there exists no intention to defraud the wife."

In *McKay on Community Property*, Introd. § VI, it is said:

"The use of the term 'marital partnership' as a synonym for the Spanish community between husband and wife in the matrimonial gains suggests many false analogies especially to lawyers trained in the learning of the common law, and the original Spanish idea has in some instances suffered at their hands. The community is not a partnership; it is lacking in nearly all the attributes of a partnership; there is a sort of a community of interests in the matrimonial gains, but even this interest has no likeness to a partnership interest, and the powers of the spouses are totally different from those of partners. * * *

"The words 'community property' suggest the idea of a common ownership, but this suggestion, too, is false, though it has been adopted in Texas and Washington. According to the Spanish law, community property is such as the spouses share together on a dissolution of the marriage, not such as they own together during marriage."

After considering what the respective rights of the parties in the community prop-

erty are under the Spanish law, the same author says (section X, p. 44):

"Now if the wife has no present right to a given thing, but is limited to a share of the common fund on the dissolution of the marital partnership, it is clear that the wife does not hold what we call the legal title, to any given article of the community property, and it follows that the full legal title is in the husband; her right is to share in the surplus of the matrimonial gains after paying the debts chargeable against it."

That (section 287, p. 349):

"From the best evidence obtainable it seems reasonably certain that under the Spanish law the husband, during the marriage, held the full proprietary right in common property and that the wife had no actual proprietary right whatever."

And that (section XI, p. 44):

"California, Louisiana and New Mexico have adhered to the Spanish doctrine that until the dissolution of the community the wife has no proprietary right, while Texas and Washington have adopted the doctrine that the spouses during marriage have an equal proprietary right."

It clearly appears from these considerations that the early decisions of this court, wherein was laid down the rule that during the existence of the community title to the community property is vested in the husband, are not open to the criticism advanced. They rest upon sound authority and a proper interpretation of the Spanish law as incorporated in the statutes of this state through which the community property system was established. If anything to the contrary appears in such cases as *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125, which is authority for the proposition that the husband may not make testamentary disposition of the wife's half of the community property, it has been disapproved. *Estate of Moffitt*, 153 Cal. 359, 360, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207. It cannot be held to have been the law, as argued by respondent, that before the adoption of section 172a of the Civil Code a wife had any vested interest in the community property before dissolution of the community.

The cases from various other community property states undoubtedly have held that the wife has an estate during coverture, but an examination of those decisions shows wherein they are distinguishable from ours, and wherein, from the viewpoint of our decisions, they should not be followed. It is held in Louisiana and California that the statutes establishing a system of community property were intended to be an adoption of the Spanish law and hence that the incidents of the system as it was understood to exist, under the laws of Spain, should be deemed incorporated in the statutory law. This theory the courts of these two states have consistently followed. In other juris-

dictions, notably Texas and Washington, the original characteristics of the community property law were not discussed in the early cases and it was simply held that the statutes gave equivalent rights of property to each spouse. *Wright v. Hays*, 10 Tex. 130, 60 Am. Dec. 200; *Holyoke v. Jackson*, 3 Wash. T. 235, 3 Pac. 841. See, also, *La Tourette v. La Tourette*, supra. In New Mexico and Idaho it has been held that, because of certain provisions in the statutes peculiar to each jurisdiction, an estate was vested in the wife. *Arnett v. Reade*, supra; *Beals v. Ares*, supra; *Kohny v. Dunbar*, supra. The Supreme Court of Nevada in *Re Williams*, supra, an inheritance tax case, frankly declined to follow the decisions of this court. After a careful consideration of authorities from other jurisdictions, including many where dower statutes prevail, and the Nevada statutory provisions, it was held the half of the community property taken by the wife upon her husband's death was not subject to the inheritance tax. No allusion was made to the origin of the system or the respective rights of the spouses under the Spanish law. In our opinion neither these authorities nor any other considerations would justify us in overturning a rule of property which has been settled law in this state for more than 60 years.

It thus appears that the husband is the owner of the community property, that except for such restrictions as the Legislature may have authority to impose he has the unqualified right to dispose of it, and that the wife has but a mere expectancy and not a title or interest which she would convey by joining in the deed. Under these circumstances, to provide that the husband must now obtain the consent of his wife to transfer realty acquired at a time when no such limitation was imposed on his right of alienation would deprive him of a vested right. *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Clavo v. Clavo*, 10 Cal. App. 447, 102 Pac. 556. It follows that section 172a can have no application to such a case, and hence does not govern the transfer in the case at bar.

In arriving at this conclusion we are not unmindful of the two decisions rendered in the case of *Blum v. Wardell*, one by the United States District Court, 270 Fed. 309, and the other by the United States Circuit Court of Appeals, 276 Fed. 226. That action was brought to recover an estate tax paid to the government under protest on the half interest of the wife of the decedent *Blum* in the community property which passed to her under the laws of this state upon his death. The tax was levied under the revenue act of 1916 (39 Stats. 776, 777, Comp. St., § 6336½b et seq.), which imposed an inheritance tax upon the transfer of the net estate of a decedent "to the extent of the interest

therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as a part of his estate." The California Inheritance Tax Act of 1917 (Stats. 1917, p. 880) provides that, for the purpose of the act, half the community property which goes to the widow on the death of the husband should not be deemed to pass to her as heir of her husband, but should go to her as for a valuable and adequate consideration, and should not be subject to the inheritance tax law of the state.

In the decision of the United States District Court it was held unqualifiedly that section 172a of the Civil Code recognizes in the wife a "valid, subsisting, vested interest and estate in the community property during the life of the husband." In the decision of the Circuit Court of Appeals it was held that the interest of the decedent was to be determined by the law of the state where the property is situate, the court saying:

"In the present instance the law of that state is declared by the statute enacted in 1917, providing that, so far as state inheritance taxes are concerned, the wife of a decedent acquires upon his death one-half of the community property in her own right, and not as heir of the husband; in effect, therefore, that, in so far as state inheritance taxes are concerned, the estate of a decedent has no interest of any sort in the wife's half of the community property. That, in our opinion, settles the question here presented against the contention of the government; for we not only see nothing in the above-quoted provision of the United States statute to indicate any intention to impose a federal inheritance tax upon the wife's half of community property which the statute of the state where the property is situate expressly declares passes to the wife upon the death of her husband in her own right and not as heir, but the federal statute, as will be seen, expressly declares as one of the essential conditions to the imposition of a federal inheritance tax that the net estate of the decedent shall be 'subject to distribution as part of his estate.'"

The court then stated that, even if the case were not controlled by the Inheritance Tax Act of 1917, the sole question being one of federal inheritance tax, the rule announced in *Arnett v. Reade*, 220 U. S. 311, 320, 31 Sup. Ct. 425, 426 (55 L. Ed. 477, 36 L. R. A. [N. S.] 1040) was applicable, wherein it was said:

"It is very plain that the wife has a greater interest than the mere possibility of an expectant heir."

We need express no opinion of the decision of the United States District Court, for, as we have already held, section 172a has no application to the property involved in the case at bar.

We agree with the decision of the Circuit

Court of Appeals in so far as it is based on an interpretation of the Inheritance Tax Act of 1917, to the effect that the part of the community property passing to the wife should not be subject to such tax. But, in so far as it relies on *Arnett v. Reade*, supra, as indicating that a wife has at all times had an interest or estate in the community property, we are constrained to disagree with it. The latter case arose in the territory of New Mexico and turned upon the construction of a statute of the territory, passed in 1901, which provided that neither husband nor wife should transfer or incur community real property by onerous title, unless both join in the execution thereof. The Supreme Court of the territory held that the statute did not apply to community real property acquired before its passage because the husband was the absolute owner of such property and would be deprived of vested rights if the statute were construed as applicable to property so acquired. This decision was reversed by the Supreme Court of the United States upon the ground that the position taken by the territorial court was in conflict with the old law of New Mexico, which, in effect, was that, after payment of the common debts, the deduction of the survivor's separate property and his half of the acquest property and subject to the payment of the debts of the decedent the remainder of the acquest property and the separate estate of the decedent shall constitute the body of the estate for descent and distribution. It was accordingly held that, prior to the passage of the statute of 1901, the wife had a greater interest than a mere possibility, and that the statute did not change the estate which the husband had prior to the passage of the statute. The case is to be distinguished from the one at bar, for, as already indicated, in this jurisdiction a husband is held to have absolute ownership of the community. It may be noted in this connection that a conflict of opinion apparently exists with reference to the law of Louisiana, under which the state courts have held that title rests in the husband, whereas the United States District Court has held otherwise. *Liebman v. Fontenot*, 275 Fed. 689.

Because of our conclusion that the property in this case is to be regarded as having been acquired before the adoption of section 172a, it is unnecessary to consider the question, argued at length by the parties, whether, with reference to after-acquired property, the section creates an estate in the wife which she had not theretofore possessed, and if so, whether a transfer of such property by the husband alone would be void or voidable. Nor is it necessary to consider the contentions which appellant makes that the action was prematurely commenced, and that William A. Roberts was a necessary party to its complete disposition.

Finally, it may be said that no title could have vested in respondent by virtue of the interlocutory decree of divorce. Aside from the proposition that the community property may be divided only upon a dissolution of the marriage and that an interlocutory decree is not such a dissolution (*Brown v. Brown*, 170 Cal. 1, 147 Pac. 1168; *Pereira v. Pereira*, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; *Remley v. Remley*, 49 Cal. App. 489, 193 Pac. 604), the deed to appellant was valid, and title vested in him. The property involved no longer belonged to the community, and respondent has no claim to it.

The judgment is reversed.

We concur: WILBUR, C. J.; LENNON, J.; MYERS, J.; SEAWELL, J.; WASTE, J.

191 Cal. 650

In re SUTTER-BUTTE BY-PASS ASSESSMENT NO. 6 OF SACRAMENTO & SAN JOAQUIN DRAINAGE DIST. (Sac. 3405.)

(Supreme Court of California. Aug. 22, 1923.
Rehearing Denied Sept. 20, 1923.)

1. Levees and flood control ⚡25—Decision of three judges sitting as court on assessment in Sacramento and San Joaquin drainage district held conclusive.

Under St. 1919, p. 1094, § 8, the decision of three judges sitting as a court, as to the assessment of lands of and in the Sacramento and San Joaquin drainage district, is final and conclusive.

2. Constitutional law ⚡329—Legislature empowered to make judgment on questions of fact, not trenching on validity of assessment in Sacramento and San Joaquin drainage district, conclusive.

While the Legislature could not deprive a litigant of the right to an appeal upon any question of law as to validity of an assessment, under St. 1911, Extra Sess. p. 117, providing a plan for the flood control of the Sacramento river, it could forbid the consideration on appeal of those questions of fact which involve the correctness of the apportionment of the assessment, and that the Legislature could not make the judgment conclusive on every question does not deprive it of the power to make a judgment conclusive on those questions which in strictness do not trench on the validity of the assessment.

3. Constitutional law ⚡63(1) — Legislature may make decision of statutory board concerning spreading of assessment final and conclusive.

The Legislature may, in its discretion, make the decision of a statutory board concerning the spreading of an assessment final and conclusive.

4. Appeal and error ⚡1—Statutory appeal to specified subordinate court does not confer privilege of further appeal to court of last resort.

The remedy of an appeal to some specified subordinate court may be provided for by stat-

ute, but such a remedy is a matter of grace and not of right, and does not confer the privilege of having the judgment of the reviewing court again upon appeal taken to a court of last resort.

5. Levees and flood control ☞29—Appeal lies from judgment of superior court determining legality of assessment in Sacramento and San Joaquin drainage district.

An appeal lies from a judgment of the superior court determining the legal questions involving the validity of the assessment, under St. 1919, p. 1092, providing for the issuance and sale of bonds of the Sacramento and San Joaquin drainage district, based on assessments by the reclamation board on lands therein.

6. Levees and flood control ☞23—Certain lands held exempt from assessment for benefits in Sacramento and San Joaquin drainage district.

Under St. 1919, p. 1126, § 2, lands east of the by-pass above contour 40 of the Sacramento and San Joaquin drainage district, *held* exempt from assessment for flood control benefit.

7. Drains ☞66—Legislature may determine lands benefited by drainage district.

It is competent for the Legislature to determine the lands to be benefited by a drainage district, either by describing them or by laying down a rule which serves to identify them and to determine the amount of the benefits accruing thereto.

8. Constitutional law ☞70(1)—Determination by Legislature of lands benefited by drainage district not reviewable.

The determination by the Legislature of lands benefited by a drainage district is not subject to review.

9. Levees and flood control ☞25—Assessment on land of Sacramento and San Joaquin drainage district held valid.

Under St. 1913, p. 269, § 13, providing that the assessors must assess all lands within the Sacramento and San Joaquin drainage district proposed assessed for plans adopted by the reclamation board the sums included in the estimates of the board, and shall apportion it according to the benefits accruing to the land, *held*, that the assessment was not vitiated, on the ground that after the assessment district was formed and a hearing with respect thereto had before the assessors, the reclamation board reduced the cost of the project.

10. Constitutional law ☞284(2)—Notice may be had by publication in cases for assessment of benefited lands.

In cases for the assessment of lands benefited by a drainage district, notice may be had by publication or otherwise.

11. Constitutional law ☞284(2)—Notice by publication in court proceedings of assessment of lands of drainage district held sufficient.

Service of notice by publication is sufficient in a case for the assessment of benefited lands of a drainage district, where a court proceeding has been authorized.

12. Levees and flood control ☞25—Published notice of proposed assessment of benefited lands in Sacramento and San Joaquin drainage district held sufficient.

In a proceeding to validate the assessment of lands within the Sacramento and San Joaquin drainage district, the publication of a notice fixing the time for objection to the assessment lists filed with the clerk of the court before which the action was pending, that any person might oppose the assessment against his property as shown by the lists, but not specifically describing the property, *held* sufficient.

13. Drains ☞15—Drainage district considered entity, although extending over two or more counties.

A drainage district, even though the lands embraced therein consist of several and separate parcels of land which extend over and into two or more counties, is in its general nature a single entity and must be considered and treated as a unit, extending to and embraced within the boundaries of the district.

14. Venue ☞16—Superior court has jurisdiction as to lands extending over two or more counties, in county where greater part affected situated.

The superior court has constitutional jurisdiction in a suit in equity to quiet title to lands extending over two or more counties, in the county in which the greater part of the land affected is situated.

15. Statutes ☞95(1)—Law for notice by publication of assessment of benefited lands in named drainage district held not special law.

The provision for service of notice by publication of the assessment of benefited lands in the Sacramento and San Joaquin drainage district in St. 1919, p. 1093, § 5, *held* not special legislation, violating Const. art. 4, § 25.

16. Continuance ☞50—Continuances pending stay held not irregular and void.

In a suit to validate the assessment of benefited lands in the Sacramento and San Joaquin drainage district, where the court having jurisdiction by statutory notice retained jurisdiction pending the hearing by the Supreme Court of an application for writ of prohibition, which, operating as a stay of proceedings, automatically continued the proceedings in the court below, and continuances pending the stay were not irregular and void.

17. Continuance ☞52—Order for continuance of suit to validate assessment in drainage district, signed by majority of judges, held sufficient.

An order for the continuance of a suit to validate the assessment of lands in the Sacramento and San Joaquin drainage district, signed by a majority of the judges, *held* sufficient.

18. Continuance ☞52—Continuance of proceedings to validate assessment in Sacramento and San Joaquin drainage district, signed by judges outside the district in which court sitting, held valid.

The order for a continuance of proceedings to validate the assessment of lands in the Sacramento and San Joaquin drainage district, sign-

ed by one or two of the judges outside the county in which the court was sitting, held regular and valid.

In Bank.

Appeal from Superior Court, Sutter County; G. W. Nicol, J. W. Bartlett, and J. S. Koford, Judges.

Proceedings to validate the Sutter-Butte By-Pass Assessment No. 6 of the Sacramento and San Joaquin Drainage District. From a judgment validating the assessment, certain parties appeal. Affirmed.

See, also, 213 Pac. 974.

Frank Freeman, of Willows, and Stephen W. Downey, of Sacramento, for state reclamation board of California.

Robert T. Devlin, of San Francisco, for reclamation district No. 1500.

A. C. Huston and H. L. Huston, both of Woodland, Meredith, Landis & Chester, of Sacramento, and Edward F. Treadwell, of San Francisco, for certain West Side objectors.

A. H. Hewitt, of Yuba City, for levee district No. 70.

Arthur Coats, of Yuba City, W. H. Carlin, of Marysville, and Lawrence Schillig and A. H. Hewitt, both of Yuba City, for reclamation district No. 70.

George Clark and Elston, Clark & Nichols, all of Berkeley, for Hershey heirs, West Side objectors.

John S. Partridge, of San Francisco, for West Side objectors.

Thomas Rutledge, U. W. Brown, and Seth Millington, all of Colusa, for Sutter Basin objectors, J. W. Browning, and West Side objectors.

Haven & Athearn, of San Francisco, for reclamation district No. 1660.

Stephen W. Downey, of Sacramento, for Sacramento and San Joaquin drainage district.

LENNON, J. This is an appeal from a judgment of the superior court, in and for the county of Sutter, three judges sitting, purporting to validate an assessment, aggregating in value some eight millions of dollars, spread over certain lands of and in the Sacramento and San Joaquin drainage district.

The controversy presented upon the appeal had its origin in the adoption, in the form of a legislative enactment by the Legislature of the state of California, of the report of the California debris commission, which provided a plan for the flood control of the Sacramento river. Stats. 1911, Ex. Sess., p. 117.

It is a matter of common knowledge that the Sacramento river in its natural condition is able to carry within its banks during flood seasons only a very small proportion of the water delivered to it from its watershed. The result is that the surplus waters spread

out and flood the country on both sides of the river. For more than 50 years reclamation districts have been organized on the west side of the Sacramento river and levees built to protect the adjacent lands from submergence. The construction of levees on the west side of the river had the natural effect of throwing the surplus water, which had formerly overrun the west side, to and upon the lands on the east side, thereby naturally increasing the height of the flood plane on that side. At that time the rule was laid down by various decisions in this state, following the English common-law rule, that flood waters were a common enemy, and landowners whose land were inundated by levees constructed by other landowners could not enjoin such construction or recover damages for the injury resulting therefrom to their lands. It was held that they must, in turn, protect their lands, if they so desired, by the construction of levees. In other words, it was the declared rule that the right of a landowner was not to be protected from injury by flood water caused by the construction of levees on his neighbor's lands, but that he had the right to protect his own land, in turn, by the construction of levees. Obviously in such a situation it was only a question of time until the landowners on the east side of the river would begin to build levees in an endeavor to retain and reclaim the lands on the east side, with the obvious and inevitable result of compelling the landowners on the west side to raise their levees. The individual reclamation work would, therefore, develop into a contest between the landowners on each side of the river (each attempting to build his levee higher than those of the landowner on the opposite side). It would also happen at times that back lands which were formerly unprotected by levees, but nevertheless free from the danger of flooding, would become subject to annual submergence. Clearly, therefore, the only adequate method of preventing this result was the unification of the individualistic and antagonistic efforts of the landowners on the opposite sides of the river into one comprehensive co-ordinating plan, looking toward the flood control of the river in its entirety. Only by carrying into effect some such a plan could the lands on both sides of the river be reclaimed.

Exhaustive investigations were made in an effort to find the best solution to the problem. One method suggested, known as the Dabney plan, called for the widening of the riverbed sufficiently to take care of all the surplus water. This plan, however, was found to be too expensive, inasmuch as it involved the purchase of valuable lands on both sides of the usual river channel. Of the several solutions offered, the report of the California debris commission, created by the United States government to investigate

the problem, was found to be the most feasible, and it was accordingly adopted by the California Legislature, by an act entitled "An act approving the report of the California Débris Commission," etc. Stats. 1911, Ex. Sess., p. 117.

This plan provided, in general, for the leveeing of both sides of the Sacramento river to protect the adjacent lands from submergence, and also provided that a by-pass, practically paralleling the Sacramento river on the east, should be acquired, into which the surplus flood waters of the Sacramento river should be turned through certain openings in the levees on the east side of the Sacramento river. The proposed by-pass, which is in its nature an auxiliary river, was planned to leave the Sacramento river at Moulton weir, which is just west of Marysville's Buttes, sometimes known as Sutter Buttes, and continue through Butte basin and Butte slough basin and thence through the Sutter basin to the confluence of the Sacramento and Feather rivers, where it would empty into the Yolo by-pass.

Below Moulton weir the capacity of the Sacramento river channel was estimated to be 65,000 second feet, and since the estimated water presented to the river at this point during flood periods was 250,000 second feet, it was planned to divert 185,000 second feet of water into the by-pass through the Moulton weir. The capacity of the river channel thereafter decreases at a point subsequently designated as the Tisdale by-pass to 30,000 second feet, and it was therefore planned that a break should be made in the east levee of the river at this point and a channel constructed from the river to the Sutter-Butte by-pass, to relieve the river at this point of the excess 35,000 second feet which the river was incapable of handling.

The report included plans for building levees on both sides of the Sutter-Butte by-pass to prevent the inundating of lands on either side of the by-pass, and also provided that levees should be built on both sides of the channel leading from the Sacramento river to the Sutter-Butte by-pass at the Tisdale weir.

The act of 1911, which adopted the report, also created a board to be known as the reclamation board, which was to have entire charge of the carrying out of the plan, and which should have the power to see that all of the reclamation work in the future should be performed in accordance with the report. Stats. 1911, Ex. Sess. § 2, p. 117.

By act of 1913, the Sacramento and San Joaquin drainage district was created, as a governmental agency, for the purpose of carrying the plan into effect. Its boundaries were specifically defined, and its management and control vested in the reclamation board already created. Stats. 1913, p. 252. Section 13 of this act gave to the reclamation board

the power of levying assessments for the carrying into execution of the plan, and provided that the plan as a whole should be divided into separate portions or projects, to facilitate the levying of the assessment for each particular portion or project which should be carried out and constructed as separate units. It provided that each particular portion or project should be designated by a name and number, and that all assessments, plans, and funds should be kept separate and should be used only for the purpose of carrying out the particular portion or project. In pursuance of this provision, the reclamation board designated the assessment, the validity of which is here contested, as Sutter-Butte by-pass assessment No. 6, and the project for the construction of which this assessment was levied as Sutter-Butte by-pass project No. 6.

It was evidently not the intention of the Legislature to vest in the reclamation board the sole power of carrying out the plan in detail, for it provided that any reclamation district, levee district, drainage district, or municipal corporation should have the right to acquire rights of way, or other easements, and to construct levees, cuts, canals, or gates, subject, of course, to the approval of the plans by the reclamation board, which works might be conveyed to the drainage district upon compensation being made of the actual reasonable cost. In other words, it was contemplated that the different owners and agencies interested in flood control and reclamation of the lands should work in conjunction with the drainage district; the drainage district supplementing the work of the other agencies whenever necessary or desirable for the carrying out of the general plan. Stats. 1913, § 18, p. 275.

In the same year, 1913, the Legislature passed an act creating reclamation district No. 1500, which was situated on the east side of the Sacramento river, and whose boundary on the east was a portion of the west line of the Sutter by-pass, and whose northern boundary was the south line of the Tisdale by-pass. The act creating the district authorized and directed the reclamation district to construct the south levee of the Tisdale by-pass and a portion of the west levee of the Sutter basin by-pass. Stats. 1913, p. 130. In the performance of the duty therein imposed, and under the direction and approval of the reclamation board, reclamation district 1500 proceeded to construct the south levee of the Tisdale by-pass and the west levee of the Sutter by-pass. The construction of the west levee of the Sutter by-pass had the effect of raising the flood plane of the lands east of the by-pass not yet protected by levees and endangering lands above contour 40, which, as back lands, had theretofore never been subject to flood. A suit was instituted by the owners of these lands to enjoin

the construction of the levees until such time as the east side levee should be constructed, both upon the ground that the by-pass area was a natural watercourse, and that the construction of the levee was an illegal interference with the waters flowing in a natural watercourse, and, furthermore, that the construction of the levees prevented the adequate drainage of the plaintiff's lands. In *Gray v. Reclamation District No. 1500*, 174 Cal. 622, 163 Pac. 1024, the right of these landowners to enjoin the construction of the levee was denied upon the ground that the construction of levees was merely a method of protecting the lands from flood waters, which were a common enemy, which the reclamation district had a right to do, and furthermore, that it was a legitimate exercise of the police power of the state.

In 1915 (St. 1915, p. 1034) reclamation district 1660, lying just north of reclamation district 1500, was created, situated on the east side of the Sacramento river, its south boundary being the north boundary of the Tisdale by-pass, and its east boundary being the west line of the Sutter-Butte by-pass.

In November, 1917, the first steps were taken by the reclamation board in the proceedings for the levying of an assessment for the construction of the Sutter-Butte by-pass project. On that date plans and estimates were prepared and approved, the estimated cost being \$14,993,190. On December 27, 1918, the board revised and amended its plans and estimates, reducing the estimated cost to \$10,624,522.25. On August 11, 1919, the second amended plan and estimate of cost for the project was adopted by the board; the cost being estimated at \$11,995,578.71, and the plan remaining practically the same as the first amended plan. Thereupon the preliminary report of the assessors, appointed by the reclamation board to apportion the assessment, was made, fixing the boundaries of the proposed assessment district on September 27, 1919, and a hearing before the assessors with respect to the assessment was held on November 7, 1919. Thereafter, on September 20, 1920, the reclamation board again adopted a third amended plan and estimates of cost; the estimate being reduced to \$8,155,798.70. It will be noted that the final plans were adopted after the report of the assessors fixing the boundaries of the proposed assessment district. And it is also to be noted that the change consisted principally in the reduction of the estimated cost of the project. The area included by the assessors within the assessment district's boundaries included lands on the west side of the Sacramento river, lands in the Butte and Sutter basin, on the east side of the river, and certain lands east of the proposed Sutter-Butte by-pass.

In 1919 three acts were passed by the Legislature relative to the proposed flood control

work. One act provided for the authorization, issuance, and sale of bonds based upon the assessments levied by the reclamation board, and provided the judicial procedure to be followed in validating the assessment in order that the bonds might be issued. Stats. 1919, p. 1092. Another act, amending the original act of 1911 as subsequently amended, specifically provided that, in determining the benefits that would accrue to each particular tract of land by the construction or maintenance of the works contemplated by any particular project or unit, "the works of such project or unit shall be considered as a whole." The latter act further provided:

That the "lands shall be assessed for the work embraced in such project or unit only in the proportion that they will or may be benefited by the construction of the entire works embraced in said project or unit," and that "no lands shall be considered as benefited by the construction or maintenance of the works embraced in such project or unit, or any part or portion thereof, nor shall any lands be assessed for the expense of the construction or maintenance of such project or unit or any part or portion thereof, because such lands have been or may be first endangered or flooded, or the natural drainage thereof obstructed by the construction or maintenance of any part or portion of the works embraced in such project or unit in advance of or prior to the completion of the construction of the entire works embraced in such project or unit." Stats. 1919, § 2, p. 1126.

By another act the sum of \$3,000,000 was appropriated by the state for the purpose of co-operation in the construction of the Sutter-Butte by-pass project No. 6. Stats. 1919, p. 1209. And it was specifically provided that the assessors in apportioning the assessment should set opposite each tract of land the amount assessed for the flood control benefit, and that the \$3,000,000 appropriated by the Legislature should be applied only to the flood control benefit assessment. Stats. 1919, § 3, p. 1129; section 5, p. 1130.

The assessors, in determining the apportionment of the assessment, divided the benefits to be derived by the construction of the project into two general groups—"flood control benefit" and "reclamation benefit." To solve the problem of how much of the total cost should be apportioned to reclamation benefits, the assessors took the situation as it existed prior to the construction of any part of the project and undertook to ascertain the total cost of reclaiming the land independent of the project. The sum total of the cost, including both levee construction and the drainage necessarily required for reclamation, was apportioned exclusively to the lands on the east side of the river subject to overflow. This sum was then deducted from the sum total of the entire cost of the project and the difference, representing the flood control benefit, assessed to lands on both the east and the west side of the

river as being lands which would benefit by the removal of the flood menace.

After the tentative apportionment of the assessment by the assessors, hearings were held before commissioners appointed by the reclamation board to levy the assessment, and, after certain statutory proceedings, the commissioners finally made the assessment, which, over the protest of certain property owners, was approved by the reclamation board.

Thereafter, in keeping with the provision of the statute (Stats. 1919, p. 1092, §§ 5, 6, 7, 8), the proceeding now before us upon appeal was instituted in the superior court, in and for the county of Sutter, that being the county in which "the largest acreage of land affected by said assessment" is situate, for the purpose of validating the assessment preparatory to the issuance of bonds. Judgment validating the assessment was rendered by the unanimous vote of three judges.

[1] The main ground of objection, and the one most strongly urged upon this appeal, is the claim by the landowners on the west side of the Sacramento river that their land is compelled by the assessment to bear an undue and unwarranted burden of the required expense. They argue that the lands on the east side of the river and the lands east of the by-pass should bear a greater share of the burden, and in this behalf contend that (1) the lands east of the by-pass were not and should have been assessed for flood control features of Sutter-Butte by-pass project No. 6; (2) that the levees constructed by reclamation districts 1500 and 1660, which levees are a part of the general plan of flood control work, should have been assessed only to those reclamation districts and should not have been included in the assessment spread over the lands of the entire assessment district; and (3) that the west side should have been assessed only for the amount necessary to acquire the land within the by-pass, and should not have been assessed for any of the construction work of the levees built in order to confine the water within the by-pass.

These objections, involving, as they do, the question of the method of the spreading of the assessment between the different characters of land, as distinguished from the question of the legality of the assessment, have been excluded, we think, from our consideration by the provisions of section 8 of the statute of 1919 (Stats. 1919, p. 1094), which provides that the decision of the three judges sitting as a court shall be "final and conclusive * * * and no appeal from the judgment given and made by said court shall be had."

There can be no doubt but that the Legislature intended by such provision, and attempted, to make the decision of that court binding as to all questions of fact involving

either the spreading of the assessment or the validity of the assessment. That intention is expressed by the clear and unequivocal language of the statute—"no appeal * * * shall be had." So far, therefore, as the Legislature had the power to do so, the decision of the tribunal in question was made final.

[2] True it is this court held upon the motion to dismiss this appeal that, inasmuch as there was a constitutional provision guaranteeing to litigants a right to appeal in cases involving the legality of a tax, assessment, etc., the Legislature had not the power to finally close and conclude by this provision all questions of law which might be involved in the proceeding to validate the assessment. In the Matter of a Proceeding to Validate Sutter-Butte By-Pass Assessment No. 6 (Cal. Sup.) 213 Pac. 974. But it was not intended by that decision to hold, nor did we hold, that all questions, irrespective of their nature and character, involved in the proceeding for the validation of the assessment, could be raised on appeal. While the Legislature did not have the power to deprive a litigant of the right to an appeal upon any question of law touching the validity of the assessment, it did have the right to forbid the consideration upon appeal of those questions of fact which involved the correctness of the apportionment of the assessment. The fact that the Legislature did not have the power to make the judgment conclusive upon every question cannot, of course, be said to operate to deprive the Legislature of the will and the power to make a judgment conclusive upon those questions which in strictness do not trench upon the validity of the assessment.

[3, 4] It is the rule generally in this and other jurisdictions that the Legislature may, in its discretion, make the decision of a statutory board concerning the spreading of an assessment final and conclusive. And it has been held the decision of such board is conclusive, except where an appeal is expressly provided by law. *Larsen v. City and County of San Francisco*, 182 Cal. 1, 186 Pac. 757; *Duncan v. Ramish*, 142 Cal. 692, 76 Pac. 661; *People v. Sacramento Drainage District*, 155 Cal. 373, 388, 103 Pac. 207; *Ward v. Beale*, 91 Ky. 60, 14 S. W. 967; *McDonald v. City of Escanaba*, 62 Mich. 555, 29 N. W. 93; *Grand Rapids v. Welleman*, 85 Mich. 234, 48 N. W. 534. The remedy of an appeal to some specified subordinate court may be provided for by the statute, but such a remedy is a matter of grace and not of right, and does not confer the privilege of having the judgment of the reviewing court again upon appeal taken to a court of last resort. *General Custer Min. Co. v. Van Camp*, 2 Idaho (Hasl.) 40, 3 Pac. 22; *Fulkerson v. Stevens*, 31 Kan. 125, 1 Pac. 261; *Olympia Waterworks v. Board of Equalization*, 14

Wash. 268, 44 Pac. 267; *Lawry v. Commissioners*, 12 Wash. 446, 41 Pac. 190; *N. Y. Cen. Ry. Co. v. Marvin*, 11 N. Y. 276.

[5] The judgment of the superior court in the instant case was, in effect, dual in its nature, to the extent that it embodied a determination of the legal questions involving the validity of the assessment and the judgment of an equalization board concerning the spreading of the assessment. As to the former there was doubtless a right of appeal. In the Matter of the Proceeding to Validate Sutter-Butte By-Pass No. 6 (Cal. Sup.) 213 Pac. 974. But inasmuch as the Legislature had the power to make the assessment final and conclusive, had it been equalized by an administrative board, it had the same power to make an equalization of the assessment final and conclusive when made by a superior court sitting, in effect, as an equalizing board.

It is no new practice for courts to take an active part in the levying of an assessment. It is held in some states that when acting in this dual capacity, the court is in reality two separate and distinct entities, a board of equalization and a court having distinctly judicial powers. *General Custer Min. Co. v. Van Camp*, supra; *Olympia Waterworks v. Board of Equalization*, 14 Wash. 268, 44 Pac. 267. Other states hold that, in acting as a board of equalization, the court is acting solely as a court. *Matter of Canal & Walker Streets*, 12 N. Y. 406. But whether it be two separate bodies composed of the same members, or one body with different duties, the judgment of the court upon questions involving the benefit to be derived from the work and the apportionment of the assessment are matters of equalization, and therefore are final and conclusive, when so provided by the Legislature.

[6-8] It is, however, maintained that the question of whether or not the land east of the by-pass, above contour 40, should have been assessed for the flood control benefit presents a question of law which appellants are entitled to have considered and determined by this court, and that it cannot be disposed of by saying that it relates merely to a question of the spreading of the assessment. This may, for the sake of argument, be conceded. The contention in this behalf is that this court, by a long and harmonious line of decisions, culminating in *Gray v. Reclamation District*, 174 Cal. 662, 163 Pac. 1024, has determined that flood waters from streams like the Sacramento river are common enemy, against which each property owner may defend himself by protection levees, even though the result be to cast the water upon his neighbors, and that the only right which the neighbor has is to protect his own lands by the building of levees. It is argued from this that, inasmuch as the construction of the levees of

reclamation districts 1500 and 1660, which are a portion of the entire flood control project, will cast the water upon the land of the east side owners above contour 40, which lands will be protected from inundation by the final completion of the project, and that these lands should have been assessed for flood control benefit, that the action of the assessors in exempting these lands from the payment of a share of the assessment was purely arbitrary and, as a matter of law, unjustified by the amendment of 1919 (Stats. 1919, § 2, p. 1126), which is undoubtedly the law under which the assessors proceeded. As to this appellants make two contentions: (1) That this amendment, properly construed, does not operate to exempt those owners, and (2) that, if it is to be construed so as to exempt them, it is unconstitutional. A mere reading of the statute satisfies us that it was the intent and the definite purpose of the Legislature by the amendment to exempt these lands from assessment for flood control benefit. Nor is there any merit in the second objection for the reason that it is always competent for the Legislature to itself determine the lands to be benefited, either by describing the same, or by laying down a rule which serves to identify them and to determine the amount of the benefits accruing to those lands. Such determination is conclusive and not subject to review. This is upon the theory that the landowners themselves have had a hearing before the Legislature in arriving at such determination by and through their representatives in the Legislature. *Tarpey v. McClure* (Cal. Sup.) 213 Pac. 983; *Flynn v. Chiappari* (Cal. Sup.) 215 Pac. 682; *Los Angeles County Flood Control Dist. v. Hamilton*, 177 Cal. 119, 123, 169 Pac. 1028; *Miller & Lux v. Sacramento-San Joaquin Drainage Dist.*, 182 Cal. 252, 187 Pac. 1041; *Rec. Dist. 108 v. Evans*, 61 Cal. 104. The only questions, therefore, remaining for consideration of this court upon this appeal are those relating to the validity of the assessment itself, and these are necessarily confined to those jurisdictional matters similar to those raised in cases where the assessment has been made by an administrative board and its validity assailed in a court of justice.

[9] It is the contention of appellants that the whole assessment was vitiated by the fact that, after the assessment district was formed and a hearing with respect thereto had before the assessors, the reclamation board reduced the estimated costs of the project. Section 13 of the statute (Stats. 1913, p. 269) provides that the assessors must assess upon all the lands within said drainage district proposed to be assessed for the plans adopted by the reclamation board the sums included in the estimates of said board, and shall apportion the same according to the

benefits that will accrue to each tract of land in said district, respectively, affected by any particular portion or project by reason of the expenditures of said sums of money. It further provides:

That "after said assessors have examined the plan or plans of the work contemplated and the estimates of the cost, they shall make a preliminary report to the reclamation board indicating the exterior boundaries of the lands that in their opinion will be benefited by the expenditures."

No claim seems to be made that there was any material change in the plans after the fixing of the exterior boundaries, but simply that, inasmuch as the estimated cost of the project was reduced thereafter, the entire assessment must be thrown out, and thus the whole expensive and prolonged procedure of making and validating the assessment be re-enacted. The only step taken by the assessors before the estimate was reduced by the reclamation board was the establishment of the limits of the property benefited by the plan. The fixing of the limit necessarily was dependent upon the plan as proposed and not upon the estimate cost, for whether the estimated cost amounted to much or little, if the plans remained unchanged, the lands benefited would ordinarily be the same. It is the plan of the project which forms the basis of the determination by the assessors of whether certain lands would or would not be benefited and, therefore, whether they should or should not be included within the proposed assessment district. Inasmuch as the burden is upon the appellants to show error, it must be assumed that no material changes were made in the plans.

Furthermore, even if changes may have been made in the plans, after the "preliminary report" of the assessors which, as required by the statute, contained a "general description" of the land which "in their opinion" would be benefited, it is evident from the language of the statute directing the assessors to make such a report fixing the boundaries, that the original determination of the boundaries was merely tentative, and subject to revision upon hearings held after the amendment of the plans. This being so, it cannot, we think, be said that the revision of the estimates of the reclamation board, after the filing of the preliminary report by the assessors, rendered the entire assessment a nullity.

The remaining objections involve the claim of various appellants who, it appears, did not file any objection to the assessment in the court below or otherwise appear therein in the validation proceedings. It is their contention that jurisdiction was not obtained over them or over their lands by the superior court in and for the county of Sutter. Admittedly the only service of process upon them was by publication as provided by the

statute. Stats. 1915, p. 1344, § 10, and Stats. 1919, p. 1093, § 5. Judgment was entered validating the assessment on the lands owned by them. Their appeal is prosecuted primarily upon the ground that the provisions of the validating statute providing for notice by publication violate the "due process of law" provisions of the state and federal Constitutions. Incidentally, in support of these particular appeals, it is also argued that, even if personal service could have been dispensed with, the published notice provided for by the statute was ineffectual, because it did not describe the lands or give adequate information to the landowners affected. And it is further insisted that the provision of the act in question, permitting service by publication, is special legislation.

In addition to the foregoing objections, the contention is advanced in behalf of the appeal of Ella Hershey et al. that, inasmuch as the action for the validation was commenced and carried to a conclusion in the county of Sutter, jurisdiction was never obtained over the last-named appellants, for the reason that the action is in the nature of a suit in equity to quiet title, and must be commenced in the county in which the land affected is situated. Section 5, art. 6, Const.

We will take up and dispose of these contentions in the order of their making.

[10,11] In so far as the decision of the statutory court involved the correctness of the apportionment of the assessment there can be no question but that the notice given was sufficient to answer the requirements of due process of law, for it has become firmly established that in assessment cases notice may be by publication or otherwise. Indeed, no court proceedings at all are necessary; it being sufficient to satisfy the requirements of due process of law if a hearing has been had before the assessing board itself. *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 (approved by U. S. Supreme Court in *Lent v. Tillson*, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419); *State Sav. Bank v. Anderson*, 165 Cal. 437, 447, 132 Pac. 755, L. R. A. 1915E, 675; *Wulzen v. Supervisors*, 101 Cal. 15, 22, 35 Pac. 353, 40 Am. St. Rep. 17; *United Real Estate, etc., Co. v. Barnes*, 159 Cal. 242, 113 Pac. 167; *Miller & Lux v. Sacramento-San Joaquin Drainage Dist.*, supra (writ of error dismissed by U. S. Supreme Court in *Miller & Lux v. Sacramento-San Joaquin Drainage Dist.*, 256 U. S. 129) 41 Sup. Ct. 404, 65 L. Ed. 859; *Davidson v. Adm'rs of New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *Brown v. Drain (C. C.)* 112 Fed. 582. A notice by publication being sufficient to satisfy the requirements of due process, if the hearing is before a statutory board, it is also sufficient where a court proceeding has been authorized. If the assessment can be made a lien without personal service by action of a subordinate body, it can be made a

lien by a court without personal notice. Board of Directors v. Tregear, 88 Cal. 334, 26 Pac. 237, citing Lent v. Tillson, supra; Crall v. Irr. Dist., 87 Cal. 140, 26 Pac. 797; Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595; People v. Doe, 36 Cal. 220; Eitel v. Foot, 39 Cal. 439; Cullen v. Glendora Water Co., 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047; Davies v. Los Angeles, 86 Cal. 37, 24 Pac. 771; Merchants' Trust Co. v. Wright, 161 Cal. 149, 118 Pac. 517; Fox v. Wright, 152 Cal. 59, 91 Pac. 1005; People v. Irr. Dist., 128 Cal. 477, 61 Pac. 86.

[12] We are of the opinion that the notice of the county clerk fixing the time for the objection to the assessment lists did give adequate information, by reference, to the landowners affected. The notice was given that the assessment lists had been filed in the office of the clerk of the court before which the action was pending, and that any person objecting thereto might appear and be heard in opposition to the assessment against his property as shown by these lists. While this notice did not specifically describe the property, it must be borne in mind that this was not the only notice given to the landowners. The statute itself specifically defined the boundaries of the drainage district and was notice to the landowners therein situated that in all probability their lands would be subjected to an assessment for the cost of the proposed improvements and thereby put them upon notice to watch the subsequent proceedings. The case of Lent v. Tillson, supra, is particularly in point. In that case it was held that a notice of the organization of the board and a notice that the report of the board was open to inspection was sufficient and adequate. The court declared that it was to be presumed that the statute is known and that the sufficiency of the notice must be determined from the particular circumstances of each case, and that in that case the statute, by informing the landowners beforehand of the course of procedure which would be followed and the notices which would be given, cast upon them the duty of exercising a certain degree of diligence in regard to them.

Furthermore, notice was given of a hearing before the assessors in the instant case to hear objections to the preliminary report fixing the boundaries of the proposed assessment district. In this notice was a general description of the lands, which, in the opinion of the assessors, would be benefited, and it referred to the preliminary report on file in the office of the reclamation board for such exterior boundaries. In addition to this notice, the statute provides for a notice by publication of the hearing before the reclamation board to be published in each county wherein any of the lands assessed are situated. No objection being urged here to the adequacy of the notices given of the hearing before the assessors and before the board of reclama-

tion, their regularity and legality will be presumed.

The contention that jurisdiction by the superior court in and for the county of Sutter cannot be obtained over land in Yolo county is predicated upon the assumption that the present proceeding is in the nature of a suit in equity to quiet title. But to admit this assumption is to answer the contention. The Constitution provides:

That "actions * * * quieting title to * * * real estate shall be commenced in the county in which the real estate, or any part thereof, is situated."

[13, 14] A drainage district even though the lands embraced therein consist of several and separate parcels of land which extend over and into two or more counties, is in its very nature a single entity, and must be considered and treated as a unit extending to and embraced within the boundaries of the district. State v. Elliott, 32 Ind. App. 605, 70 N. E. 397; Denton v. Thompson, 136 Ind. 446, 35 N. E. 264. Conceding, therefore, that this is a suit in equity to quiet title to land situate in Yolo, Sacramento, and Sutter counties, it follows that jurisdiction is given by the Constitution to the superior court in and for the county of Sutter, the county in which the greater part of the land affected is situated. Kent v. Williams, 146 Cal. 3, 79 Pac. 527; Murphy v. Superior Court, 138 Cal. 69, 70 Pac. 1070.

[15] We cannot concur in the contention that the provision in the act in controversy for service by publication is special legislation and violates the provision of the Constitution which prohibits the Legislature from passing special laws "regulating the practice of courts of justice." Article 4, § 25, Const. It is the rule generally that an act applying uniformly to any single class in its entirety, when the classification is founded upon some natural, intrinsic, or constitutional distinction, is not special legislation. Of course, it will be conceded that the Legislature is vested, primarily, with the discretion to make the classification, and it has been repeatedly held that courts will not disturb a legislative classification unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason, and the courts, generally, with the commendable purpose of upholding the constitutionality of a legislative enactment, when possible, are permitted to and do indulge in a liberal construction of an assailed statute. Title, etc., Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; Sacramento and San Joaquin Drainage Dist. v. Rector, 172 Cal. 385, 156 Pac. 506; People v. Sacramento-San Joaquin Drainage Dist., 155 Cal. 373, 103 Pac. 207. The law creating the Sacramento and San Joaquin drainage district and the reclamation board stands, in many respects, in a class by itself. This nec-

essarily follows from the nature of the subject-matter, which necessitates special law. *People v. Sacramento Drainage Dist.*, supra. We are of the opinion that the nature of the whole proceeding is sufficiently distinct and different from ordinary civil actions to justify the creation of a class for which special rules of procedure may be provided.

[16] There is no merit in the final contention of appellants that the continuances were irregular and void. The statutory court having acquired jurisdiction in the first instance by the filing of the assessment and by the publication of the notice required by the statute, retained jurisdiction of the proceeding pending the hearing by the Supreme Court of an application for a peremptory writ of prohibition. It is conceded, as indeed it must be, that the alternative writ operated as a stay of proceedings and that as a matter of course the judges of the court below were powerless to do anything in the premises save to await the decision of this court determining the constitutionality of the act under which the court below was created and the proceedings provided therein permitted. This being so, it is manifest that the proceedings of the court below were continued by operation of law. In addition to this, the court below, as a matter of caution, formally ordered the hearing of the validating proceedings continued from time to time until the prohibition proceedings were decided by this court, and then, upon that decision coming down, the court below gave notice by publication of the time set for hearing.

[17,18] The point that the orders for continuance were in some instances signed only by two of the judges does not seem to us to be possessed of much merit. The statute itself provides that the decision of a majority of the judges shall control, and, that being so, we know of no good reason why a majority of the judges should not be permitted to make an effective order for a continuance of the hearing of the proceeding. Nor do we think there is much merit in the contention that the order for a continuance was void because it was signed by one, or perhaps two, of the judges outside of the county in which the court was sitting. The order for a continuance relates to but a mere matter of procedure necessary to put the proceedings in a condition to be heard and as such its validity was not impaired by the fact that it may have been signed outside the county in which the proceeding was pending. *Comstock, etc., Co. v. Superior Court*, 57 Cal. 625; *Walter v. Merced Academy Association*, 126 Cal. 588, 59 Pac. 136; *Estudillo v. Security Loan Co.*, 158 Cal. 66, 109 Pac. 884.

The judgment appealed from is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; KERRIGAN, J.; SEAWELL, J.; WASTE, J.; MYERS, J.

191 Cal. 696

PALMER v. TSCHUDY. (L. A. 7192.)

(Supreme Court of California. Aug. 30, 1923.)

1. Negligence ⇨83—Requisites of "last clear chance doctrine" stated.

The "last clear chance rule" applies only when the plaintiff has been negligent, and as a result is in a position of danger of which she is either not aware, or from which she cannot escape by the exercise of ordinary care; and defendant is aware of her danger and her inability to escape, and has a clear chance to avoid injuring her by the exercise of ordinary care, but fails to do so.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

2. Municipal corporations ⇨705(10)—Last clear chance rule not applicable where plaintiff's negligence continued to instant of injury.

Where a pedestrian, intending to cross the street, saw an automobile approaching, and proceeded to cross without again looking, and was struck by the car when it skidded on the wet pavement, his contributory negligence continued to the very instant of the injury, and the last clear chance rule did not apply.

3. Appeal and error ⇨1066—Error in taking issue of contributory negligence from jury does not require affirmance of judgment for plaintiff on erroneous application of last clear chance doctrine.

Where the trial court erroneously instructed the jury that plaintiff was guilty of contributory negligence as a matter of law, but the verdict went for plaintiff under the last clear chance rule, which had no application to the case, the judgment must be reversed and the cause remanded, there being no basis for affirmance since the issue of contributory negligence has not been determined in favor of plaintiff by either court or jury.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Ethel B. Palmer against J. H. Tschudy. From a judgment for plaintiff, defendant appeals. Reversed.

Arthur W. Eckman, William B. Himrod, and Frank E. Carleton, all of Los Angeles, for appellant.

Donald Barker and Wm. H. Neblett, both of Los Angeles, for respondent.

MYERS, J. Defendant appeals from a judgment awarding damages to the plaintiff in an action for personal injuries suffered by her as a result of being struck by defendant's automobile. The plaintiff testified that she was walking with a friend westerly along the north side of Seventh street, which runs east and west, in the city of Los Angeles, approaching the intersection of Hope street, which runs north and south; that upon ar-

riding at the east curb of Hope street she glanced to the north and saw defendant's automobile approaching south-bound at a distance of about one-third of a block (this block was shown by other evidence to be about 590 feet long); that she then started across Hope street, and when she had taken two or three steps from the curb she again glanced to the north and saw the automobile still approaching, and, of course, nearer at hand; that she and her companion then proceeded on across Hope street, and that she did not again look at or toward the approaching automobile and did not again see it until after the accident had taken place; that when she had proceeded a few feet or a few steps beyond, and to the west of, the center line of Hope street she received a blow upon her right hip, which threw her to the pavement; that she at first did not realize what had happened, but thereafter she saw defendant's automobile, which had come to a stop within a few feet westerly and southerly from where she lay. Plaintiff's companion, Mrs. Webb, testified to substantially the same effect, but added thereto:

"The first thing I knew the machine was pretty near on top of us; I grabbed Miss Palmer by the arm and pulled her out of the way; otherwise she would have been struck. She was struck with force and hit me and knocked me down. * * * The machine stopped immediately, within 2 or 3 feet."

Hope street was 56 feet wide from curb to curb, and there was a gutter along the northerly curb line of Seventh street in which water was flowing across Hope street. The pavement of Hope street from this gutter sloped up to the north at the rate of 1 foot in the first 12 feet, and 2 inches in the next 10 feet. The testimony is conflicting as to whether the pavement was wet or dry in the vicinity of this gutter. Defendant and his chauffeur testified that it was wet and slippery at the point of the accident and for a considerable distance north of the gutter, but plaintiff and Mrs. Webb testified that it was dry at the point of the collision. Plaintiff also introduced in evidence as part of her case the deposition of the defendant, who testified that the automobile was approaching the intersection at about five miles per hour, and his attention was first directed to plaintiff and her companion by his chauffeur sounding the horn; that the two ladies were then standing near the center of the street facing south with their backs to the approaching automobile, which was about 40 or 50 feet away; that the automobile was proceeding at about the center of the street, and the two ladies were slightly to the right thereof; that when the horn sounded they both looked around; that when the automobile was about 25 feet from them the horn was again sounded; that he does not remember that the ladies again looked around, and that the chauffeur then began coming to a stop; that

he did not succeed in bringing the car quite to a standstill; that the pavement was wet, and because of its sloping and slippery condition the car slipped into the incline of the gutter on Seventh street, and that the right front fender brushed the plaintiff, causing her to jump and strike the other lady, whereupon they both fell to the pavement; that the street where they were standing and where they fell was slippery and wet; that the car stopped within a couple of feet after touching plaintiff. Plaintiff was a young woman 29 years of age, in good health and in normal possession of all her faculties. The accident occurred about two o'clock in the afternoon, on a clear day. There was no evidence that the car was going faster than five or six miles an hour, except as it might have been inferred from the chauffeur's testimony that at five miles per hour he could have stopped in two feet on a dry pavement. He explained his failure to stop by the slope of the pavement and, as he claimed, its wet and slippery condition. So far as disclosed by the evidence, there was no other vehicle or pedestrian upon the street at the time in the immediate vicinity. Plaintiff having rested her case, defendant moved for a nonsuit upon the ground that plaintiff had failed to prove any negligence of the defendant, and upon the further ground that the evidence established plaintiff's contributory negligence as a matter of law. The trial judge, in ruling upon the motion, stated that he was satisfied that the plaintiff was guilty of contributory negligence and would so instruct the jury, but that he was of the opinion that there was sufficient evidence to go to the jury upon the question of the last clear chance, and for that reason he denied the motion. Thereupon defendant's chauffeur was called as a witness. His testimony was in the main to the same effect as that given by defendant upon his deposition, but was in some respects confused and self-contradictory, and the jurors might, by accepting portions of it and discrediting other portions thereof, as they had a right to do, have found sufficient facts to support a conclusion that the defendant was negligent. The trial court instructed the jurors that the plaintiff was guilty of contributory negligence as a matter of law, and submitted the case to them upon the single issue of the last clear chance, under appropriate instructions defining that rule; whereupon a verdict was returned in favor of plaintiff. Defendant contends upon this appeal that his motion for a nonsuit should have been granted upon both grounds stated therefor, and contends further that in any event the evidence did not justify the submission of the case to the jury upon the issue of the last clear chance, and that it is legally insufficient to support a finding in favor of plaintiff upon that issue.

[1] The last clear chance rule presupposes: That the plaintiff has been negligent; that

as a result thereof she is in a situation of danger from which she cannot escape by the exercise of ordinary care; that the defendant is aware of her dangerous situation under such circumstances that he realizes, or ought to realize, her inability to escape therefrom; that he then has a clear chance to avoid injuring her by the exercise of ordinary care, and fails to do so. If all of these elements are present, the rule applies and enables the plaintiff to recover, notwithstanding her own negligence. But if any of them be absent the rule does not apply, and the case is governed by the ordinary rules of negligence and contributory negligence. The rule does not require that the inability of the plaintiff to escape the danger shall be due to a situation which renders it physically impossible for her to do so. It applies equally when she is wholly unaware of the danger and for that reason unable to escape it. But the rule also requires that if she is aware of the danger, or becomes aware of it, she must thereafter exercise ordinary care for her own protection. If, being aware of the danger and able to escape it by exercising ordinary care, she neglects to do so, she cannot invoke the last clear chance rule to place the burden of the resulting loss upon the other party.

"Obviously, if both parties to an accident could, by the exercise of ordinary care, have avoided it, neither can be said to have had the last clear chance. It is only when a defendant charged with the negligent infliction of the injury, knowing plaintiff's peril, could and the injured plaintiff could not have avoided the injury that the defendant is liable. The liability is placed upon the party inflicting the injury only if immediately before the actual infliction of the injury the injured person was in such a situation as to be unable, by the exercise on his part of reasonable and ordinary care, to extricate himself, and vigilance on his part would not have averted the injury." *Young v. Southern Pacific Co.* (Cal. Sup.) 210 Pac. 259.

[2] Measuring the facts of this accident by the foregoing rules of law, it becomes apparent that they do not meet the requirements of the last clear chance rule. According to plaintiff's version, when in a position of safety, within three steps of the east curb, she saw the automobile approaching the spot which she intended to traverse. Then she proceeded to walk across the street in front of the approaching automobile without ever again looking at it or in the direction from which it was approaching. Can it be justly said, under these circumstances, that the defendant could, and the plaintiff could not, have avoided the injury? Undoubtedly either one of them could have avoided it very easily. The defendant could have avoided it by bringing his automobile to a stop. Plaintiff could have avoided it by waiting until the automobile passed, or by keeping her

eyes on it as she went forward and timing her steps so as not to pass in front of it so close as to be in danger. If her conduct in going forward in the manner in which she did was negligent, it was negligence which continued up to the very instant of the injury.

"This exception to the general rule [the last clear chance rule], however, has no application to a situation where, by their mutual carelessness, an injury ensues to one of two parties, both of whom are contemporaneously and actively in fault down to the very moment of injury." *Young v. Southern Pacific Co.*, supra.

If we accept defendant's version, plaintiff stood in the middle of the street with her back to the approaching automobile, knowing that it was approaching her, without taking the slightest precaution for her own safety. If this was negligence, it continued up to the instant of the injury. If the approach of the automobile under these circumstances did not create a dangerous condition, there is no basis for the application of the last clear chance rule. If it did create a dangerous situation, plaintiff was aware of it from the beginning, and could easily have avoided it, either by stepping to one side of the street or by watching the automobile so as to keep out of its path. In this version of the facts it cannot be said that there was any point of time when the defendant could, and the plaintiff could not, have avoided the injury.

[3] We are of the opinion that the facts of this case, taking either version of them, do not justify the application of the last clear chance rule. Respondent does not very seriously contend that they do, but urges that the judgment should nevertheless be affirmed because, as she contends, she was not guilty of contributory negligence at all. She concedes that she cannot upon this appeal claim prejudicial error because of the ruling of the trial judge holding her guilty of contributory negligence as a matter of law, but she insists that it was error nevertheless which operated greatly to the advantage of the appellant, and the jury having found in her favor, notwithstanding this error, the judgment should be affirmed. She earnestly contends that she was not guilty of contributory negligence, at least not as a matter of law. She relies upon the case of *Burgesser v. Bullock's* (Cal. Sup.) 214 Pac. 649, in which we held that the issue of contributory negligence should have been submitted to the jury. She asserts that the facts in that case are identical with the facts herein, but there are, in fact, important differences. In that case a pedestrian, alighting from a street car at night, attempted to cross the street in front of an approaching automobile. He continually watched it as he crossed, but apparently misjudged

either its speed or its distance and was struck as a consequence thereof. The instant case much more nearly parallels in its essential facts the case of *Finkle v. Tait*, 55 Cal. App. 425, 203 Pac. 1031, in which the trial court directed a verdict for the defendant on the ground of the contributory negligence of the decedent and the judgment was affirmed. We pointed out, in the *Burgesser Case*, the distinction between the two sets of facts in the following language:

"There may be circumstances under which it can be said that the pedestrian is negligent as a matter of law. For instance, in the case of *Finkle v. Tait* (Cal. App.) 203 Pac. 1031, in the case of a directed verdict, the District Court of Appeal affirmed the decision, but, in denying the transfer to this court (*Finkle v. Tait*, 203 Pac. 1034), we sustained the conclusion of the District Court of Appeal solely for the reason that *the pedestrian was crossing the street without looking and under such circumstances that he could not see in the direction from which traffic might be expected.*" (Italics added.)

In that case the pedestrian was carrying a box upon his shoulder in such manner that it obstructed his vision, but manifestly one who can see and will not is at least as negligent as one who cannot.

For the purposes of this appeal it is not necessary to determine whether or not the trial judge was correct in ruling that the evidence established contributory negligence of the plaintiff as a matter of law. If he was correct the plaintiff could recover only by virtue of the last clear chance rule, and, as we have seen, that rule was not applicable under the evidence. If he was mistaken, the fact still remains that the issue of contributory negligence has never been determined in favor of the plaintiff, by either court or jury. That was a material issue in the case which was withdrawn from the jury by the trial judge. We cannot assume that if it had been submitted to the jurors they would have resolved it in favor of the plaintiff. To affirm a judgment in a case, tried by a jury as a matter of right, wherein the jurors have not found, either expressly or impliedly, upon an essential issue of fact, would be a miscarriage of justice. *O'Meara v. Swortfiguer* (Cal. Sup.) 214 Pac. 975.

The appellant complains of the giving of one instruction which is justly subject to the criticism that it was likely to be misleading. It should not have been given without further qualifications or explanation, but it is not probable that the jurors were misled thereby under the evidence herein. In view of the fact that other evidence may be produced upon another trial, it is not necessary to give further consideration to appellant's contention that the evidence herein was in-

sufficient to sustain the implied finding of defendant's negligence.

The judgment is reversed.

We concur: WILBUR, C. J.; LAWLOR, J.; SEAWELL, J.; KERRIGAN, J.; WASTE, J.; LENNON, J.

191 Cal. 703

TARTAR v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (L. A. 7516.)

(Supreme Court of California. Aug. 31, 1923.)

1. Master and servant §417(7)—Findings of Industrial Accident Commission on substantial evidence conclusive.

The findings of the Industrial Accident Commission upon questions of fact are conclusive, and are not subject to review, where there is any substantial evidence to support them.

2. Master and servant §417(7)—Reviewing court determines whether inferences deducible from facts sustain findings of Industrial Accident Commission.

When an award of the Industrial Accident Commission is based wholly upon circumstantial evidence, it is within the province of a court of review to determine whether there are inferences reasonably deducible from the facts to sustain the Commission's findings.

3. Master and servant §405(1)—Finding of Industrial Commission must be based on fair inference.

There must be direct evidence or a fair inference based on the testimony tending to support the conclusion of the Industrial Accident Commission, or it will not be upheld.

4. Master and servant §405(2) — Evidence held to warrant finding that transfer of business by employer was a sham.

Evidence held sufficient to warrant inference and finding of Industrial Accident Commission that applicant for award was, at the time of injury, in the employ of T. and that a sale and transfer of the business by T. to W. was a sham and pretense.

5. Appeal and error §996—Inference drawn from facts legally proved is finding impervious to review.

A finding based upon reasonable inference, drawn from facts proved with legal sufficiency, is as much and as completely a finding, as respects review, as any other finding based upon good and sufficient evidence.

In Bank.

Proceeding under the Workmen's Compensation Act (St. 1917, p. 831) by Robert L. Smithers, applicant, opposed by A. P. Tartar and R. E. Walters, employers. From an order of the Industrial Accident Commission, granting an award, A. P. Tartar applied for writ of review to annul the order. Affirmed.

David D. Stuart and Hubert Starr, both of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

WASTE, J. [1-3] Petitioner seeks an annulment of an award of the Industrial Accident Commission, upon the ground that there is no evidence to sustain the findings upon which the Commission based its decision that the applicant was entitled to recover. The return of the Commission discloses that support for the award rests solely upon disputable inferences arising from facts of a circumstantial nature; the weight of which petitioner contends was overcome by positive and uncontradicted evidence. It is well settled that the findings of the Industrial Accident Commission upon questions of fact are conclusive, and are not subject to review, where there is any substantial evidence to support them. *Southern Pac. Co. v. I. A. C.*, 177 Cal. 378, 381, 170 Pac. 822; *Western Indemnity Co. v. I. A. C.*, 182 Cal. 709, 720, 190 Pac. 27. But, while this court has no power to weigh the effect of positive evidence (*Dearborn v. I. A. C.*, 187 Cal. 591, 594, 203 Pac. 112), it is within its province, in reviewing an award based wholly upon circumstantial evidence, to determine whether there are inferences reasonably deducible from the facts to sustain the Commission's findings, which may not rest on conjecture or guesswork (*Clapp's Parking Station v. I. A. C.*, 51 Cal. App. 624, 627, 197 Pac. 369). There must be direct evidence or a fair inference based on the testimony tending to support the conclusion of the Commission, or it will not be upheld. *Employers' Liab. Assur. Corp. v. I. A. C.*, 182 Cal. 612, 187 Pac. 42. If it cannot be said in this case that the inferences drawn by the Commission are sufficient to raise a conflict, in the light of the positive evidence produced by the petitioner, the award must be annulled.

[4] The sole question presented is whether or not Robert H. Smithers, the applicant before the Commission, was, at the time of the injury, in the employ of petitioner, who for many years conducted a jewelry store in the city of Los Angeles, maintaining an optical department as an adjunct thereto. There is no direct evidence to that effect. In August, 1921, Smithers applied at petitioner's store for employment as a bench worker and assistant in optometry. His application was first made to Dr. R. E. Walters, one of the respondents here, who appeared to be the head of the optical department. The applicant and Dr. Walters "talked it over," and Dr. Walters told Smithers he "would have to see Mr. Tartar before anything could be done." Smithers thereupon gave his references to Mr. Tartar and was asked by the latter concerning his schooling, ability, and habits. He was

informed that "if it was all right with Mr. Walters, he [Tartar] thought it would be all right * * * that they would try me out for a week." With this understanding, Smithers went to work. He was injured October 7, 1921, by the explosion of an alcohol lamp he was using in the course of his employment. He received extensive burns, and no question is raised as to the nature and extent of his injuries.

Smithers filed an application with the Industrial Accident Commission for compensation, alleging that he was injured "in the course of his employment by A. P. Tartar." The latter answered, denying that he was the owner of the optical business or that Smithers was ever in his employ. When the matter came on for hearing, Dr. R. E. Walters, who was personally present, asserted that he, and not Tartar, was the employer. The referee for the Commission thereupon made Dr. Walters a party defendant to the cause. The established facts relied on by Smithers in support of his claim that the defendant A. P. Tartar was in fact his employer are: When he applied to Dr. Walters at the store he was not given employment until after he had been referred to Mr. Tartar. The jewelry store was located at Eighth and Spring streets. The optical department was located in one corner of the establishment adjacent to the Eighth street entrance. It was not separated from the other departments. There were three small signs in and about the optical department, bearing the legend, "R. E. Walters, Optometrist," or "Optician." One sign read, "Our Optical Department, A. P. Tartar." Other signs in and about the place tended to indicate that Tartar was the owner of the entire establishment. Money received for optical goods sold, and the sales slips on which were printed the words "Optical Department," were turned over to Mr. Tartar's cashier. But one set of books was kept. In these all accounts of both the optical department and jewelry business were kept. Smithers, while employed at the place, from time to time gave out advertising matter consisting of a chemically treated, antiseptic cloth for cleaning lenses, which bore the printed legend, "Compliments of our Optical Department, A. P. Tartar, Jewelers and Mfg. Opticians." After the injury to Smithers, a card announcing the removal of the business to a new location bore the name "A. P. Tartar, Jeweler, Silversmith, and Manufacturing Optician and Official Railroad Watch Inspector. * * *" This card also bore the following: "Dr. R. E. Walters Optometrist & Optician Office with A. P. Tartar, 107 West Ninth Street, Los Angeles."

In opposition to the claim of the applicant, A. P. Tartar, the petitioner, testified that he disposed of the optical business theretofore carried on in connection with his jewelry store to Dr. Walters on the 25th of

September, 1920, nearly one year before Smithers was employed. The reason he assigned for making the sale was that he had much business to attend to in the jewelry department, and, not being a registered optometrist, he had been previously told by the state board of optometry that it would be necessary for him to dispose of the optical business. In September, 1920, Dr. Walters was in the employ of Mr. Tartar on a salary of \$45 per week. On the date mentioned, Tartar and Dr. Walters, according to the testimony of both of them, signed a contract in writing, which was produced in evidence, whereby Dr. Walters purchased all the fixtures, furniture, optical goods, and good will of the optical department, for and in consideration of \$12,000, payable in the form of a promissory note for that amount, due one month later. It was mutually agreed that Dr. Walters should secure the payment of the note by a chattel mortgage on the furniture and fixtures located in the storeroom. Mr. Tartar agreed to pay all indebtedness then existing against the optical department, and stipulated that he would execute a bill of sale covering the property upon full payment of the note. Dr. Walters agreed to pay \$75 a month as rent, including "light, water, space, and everything." At this time Dr. Walters had little or no funds, the arrangement entered into being that the profits of the optical department, after deducting expenses and a reasonable amount for the living expenses of Dr. Walters, should apply in liquidation of the note until the full purchase price was paid. Petitioner relies upon the testimony of Dr. Walters, which strongly corroborates everything Mr. Tartar testified to. Both witnesses asserted that immediately following the purported transfer Dr. Walters assumed full control of the optical department and all business in connection therewith. There were introduced in evidence monthly returns for excise tax purposes required by the United States internal revenue regulations, of the business done in the optical department after the alleged transfer of ownership. These were all made out in the name of and were sworn to by Dr. R. E. Walters as owner. He also appeared to have paid the required amount of tax. It is also in evidence that after Smithers went to work his wages were paid to him by checks signed by Dr. Walters. One set of books, in which the accounts of the jewelry store and the optical department were entered, was introduced in evidence. The method of book-keeping employed was far from being satisfactory. About all that can be said of it is that it served to segregate the account of sales in the jewelry store from the business done in the optical department, in response to the governmental requirements in that respect. No change in the method of book-

keeping appears to have been made after the purported sale, other than a notation of the sale to Dr. Walters, which appears on one of the pages in the midst of the accounts. It does not satisfactorily appear when that entry was made. From time to time, Dr. Walters, instead of drawing a regular salary, as he had been accustomed to do before the sale, withdrew amounts sufficient for his living expenses, and it is claimed he paid bills incurred in running the business. A recapitulation of accounts, which was before the Commission, tended to show that on November 21, 1921, after making deductions of amounts drawn by Dr. Walters and bills paid, he was entitled to a credit arising from the profits of the business amounting to \$2,627.74, on the purchase price of the optical department. No notation on the note or elsewhere was introduced in evidence, showing that he had actually been credited with any amount for that purpose. The defendants before the Commission were unable to show that Dr. Walters had paid the monthly rental, said to have been agreed upon for the optical department, and, in fact, it was admitted that he had not been charged therefor.

Only one copy of the agreement of sale was in existence. That was kept by Tartar in the safe in the store, where, it was contended, Dr. Walters had access to it. Neither the promissory note for \$12,000 nor the chattel mortgage securing its payment was written or executed until after the injury to Smithers, when an antedated note, bearing the date of September 26, 1920, one day after the date of the contract of sale, was signed by Dr. Walters. The chattel mortgage, bearing the same date, containing a copy of the antedated note, was introduced in evidence and was shown to have been executed by Dr. Walters and Mr. Tartar, and sworn to and acknowledged on October 17, 1921, and recorded the following day, more than a month after the accident. There is confusion in the record as to whether or not an inventory of what was actually in the optical department was taken at the time of the alleged sale. None was produced. At the hearing it was shown that fixtures, furniture, stock, and supplies worth only about \$3,000 were regarded as being in the property agreed to be sold for the sum of \$12,000. There was brought here in the record of the proceedings before the Commission a large number of exhibits, consisting of checks drawn by Dr. Walters and by A. P. Tartar, a list of cash tags from the prescription department of an optical company for goods sold to Dr. Walters, and various receipts purported to have been given by Dr. Walters in connection with the business. There were also included a list of credit memorandums, a list of cash tags and miscellaneous papers. These were intro-

duced for the purpose of corroborating the contention that Dr. Walters conducted the business after the alleged transfer. They do not have that effect, for it appears that after the purported sale the method followed was that Tartar, by himself or by his bookkeeper, drew checks payable to Dr. Walters for everything he withdrew from the business for his own support and for the bills due. These checks seem to have been deposited in the bank, and checks by Dr. Walters drawn against the account thus created for the wages of the employees and other expenses incurred in the optical department. Many of these checks, and all of the cash tags and the receipts, bore date after the accident to Smithers.

Explanations were made, principally by the petitioner Tartar, of the various transactions we have noted, which are relied upon by the respondent to negative the fact of a bona fide sale of the optical department. For instance, Tartar testified that it was necessary for him to be satisfied as to the character and honesty of employees working in the optical department because of the valuable nature of the jewelry stock kept in the other part of the store. The continuation of the use of Tartar's name in connection with the matter distributed at the store, and announcing the removal to the new location, he testified, was for the purpose of "advertising." He saw no need of exacting the note and security provided by the contract of sale for the reason that the business would not be transferred until fully paid for. The note and mortgage were only executed after the injury because Smithers was "threatening to make trouble."

[5] Here we have a very considerable number of inferences, all tending to sustain the finding of the Commission, contradicted by the positive testimony of two witnesses who were directly interested in the outcome of the proceeding. They were both attempting to prove that the applicant was employed, not by Tartar, who, according to the Commission, was financially responsible, but by Dr. Walters, who, the Commission asserts, was financially irresponsible. Their testimony is wholly uncorroborated by the testimony of any disinterested witness, although it appears there were at least two persons who would have been in position to corroborate the circumstances relating to the purported transfer of the optical department. There are numerous facts and circumstances, to which we have referred, which reasonably tend to support the inference relied upon by the Commission that the claimed contract of sale from Tartar to Walters may have been a sham. The motive for such pretense is not, we think, supplied by the desire

to escape liability in the present proceeding, as claimed by the respondent, but may have been actuated by the direction of the state board of optometry requiring Tartar to dispose of his optical business. The optical business was conducted after the purported sale in precisely the same manner as it had been prior thereto, except that wages and the expenses of the business, instead of being paid directly by Tartar, were paid by Tartar to Walters and by the latter disbursed. In fact, it may be safely inferred that the business was under the actual or potential direction of petitioner as before. Apparently Dr. Walters drew from the business whatever money he desired. But an examination of the accounts and of the exhibits would indicate that he actually appropriated to himself no more than would have amounted to a reasonable salary. There seems to be justification also for the inference that the segregation of the accounts upon the books, which showed no change in the method of entry after the purported sale, was required by the excise tax regulations, regardless of who owned the business. Under all these circumstances it cannot be said that the Commission was required to accept the testimony of petitioner and Dr. Walters. If it was not so required, then it would appear that it was justified in finding upon the circumstantial evidence, and the inferences arising therefrom, that the purported sale from petitioner to Dr. Walters was a sham and a pretense. From this it would follow that the finding that petitioner was the real employer of Smithers is supported by the evidence and that the award should be sustained.

"If the finding of fact is based upon a reasonable inference it is not within the power of this court to set it aside any more than it is within its power to set aside any other finding supported by sufficient legal evidence. For a finding of fact based upon reasonable inference drawn from facts proved with legal sufficiency is as much and as completely as is any other finding of fact a finding based upon good and sufficient evidence. It is the peculiar and exclusive province of trial court or trial jury in the first instance to make such finding of fact, and it is the especial right of every litigant to have all facts so determined by court or jury; this court sitting only to review the findings and being empowered to set them aside as matter of law only when not sustained by adequate evidence." *Ryder v. Bamberger*, 172 Cal. 791, 799, 158 Pac. 753, 756."

The award is affirmed.

We concur: WILBUR, C. J.; MYERS, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

(191 Cal. 680)

EAST BAY MUNICIPAL UTILITY DIST. v. GARRISON, Auditor of Alameda County, et al. (S. F. 10737.)(Supreme Court of California. Aug. 25, 1923.
Rehearing Denied Sept. 24, 1923.)

1. Statutes $\Leftrightarrow$ 227—Whether statute providing for performance of act within specified time is mandatory or directory determined from terms thereof, nature of act, and consequences of doing act or not.

Whether a statute providing that an act shall be done within, at, or before a specified time is mandatory, or merely directory, in the absence of an express provision of law, must be determined from the terms thereof construed as a whole, the nature of the act, and the consequences of doing or failing to do it at such time.

2. Municipal corporations $\Leftrightarrow$ 958—Act as to taxation of property in utilities districts embracing existing political subdivisions construed strictly, and not as retroactive, unless expressly made so.

Municipal Utility District Act, § 20, subds. 1-4, being in invitum in imposing taxes on property in districts embracing existing political subdivisions already subject to tax burdens, will be construed strictly, and hence not as retroactive, unless expressly made so.

3. Municipal corporations $\Leftrightarrow$ 958—Act requiring utility district to elect to adopt county assessor's assessments by certain date held mandatory.

Municipal Utility District Act, § 20, subd. 3, requiring the board of directors, which by subdivisions 1 and 2 is empowered to levy and collect district taxes by its own system, to declare its election to adopt assessments made by assessors of the counties in which the district is situated by ordinance filed with the county auditors by the first Monday in February, held mandatory, especially in view of Pol. Code, §§ 3629 (see Const. art. 13, § 8) 3656, 3718, as to the time when the lien of taxes attaches, and the times within which the assessor must prepare and complete his books, embracing the matters required by section 3650, and furnish copies to cities, towns, and districts requesting them.

4. Statutes $\Leftrightarrow$ 263—Not construed as retroactive in absence of express declaration or clear implication.

An act will not be construed as retroactive, in the absence of an express declaration or very clear implication of such intent.

5. Taxation $\Leftrightarrow$ 501—Existence of obligation to pay particular tax essential to fixation of lien.

A lien being a charge imposed on property as security for performance of an act or obligation (Civ. Code, §§ 2872-2875), it is essential to the fixation of a tax lien on property as of the first Monday in March, as required by Pol. Code, § 3718, that there be, at such time, an existing obligation to pay the particular tax secured by the lien.

6. Municipal corporations $\Leftrightarrow$ 958—Act authorizing utility district directors to take county assessment as basis for district tax not retroactive as to property in districts formed after times for attachment of lien.

Municipal Utility District Act, § 20, subdivision 3 of which authorizes the board of directors to elect to take assessments made by the assessors of counties in which the district is situated as the basis for district taxation by filing an ordinance declaring its election with the county auditors by the first Monday in February, is not retroactive as respects property within a district not yet in existence on such date or the first Monday in March, when the lien of general property taxes attaches under Pol. Code, § 3718, which is made a part of the act by subdivision 4, and officials of a county in which such district is situated cannot be required, by writ of mandate, to assess, levy, and collect a district tax because of an election made after such dates.

In Bank.

Application for writ of mandamus by the East Bay Municipal Utility District against E. F. Garrison, Auditor of Alameda County, and others. Application denied.

Wm. J. Locke, of San Francisco (Louis Bartlett, of San Francisco, of counsel), for plaintiff.

Ezra W. Decoto, Earle Warren, and Ralph E. Hoyt, all of Oakland, for respondents. ¶

RICHARDS, Justice pro tem. This is a proceeding wherein the petitioner applies for a writ of mandate directed to the respondents herein, who are, respectively, the auditor, the assessor, and the tax collector of the county of Alameda, requiring the said E. F. Garrison, as said county auditor, to compute and enter in the assessment book or books of said county, to be prepared by him in accordance with the laws governing the making and collection of property assessments and taxes for such county, and in a separate column in said assessment book or books, to be headed Utility District Tax—Municipal Utility District [naming it], the sum or sums to be paid as a district tax on the property within the East Bay municipal utility district, the petitioner herein, and requiring the said Louis J. Kennedy, as the county assessor of said county, to assess and levy, and the said Edward T. Planer, as the county tax collector thereof, to collect said district tax for the use and benefit of said East Bay municipal utility district, in accordance with law and the provisions of an act of the Legislature providing for the creation and maintenance of municipal districts for supplying water and other commodities within such districts, known as the "Municipal Utility District Act," approved May 23, 1921. Stats. 1921, p. 245.

The petitioner alleges that it was duly organized as a public corporation under and in pursuance of the terms of said act of the Legislature on the 22d day of May, 1923, and that said district embraced within its territory certain lands and the inhabitants thereof within the counties of Alameda and Contra Costa; that thereafter, and on the 31st day of May, 1923, the petitioner duly adopted an ordinance entitled "An ordinance of the board of directors of the East Bay municipal utility district whereby said board elects to avail itself of the assessments made by the assessors of Alameda and Contra Costa counties." and reading as follows:

"Section 1. The board of directors of the East Bay municipal utility district hereby elects to avail itself of the assessments made by the assessors of Alameda and Contra Costa counties respectively for the territory within said counties embraced within said district, and elects to take such assessments as the basis for district taxation, in accordance with the provisions of the act of the Legislature entitled 'An act to provide for the organization, incorporation, and government of municipal utility districts, authorizing such districts to incur bonded indebtedness for the acquisition and construction of works and property and to levy and collect taxes to pay the principal and interest thereon.'" (Approved May 26, 1921.)

The petitioner further alleges that, pursuant to the provisions of subdivision 3 of section 20 of said Municipal Utilities Act, the board of directors of said district filed a certified copy of said ordinance with each of the respondents herein; that each of said respondents, notwithstanding the presentation and filing of the respective copies of said ordinance, have refused to comply with the provisions of said act, and to compute, assess, and collect the taxes for said district as is in said act provided; wherefore the petitioner prays for the issuance of a writ of mandate compelling the said officials respectively so to do.

The respondents demur to said petition as failing to state sufficient grounds for the issuance of said writ. In support of their said demurrer respondents assert and show that the power and authority of the board of directors of the petitioner herein to pass and adopt the ordinance above set forth, and by so doing to entitle the said petitioner, as a municipal utility district, to require the respondents herein, as the auditor, assessor, and tax collector, respectively, of the county of Alameda to compute, assess, levy, and collect the taxes for the uses of said district for the fiscal year 1923-24, is to be found in that portion of subdivision 3 of section 20 of said Municipal Utilities Act, which reads as follows:

"(3) The board of directors may elect to avail itself of the assessment or assessments made by the assessor or assessors of the county or counties in which the district is situated, and may

take such assessment or assessments as the basis for district taxation; provided, that the board of directors shall declare its said election by ordinance and file a certified copy of the same with the auditor or auditors of the county or counties in which the district is situated, on or before the first Monday in February of each year. Thereafter all assessments shall be made and taxes collected by the county assessor and tax collector, or county assessors and tax collectors, of the county or counties in which the district is situated until the board of directors of the district by ordinance elects otherwise."

The respondents insist that, since the application of the petitioner herein affirmatively shows that the ordinance upon which the petitioner relies for its authority to compel and seeks the compulsion of the respondents to do the acts and things required under the provisions of said enactment was not adopted by said board of directors "on or before the first Monday in February" of the year 1923, nor, in fact before the 31st day of May, 1923, and that a copy of said ordinance was not presented to or filed with the respondents herein before the 14th day of June, 1923, and that, having thus failed to comply with the express provision of said act with respect to the time on or prior to which such ordinance should have been adopted by said district, and a certified copy filed with said respondents, it is not entitled to impose upon the latter as county officials of the county of Alameda the added duties provided for in said enactment.

The respondents further insist that, since the petition herein affirmatively shows that the petitioner was not organized as a public municipal utility district prior to May 23, 1923, and had no existence prior to that time, it could not legally impress a lien for taxes for the use of such district upon the property within it which should take effect as of the first Monday of March, 1923, so as to impose a lien as of that date upon said property, and hence could not require the respondents herein to compute, assess, levy, and collect taxes upon the property within said district for the enforcement of said lien.

The answer which the petitioner makes to the first objection above set forth is that the provisions of said Municipal Utilities Act with regard to the time within which the board of directors of a corporation organized and functioning under said enactment should take action in the adoption and filing of said ordinance electing to avail itself of the general laws governing the levy and collection of taxes and of the services of the county officials in charge of the administration thereof are not mandatory, but directory in character, and hence that the failure of the board of directors of the petitioner to exercise the election provided for in said enactment through the passage of the ordinance in question on or prior to the first Monday in February of the current year was not fatal, and that the

adoption of said ordinance on the later date, constituted a substantial compliance with the requirements of said enactment by which these respondents are bound.

[1] Whether the terms of a statute which provides that a particular act shall be done within or at or before a specified time are to be construed as mandatory or merely directory, in the absence of an express provision of law declaring them to be one or the other, must be determined from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time. The act of the Legislature approved May 23, 1921, and known as the Municipal Utility District Act, is an act to provide for the organization, incorporation, and government of municipal utility districts for the purpose of acquiring, constructing, owning, operating, controlling, and using within or without, or partly within and partly without, the designated district, works for the purpose of supplying the inhabitants and municipalities of said district with light, water, power, heat, transportation, telephone service, or other means of communication or works for the disposition of garbage, sewage, or refuse matter, with power to do all the things necessary or convenient for the full exercise of the powers granted to districts organized within such territory. Such districts are given the right of eminent domain, and are empowered to construct works across or along streets and highways and over lands which now are or may become the property of the state, including the right to construct works upon or across any stream or water course, and in the exercise of these rights shall have the same rights and privileges which have been or may be granted to municipalities within this state. A district thus formed and functioning is expressly given the right to levy and collect, or cause to be levied and collected, taxes for the purpose of carrying on its operations and paying the obligations of the district.

Section 20 of said act deals specifically with the matter of taxation. By subdivision 1 thereof it is provided that—

"If from any cause the revenues of the district shall be inadequate to pay the principal or interest on any bonded debt as it becomes due, the board of directors must, or if funds are needed to carry out the objects and purposes of the district, which cannot be provided for out of the revenues of the district, then the board of directors may, levy a tax for such purposes as herein provided. The board shall state the purposes for which such taxes are necessary, and must fix, by resolution, the amount of money necessary to be so raised by taxation."

Subdivision 2 of said act provides that—

"The board of directors may by ordinance provide the mode and manner of assessing, and of correcting and equalizing assessments upon,

the taxable property situated within the district, for the purpose of levying district taxes, and of levying and collecting such taxes, and may provide for the collection of delinquent taxes by actions or legal proceedings which are hereby authorized to be brought, prosecuted and maintained in the name of the district against the several owners of property from whom such taxes may be due and delinquent, for the purpose of recovering the amount of the delinquent tax, with penalties, interest, and costs; provided, that the provisions of such ordinance shall be conformable to general law."

Subdivision 3 of said act provides in part that—

"The board of directors may elect to avail itself of the assessment or assessments made by the assessor or assessors of the county or counties in which the district is situated, and may take such assessment or assessments as the basis for district taxation, provided, that the board of directors shall declare its said election by ordinance and file a certified copy of the same with the auditor or auditors of the county or counties in which the district is situated, on or before the first Monday in February of each year. Thereafter all assessments shall be made and taxes collected by the county assessor and tax collector, or county assessors or tax collectors, of the county or counties in which the district is situated until the board of directors of the district by ordinance elect otherwise."

By subdivision 4 of said section 20 of said act it is provided that—

"All taxes levied under the provisions of this act shall be a lien on the property on which they are levied; and the enforcement of the collection of such taxes shall be had in the same manner and by the same means as is provided by law for the enforcement of liens for state and county taxes, all the provisions of law relating to the enforcement of the latter being hereby made a part of this act, so far as applicable."

[2] From this statement of the provisions of said act germane to the question before us, it is manifest that it is an act most comprehensive in its application to districts to be formed thereunder regardless of pre-existing political subdivisions, county, district, or municipal, and susceptible of embracing populous communities already organized in political subdivisions and already subjected to their own burdens by way of taxation, imposed under state, county, municipal, and charter laws, ordinances, and regulations. The particular provisions of the act above set forth touching the subject of taxation come clearly within the category of laws which are in invitum in their imposition of the burdens of taxation and hence are to be strictly construed. *McDougald v. Boyd*, 172 Cal. 753, 159 Pac. 168; *Mulville v. City of San Diego*, 183 Cal. 734, 192 Pac. 702; *Weyse v. Crawford*, 85 Cal. 196, 24 Pac. 735.

[3] So interpreted, the provisions of this act, whether they are regarded as a whole or

whether the particular portion thereof embraced in section 20 thereof is to be considered as a tax measure, are not to be construed as retroactive in their application in the absence of language in the statute expressly making them so. When the particular provisions of section 20 of the act are considered it will appear that they purport to provide an alternative method for the imposition and levy of the taxes which are to be imposed upon property within the limits of said district, and for its use and benefits in carrying into effect the purposes of its creation. By subdivision 1 of said section the board of directors is fully empowered to levy and collect taxes for such purposes; by subdivision 2 of said section the board of directors of the district is fully empowered to create by ordinance its own complete system for the assessment, levy, and collection of such taxes, its only limitation in that regard being the requirement that the provisions of such ordinance shall be conformable to general law; by subdivision 3 of said section the board of directors is empowered by ordinance to elect to avail itself of the assessment or assessments made by the assessor or assessors of the county or counties in which the district is situated, and may take such assessment or assessments as the basis for district taxation. This substitute method for the computation, assessment, levy and collection of district taxes is made subject to the proviso that the election which the board of directors are thus permitted to make must be exercised through an ordinance duly adopted and duly filed with the respective county officials of the county or counties in which such district is situated, on or before the first Monday in February of each year. Reading these two subdivisions of section 20 of said act together, it would seem to have been the apparent purpose of the lawmakers to fix upon a date early enough in each year to enable the district itself to organize its own complete equipment for the assessment, levy, and collection of such taxes as its board of directors should find it necessary or expedient to impose; or, in the event of the exercise of said election, to enable the county officials upon whom the burden of computing, levying and collecting such taxes was to be laid to provide the necessary equipment for the doing of the additional work which the exercise of such election cast upon them. To interpret these provisions of said section fixing the first Monday in February as the date on or prior to which the board of directors of the district should exercise this election to be merely directory would be altogether unreasonable as leaving both the officers of the district who might be charged with the assessment, levy, and collection of those taxes in the event such election was not exercised and the county officials who would be charged with the like duty in the event of its exercise in a state of uncertainty as to which body of offi-

cials should undertake the task, until such a time, owing to the failure of the board of directors to pass the ordinance of election, as would be likely to imperil or render difficult, if not impossible, the legal performance of the precise, detailed, and delicate duty of computing, assessing, levying, and collecting the taxes of the district for any current year.

These views of the interpretation to be given the particular provisions of the statute are further enforced by an examination of the provisions of the general laws relating to the assessment and taxation of property. Section 3718 of the Political Code provides that the lien of taxes upon real property and the improvements thereon to be assessed, levied, and collected for each year attaches to said property as of the first Monday of March in each year. Section 3629 of the Political Code (see section 8, art. 13, Const.) provides that the assessor must exact from each taxpayer a statement under oath setting forth specifically the real and personal property owned by such person at 12 o'clock noon of the first Monday in March of each year. Between these dates and the first Monday in July of that year the assessor must prepare his assessment books embracing the detailed matters required by the provisions of section 3650 of the Political Code, and he must complete his said assessment books on or before the last-named date, and deliver the same to the clerk of the board of supervisors of the county, and for his failure so to do he is subject to the penalties provided for in section 3656 of the said Code. He must also, on or before the third Monday of July of each year, furnish to such incorporated cities, towns, lighting, water, and irrigation districts within his county as shall have made written requests for the same on or before the first Monday of March of each year, certified copies of his said assessment books in so far as the same pertains to property within the limits of these several bodies so requiring the same. It will thus be seen that the statutes relating to taxation fix upon a date not later than the first Monday in March of each year when the activities of these several county officials in the matter of the assessment, levy, and collection of taxes begin. The Legislature must be held to have had these several provisions of the Political Code in mind in the formulation of the particular act under review and in the fixation of the particular date named therein when the ordinance of the board of directors of the district to be formed under said act should be adopted and a certified copy thereof filed with the county officials specified therein, and that the adoption of said ordinance on or before said date and the filing of a certified copy thereof with each of said officials was to be a mandatory duty cast upon the governing body of said district in order to the exercise of the election provided for in subdivision 3 of section 20 of said act.

The applicant herein relies strongly upon the case of *Cake v. City of Los Angeles*, 164 Cal. 705, 130 Pac. 723, as upholding their contention that the provisions of said act are to be deemed directory. There can be no doubt that said decision correctly states the law as to the particular situation presented in that case; but the cases are in no wise similar. The act to be done in that case related to the preparation of an amended assessment under the Street Opening Act of 1903 (St. 1903, p. 380, § 16), as amended in 1909 (St. 1909, p. 1040), and the statute contained the general direction that such amended assessment should be made by the street superintendent within 60 days after the council had ordered the same to be made, with a proviso that the council might extend said time for a period not exceeding 90 days additional; and this court, in construing these provisions of said act, held that, in view of the fact that there were no negative words denying the power to return the new assessment after the indicated time, and no undue advantage would be gained by the county or the contractor, and no benefit either to the public or any individual impaired or lost, the said provision in said statute must be held to be merely a directory provision. A very different situation is, as we have just seen, presented by the requirements of the act under review in this proceeding when read in the light of the particular duties imposed upon county officials with respect to the levy and collection of taxes under the provisions of the Political Code above set forth.

[4-6] The foregoing views as to the proper interpretation of the meaning of these provisions of the act in question are further enforced by a consideration of the main objection which the respondents herein urge against the issuance of the writ of mandate sought by this proceeding. The record shows that the petitioner herein was not in existence as a political or corporate entity on the first Monday in March of the present year, and was not, in fact, created or organized as a municipal utility district under the provisions of said act until on or about the 21st day of May, 1923. The date upon or before which it was required under section 20 of said act to exercise its election as to how and by whom its taxes for the fiscal year 1923-24 were to be assessed, levied, and collected had expired more than three months before it came into being. To give to the act the interpretation which the petitioner claims for it in this proceeding would be to render the provisions thereof retroactive in their operation as to districts not in being at the time when the particular election provided by its terms was to be made. There is nothing in the act itself to indicate that it was intended to have any such retroactive effect, and it is a well-settled principle of statutory construction that an act will not be construed to be

retroactive in the absence of either an express declaration to that effect or a very clear implication that such was the intent of the Legislature. *Willcox v. Edwards*, 162 Cal. 455, 123 Pac. 276, Ann. Cas. 1913C, 1392; *Vanderbilt v. All Persons*, 163 Cal. 507, 126 Pac. 158; *Estate of Richmond*, 9 Cal. App. 402, 99 Pac. 554; *State Commissioner, etc., v. Welch*, 20 Cal. App. 624, 129 Pac. 974.

But the respondents urge an even more serious objection to the giving to this act the retroactive aspect which the petitioner is seeking to impose upon it. Under section 3718 of the Political Code the lien of property taxes to be imposed under general laws attaches to the property to be affected thereby upon the first Monday in March of each year. The act under review provides in subdivision 4 of section 20 thereof that all taxes levied under the provisions of this act shall be a lien upon the property upon which they are levied, and that the provisions of the general law relating to the enforcement of such liens are made a part of said act. The duty imposed by the general laws relative to taxation upon those county officials who are the respondents herein is to compute, list, assess, levy, and collect such property taxes as by virtue of said section 3718 of the Political Code become a lien upon real property and the improvements thereon upon the first Monday in March of the current year. A lien, according to its general definition, is a charge imposed upon property as security for the performance of an act or obligation. Civ. Code, §§ 2872 to 2875, inclusive. The lien of taxes differs in no respect from other liens, in that it must rest upon an obligation to do the particular act which its attachment to the property of the obligee, or another, secures. In order, therefore, for the lien of taxes to be legally imposed upon property as to the first Monday in March of any particular year, it is essential to the fixation of such tax lien upon such property as of said date not only that the property itself should be in existence at the time of the attachment of such lien, but also that there should be at such time an existing obligation to pay the particular tax which the lien thus imposed is to secure. Otherwise the lien would have no foundation upon which to rest, and would by the imposition of an incumbrance having no obligation to support it, amount to the taking to the extent of such incumbrance of the property of the citizen without due process of law. On the first Monday in March, 1923, the property lying within the region which now forms the East Bay municipal utility district was in existence and was the subject of ownership on the part of persons who were on that date legally liable to pay the taxes upon their respective holdings which were then impossible under existing laws; and for such obligation the lien of taxes as of that date legally attached to such property, but as to any taxes for the maintenance or expenditures

of the East Bay Municipal Utility District there could on said date be no such tax nor any lien to secure its future collection, for the reason that such district had not yet been formed, did not exist, and, not having been called into being, could not create an obligation which would support a tax lien attaching as of said prior date.

We can perceive no distinction in principle between the nonexistence of a law creating a tax at the date of the attempted attachment of the lien of such tax and the nonexistence of a municipal district capable of creating the obligation which is requisite to support such a lien as of said date. In the case of *Dodge v. Nevada Nat. Bank of San Francisco*, 109 Fed. 726, 48 C. C. A. 626, it was held that an act of the Legislature of California which went into effect on March 14, 1899 (St. 1899, p. 96), and which purported to render national bank stock taxable which had not theretofore been subject to taxation under existing state laws, was ineffectual to subject such property to the lien of taxes for that year. In so deciding the federal court construed the Constitution and law of California relative to taxation, and in so doing used this significant and persuasive language:

"The entire system of taxation in the state of California plainly contemplates the existence of property liable to be assessed for taxes, and that its assessment, at whatever date actually made, shall relate to some fixed period of time, and that the taxable status of the property is to be determined by its condition on that day. The Constitution and Codes clearly designate the time when the assessable character of property becomes fixed, to wit, 'at 12 o'clock, meridian, on the first Monday in March,' and the question here involved must be determined with reference to that date. The initial right of the assessor to assess any property during the assessing period relates to that day. The assessor is not authorized to assess any property that is exempt from taxation on that day. The owner or party in control of property is not required to include in his list, to be given to the assessor, any property not subject to taxation on the first Monday of March in each year. That is the time the lien on the property for the taxes attaches, regardless of the date when the assessment is made. The property assessed in this case was in existence on the first Monday in March. At that date there was no law in force which made it taxable."

A similar question was presented to the Supreme Court of the United States in the case of *Wagoner v. Evans*, 170 U. S. 588, 18 Sup. Ct. 730, 42 L. Ed. 1154, which involved the validity of an attempted tax upon cattle kept or grazed in an unorganized county of the territory of Oklahoma; and in holding the tax invalid the Supreme Court said:

"It is sufficient to say that, prior to the passage of the act of March 5, 1895, there existed

no power in the authorities of Canadian county to tax property within the attached reservation. Such authority was first given by that act, and could only be validly exercised on property subjected to its terms after its enactment."

So in the case at bar there was on the first Monday in March, 1923, no law which rendered the property within the region later to be organized into the East Bay municipal utility district subject to taxation for the use of such as yet nonexistent district, and hence no lien which could attach to such property for such uses upon said date, and therefore no duty imposed or imposable upon the respondents herein to set in motion the official machinery provided by general laws for the enforcement of a lien. We are constrained, therefore, to hold that the respondents herein, as county officials of the county of Alameda, were not bound to conform to the requirements of the act in question by virtue of the election sought to be exercised by the board of directors of the petitioner herein pursuant to the provisions of subdivision 3 of section 20 of said act, and that a writ of mandate should not issue to compel said officials so to do.

We have not considered the practical difficulties in the application of the provisions of said act to the assessment of the property of the district for the current year which are discussed in the briefs of counsel, preferring to dispose of the case upon what appears to be the fundamental questions involved in its consideration.

The application is denied.

We concur: **LAWLOR, J.; WASTE, J.; SEAWELL, J**

WILBUR, C. J. (concurring). I concur in the judgment for the reason that, even if we assume that the date of the passing of the ordinance calling upon the county officers to make the assessment by the utility district is directory, it is manifest, in view of the fact that our system of taxation is based on the accruing of a lien on the first Monday of March, that an ordinance after that date demanding the assessment of a tax in favor of a district not in existence on the first Monday of March was not intended by the statute.

I think it is unnecessary to determine whether or not the Legislature would have power to provide that an assessment made after the district was created could relate back to a date before it was incorporated. Assuming that they had power to do so, they have not, in fact, exercised that power.

I concur: **MYERS, J.**

63 Cal. App. 59

PEOPLE v. GRAY. (Cr. 1114.)

(District Court of Appeal, First District, Division 2, California. July 18, 1923.)

1. Criminal law ☞1159(3)—Evidence not reviewed if any is in harmony with verdict.

The appellate court will not review the evidence if there is any in harmony with the verdict and judgment.

2. Criminal law ☞1170(2)—Exclusion of testimony held not prejudicial in view of testimony rendering it immaterial.

In a prosecution for violating Juvenile Court Law, § 21, by procuring and permitting a girl under 21 to visit and remain in a house for prostitution, exclusion of testimony that gas and electric bills were charged to, and the furniture purchased by, another, *held* not prejudicial to defendant; such testimony being immaterial in view of other testimony tending to show that either one of two other persons was responsible for the conduct of the premises when the offense was committed.

3. Criminal law ☞1170½(3)—District attorney's misconduct in asking defendant whether he had been bootlegger held not prejudicial, in view of instructions.

In a prosecution for procuring and permitting a girl under 21 to visit and remain in a house for prostitution, the district attorney's misconduct in asking defendant if he had not been engaged in the bootlegging business *held* not prejudicial to him where the jury could not have convicted him under the court's instructions unless it believed prosecutrix's story and testimony corroborating her, and the court ruled the questions improper, and instructed the jury to disregard them.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Chester Gray was convicted of violating Juvenile Court Law, § 21, by procuring and permitting a girl under 21 to visit and remain in a house for the purpose of prostitution, and he appeals. Affirmed.

Frank M. Carr, of Oakland, for appellant.
U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction of violation of section 21 of the Juvenile Court Law (St. 1915, p. 1246). He was charged with having procured, permitted, and allowed a girl under the age of 21 years to visit in and remain in a designated house in the city of Oakland, state of California, for the purpose of prostitution.

[1] Three assignments of error are made. The one with relation to the insufficiency of the evidence to sustain the verdict and judgment need not be discussed by us further than to say that the evidence was conflicting, but that, upon the testimony of the prosecutrix and the police officers, the jury was en-

titled to bring in a verdict of guilty. Our function ceases with relation to a review of the evidence upon encountering in the record testimony in harmony with the judgment.

[2] Objection is made to the rulings of the trial court by which was excluded, upon the objection of the plaintiff, certain testimony of an employee of the Pacific Gas & Electric Company and of a furniture dealer. By the testimony of these witnesses it was sought to be shown by the defense that the gas and electric bills incurred on the premises in question were charged to one William Canty, and that the furniture on said premises at the time of defendant's arrest had been purchased by said William Canty, and was being paid for by him upon the installment plan. A statement of certain facts appearing in the record will demonstrate that the testimony excluded was entirely immaterial, and its exclusion, therefore, could not have prejudiced the defendant. Defendant introduced testimony to the effect that the premises in question were rented about March 1, 1922, by William Canty. The defendant was arrested on or about May 6, 1922. He stated that he had rented a room in the house from Canty some time the latter part of March. He also testified:

"Q. During the time that you were there, from the last week of March up until the time of your arrest, the 7th day of May, 1922, did Mr. Canty remain there all the time? A. No; he was there part of the time. Q. Yes, sir. Was he there at the time of the arrest? A. No, sir. Q. Did any one else aside from Mr. Canty have charge of those premises after you went there? A. Yes, sir. Q. Who else did? A. Why, a party by the name of Schultz come in there about 10 days after I come in with his wife, and had charge of the property up until the day of the arrest. Q. Up until the day of the arrest? A. Yes, sir. Q. And on the day of the arrest who took charge of the premises? A. A party by the name of Whitey. Q. And he was there at the time of the arrest by the officers? A. Yes, sir. Q. Was anything said by the officers as to who was in charge of the premises at the time of the arrest on May 7, 1922? A. Mr. Whitey told Mr. Canning, himself, that he was in charge at the time he took me."

Neither Mr. Canty, Mr. Schultz nor Mr. Whitey, the persons alleged to have been in charge of the premises, successively, were produced as witnesses, but it is apparent that, if the testimony of the defendant had been accepted as true by the jury, either Whitey or Schultz, and not Canty, would have been responsible for the conduct of the premises at the time the offense was committed, and Canty's original connection with the house would have been immaterial. The testimony of the defendant was aided by the testimony of one of his witnesses, Corato, with reference to the responsibility of Schultz and Whitey for the conduct of the premises at

the time of defendant's arrest. In view of this contention and this testimony by the defendant and his own witness, it becomes unimportant who originally purchased the furniture for the premises or in whose name the gas and electric service was being obtained, as it was not contended that Canty was in charge of the premises at the time of the arrest, which occurred a few moments after the offense. The objection, therefore, is without significance upon this appeal.

[3] The only other objection made is with reference to alleged misconduct of the district attorney. It is contended that the district attorney was guilty of misconduct in asking the defendant if he had not been engaged in the "bootlegging" business at various places mentioned at dates prior to the time of the offense for which he was being tried. It is evident that these questions were improper, and the court so ruled, and afterwards instructed the jury to disregard them, and not to consider them. In the excitement of a contest in the trial court, it often happens that a district attorney, through overzealousness on behalf of the people, attempts to bring before a jury matters which the settled rules of evidence exclude. This is to be regretted, and, in cases where it is evident from a perusal of the entire record that justice has not been done, or that the defendant has been prejudiced by such efforts of the prosecutor, judgments will be reversed for these reasons. But in the instant case it is not apparent that any prejudice has resulted to the defendant from the questions complained of. The jury could not have convicted the defendant under the instructions of the court unless it believed the story of the prosecutrix and the testimony and matters appearing in the record which corroborated her, and, if the jury believed that story, it is evident that the conduct of the district attorney did not influence the result. Furthermore, the direction of the court with reference to the conduct complained of must be deemed to have cured the error.

What we have just said applies with equal force to the other assignments of misconduct on the part of the district attorney.

The judgment is affirmed.

We concur: **NOURSE, J.; STURTEVANT, J.**

(63 Cal. App. 18)

SHAW v. KING. (Civ. 4549.)

(District Court of Appeal, First District, Division 2, California. July 16, 1923. Hearing Denied by Supreme Court Sept. 13, 1923.)

1. Specific performance — 49(2)—Consideration of contract held insufficient to warrant specific performance.

An alleged contract between brother and sister, evidenced by letters wherein the brother

offered to maintain the sister for the rest of her life, held so lacking in consideration on the part of the sister that specific performance of it was unwarranted.

2. Specific performance — 28(1)—Contract held too indefinite to warrant.

An alleged contract by a brother to care for his sister during the remainder of her life held too indefinite to warrant a decree of specific performance.

3. Specific performance — 62—Held unwarranted in absence of showing that damages could not be adequately compensated for at law.

In an action by a sister against her brother's estate to enforce specific performance of an alleged agreement by decedent to maintain plaintiff during the rest of her life, where there was no showing that plaintiff's damages, if any, could not be adequately compensated for at law, held, that specific performance was unwarranted.

4. Specific performance — 6—Held unwarranted because of lack of mutuality of remedy.

In an action against the estate of plaintiff's brother to enforce specific performance of an agreement by decedent to care for plaintiff during her life in exchange for her society and company, held, in view of the death of plaintiff's brother, rendering specific performance by plaintiff impossible, that there was no mutuality of remedy, and specific performance was unwarranted.

5. Contracts — 19—Death of offeror before acceptance held revocation of offer precluding.

Where a brother, after forwarding his sister money on which to come to him, and offering to maintain her during the rest of her life, dies before the offer is accepted, it must be deemed revoked, under Civ. Code, § 1587, subd. 4.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Eoline W. Shaw against Hazel Hubbard King, as administratrix of the estate of Fred C. King, deceased. From judgment of nonsuit, plaintiff appeals. Affirmed.

Louis Goldstone, of San Francisco, for appellant.

Geo. Clark Sargent, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by plaintiff from a judgment against her entered upon granting the motion of the defendant for a nonsuit. The defendant is the surviving wife of Fred C. King, deceased, and also the administratrix of his estate. The plaintiff presented her alleged claim against the estate to the administratrix. It was rejected. She thereupon brought this action, seeking specific performance of an alleged contract with deceased, or, failing in that, for damages against his estate for its breach.

It is unnecessary to go into the facts at great length, for the case presents but one question, which is answered by a fundamen-

tal rule of contract law, i. e., that an enforceable contract must be founded upon a consideration known to the law.

In the present case, the plaintiff and deceased were sister and brother. The brother lived in California and the sister in New York. The letters of the brother to his sister, relied upon by her to establish the alleged contract, as well as the undisputed testimony of relatives and intimate friends, prove beyond doubt that there was a deep and tender affection between the brother and sister, and that he looked after her and provided for her necessities and comforts with loving care. It is also apparent that the brother planned for years, and frequently expressed his purpose, to care for his sister during the remainder of her lifetime. He was the president and a large stockholder of an oil company, and a short time before his death the affairs of this company were in the hands of a federal court receiver. During the period of the receivership he wrote to his sister frequently, telling her of the situation, and that \$1,500,000 would soon be received by the company from the receiver and distributed among its stockholders; that he would then receive a substantial sum of money, and would be able to carry out long-cherished plans for her; that he would send her money to come to California, where the climate would improve her health, and that they would spend the remainder of their lives near each other, and enjoy the companionship they had known as children. These letters were attached to plaintiff's complaint, and indicate clearly the generous, kindly spirit of the brother toward his sister. In November, 1920, the receiver paid over to the company the money held by him, and deceased received a dividend of 50 cents a share on 50,334 shares of stock in the oil company, and also received additional money from other sources. On November 16, 1920, deceased forwarded to plaintiff his personal check for \$300, together with a letter telling her to start for California at once, and to stop on the way and see another sister, who was ill, and to whom he had also sent money.

Plaintiff alleged that after receiving this check she quitted the employment upon which she had previously depended for her livelihood and support, and terminated and abandoned her former domicile in New York, with the intention of thereafter establishing her residence in California, and relying for her permanent future maintenance and support for the remainder of her life upon her brother. Plaintiff left New York on December 14, 1920, without knowledge that her brother had died suddenly three days earlier. This information was communicated by telegraph to friends in the east with whom the plaintiff was living at the time, but they, fearing she would not be able to endure the long railroad journey if she knew the truth,

concealed the fact from her, and she did not learn of her brother's death until she reached San Francisco. Plaintiff is a woman of the age of 60 years, in delicate health, and without financial means to provide for her own support and unable to earn her own living.

The testimony of several friends and relatives of the family is undisputed that the brother frequently spoke of his purpose to care for his sister during her entire life; that it was an object ever before him. He stated frequently that he had promised his mother when she was dying that he would care for his sister, who had been afflicted with brain fever when a child, and thereby incapacitated for solving her own economic problems. His great desire was to have the affairs of the oil company settled so that he might carry out his promise to his mother and enjoy the comfort and society of his sister in California. He had almost accomplished this purpose when the hand of death was laid upon him, thwarting his long-cherished plans.

The trial judge was moved to comment upon the kindly, generous nature of deceased, as evidenced by the letters to his sister and his conduct toward her, and to regret that his estate could not be charged with a moral obligation which he so constantly recognized. We join in those sentiments, but we can find no enforceable contract in the facts proven at the trial.

[1] As previously stated, the plaintiff sought recovery upon two grounds: One by the enforcement of specific performance of the alleged contract to provide for her maintenance for the remainder of her life, and the other for damages for breach of said contract. Viewed as an action for specific performance, the pleading and proof is insufficient for several reasons. There is no showing that the consideration for the alleged contract was adequate; the terms of the alleged contract are too vague to be specifically enforced; there is no showing that the plaintiff cannot be compensated in damages for a breach of the alleged contract. *Parsons v. Cashman et al.*, 23 Cal. App. 298, 301, 137 Pac. 1109, 1111.

As to the first objection, the contract was evidenced by letters written by the brother to the sister. In one of these letters he expresses the hope that he will soon be able to tell plaintiff to "stop work and come West and be near us." The same idea is expressed in the other letters. In the last letter he said: "Inclosed find check for \$300. I think you had best come at once. I think you had far better put off your visit to Boston until next summer, when I will be far better prepared financially to send you and spare the money." The letter then continues with directions as to her tickets, etc. The plaintiff started for San Francisco in response to that letter. She

alleged, but offered no proof upon the subject, that she had quitted her employment in New York. The only suggestion of any employment by the plaintiff is the references in the letters to her work. But there is no proof that she was working at the time she received the last letter which induced her to leave New York, nor that she gave up her employment because of her brother's offer. On the contrary, the testimony of her friends and relatives offered on her behalf was all to the effect that she was in delicate physical health, and was unable to look after herself in the matter of earning a living. So far as the record shows, therefore, there was no consideration given for the alleged agreement of defendant's intestate, except the journey from New York to San Francisco. Plaintiff offered no evidence that this was any hardship or detriment to her, and the expense of it was paid by her brother. There was no proof that plaintiff had sacrificed any opportunities of any kind in leaving New York for a short time. She never performed any services for her brother, and never gave him the comfort and pleasure of her society, because he died before she left New York.

A case rather closely in point is *Jaffee v. Jacobson*, 48 Fed. 21, 1 C. C. A. 11, 14 L. R. A. 352, where it was held that a failure to perform services called for by the agreement, although due to the death of the party for whom the services were to be performed before the beneficiaries had an opportunity to carry out the agreement, will prevent enforcement of the contract by the beneficiaries.

[2] As to the rule that a contract must be definite before specific performance will be decreed, there is no showing, either by the letters relied upon as constituting the contract, nor by the testimony introduced on behalf of the plaintiff as to the approximate amount monthly which the brother contemplated allowing his sister. Was it to be \$50 a month or \$200, as she asks in this action?

[3] Furthermore, this is not a case where the plaintiff gave up years of her life and opportunities for pleasure and profit in order to minister to the needs of her brother, in reliance upon his promise to care for her. In such cases it has been held that damages would not be an adequate compensation for the loss of the opportunities of an entire lifetime, and that the contract would be specifically enforced. There is nothing in the present record to indicate that plaintiff's damages, if any, could not be adequately compensated for at law.

[4] As a further objection to enforcing this alleged contract specifically, there was

no mutuality of remedy. A court of equity will refuse to decree the specific performance of an executory contract wherever it creates a duty from the plaintiff of such confidential or personal nature that the court could not have enforced it at the instance of the defendant. After the services have been rendered, however, the reason for the foregoing rule no longer applies, the contract having become mutual in both obligation and remedy. 25 R. C. L. § 118; *Sturgis v. Galindo*, 59 Cal. 29, 43 Am. Rep. 239. In the instant case plaintiff contends that in return for her brother's provision for her financial needs during her lifetime she was to give him the benefit of her society and companionship, and to maintain her residence near him, so as to make their constant association practicable. As in the case of *Jaffee v. Jacobson*, supra, this companionship and association was the real consideration for the contract. The brother could not have enforced this contract against the sister. Equity would not undertake to compel the plaintiff to be her brother's companion in California. She had not entered upon the fulfillment of that portion of the contract at the time of the breach, and there was no mutuality of remedy.

We are now brought to a consideration of the legal remedy sought. Plaintiff asks for damages for breach of contract in the event specific performance cannot be had. Apart from the uncertainty of the contract there is no proof of damage in the record. Plaintiff's damage would be the difference between the value of the thing she was to receive and the value of the things she was to give up. How much money was plaintiff to receive from her brother and for how long a time, under the terms of the contract, and what was the value of the time and attention she was expected to devote to her brother in return therefor? The record is silent upon all of these matters; there was no proof offered.

[5] A further answer to appellant is that, taking her view of the legal situation and regarding the letters of the brother as an offer to the sister which she accepted by part performance when she started upon her journey from New York to San Francisco, a difficulty is presented by the fact that before plaintiff left New York her brother had died. The offer of the brother was revoked by his death before plaintiff's acceptance of it by part performance. Section 1587, Civ. Code, subd. 4.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

63 Cal. App. 78

W. P. FULLER & CO. v. FLEISHER et al.
(Civ. 4049.)

(District Court of Appeal, Second District, Division 2, California. July 19, 1923.)

1. Mechanics' liens §52—Materialman not entitled to lien unless material furnished contractor for use in particular building.

Under Code Civ. Proc. § 1183, a materialman, to be entitled to a lien for materials furnished a building contractor, must have furnished the material with the purpose that it be used or consumed in the work on the particular building upon which he claims a lien.

2. Mechanics' liens §281(1)—Evidence held insufficient.

Evidence that lumber company shipped lumber to contractor *held* insufficient to support finding that such lumber was furnished for the purpose of use in that particular building.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Suit by W. P. Fuller & Co. against M. Fleisher, M. Fleisher & Co., and another. Judgment for plaintiff, and the named defendants appeal. Reversed and remanded.

A. B. Bigler, of Santa Maria, for appellants.

Armstrong & Shaeffer, of Santa Maria, for respondent.

FINLAYSON, P. J. This is an appeal by the defendants M. Fleisher and M. Fleisher & Co. from a judgment in favor of plaintiff in an action to enforce a mechanic's lien. The complaint alleges that the defendant M. Fleisher & Co., a corporation, entered into a contract with the Santa Maria Construction Company, a copartnership, whereby the latter agreed to construct, remodel, and erect for the former a certain one-story business and office building in the city of Santa Maria, Santa Barbara county, and that plaintiff, a corporation having its principal place of business at San Francisco, furnished glass and other material to be used in, and which were used in, the construction, remodeling, and erection of the building. The court found these averments of the complaint to be true. It is contended by appellants that there is no evidence to support the finding that the glass and other material were furnished by plaintiff to be used in this particular building.

[1] In a suit to enforce a materialman's lien it not only must be alleged and proved by the plaintiff that the material was actually used or consumed in the construction, alteration, addition to or repair of the building, but it also must be averred and proved that the material was furnished by the materialman expressly for that particular building. Upon this proposition the decisions in this

state are of one accord, from the early case of *Bottomly v. Rector of Grace Church*, 2 Cal. 90, to the recent decision of the Supreme Court in *Ensele v. Jolley*, 188 Cal. 297, 204 Pac. 1085. It is not enough that the owner or contractor purchased the material for use in the building on which the lien is asserted; the materialman himself must have furnished it for use or consumption in that building. *Weatherly v. Van Wyck*, 128 Cal. 329, 60 Pac. 846.

[2] Respondent contends that the rule that the materialman must have furnished the material to be used or consumed in the particular building upon which he claims the lien is not justified by the language of the present mechanic's lien law—the law of 1911 (St. 1911, p. 1313), as amended. There is no merit in the claim. So far as the rule under consideration is concerned, the language of the present statute does not differ substantially from that of the prior statutes. Section 1183 of the Code of Civil Procedure, as it now reads, declares that—

"Materialmen * * * furnishing materials to be used or consumed in * * * the construction, alteration, addition to or repair * * * of any building * * * shall have a lien upon the property upon which they have * * * furnished materials, for the value of such * * * materials furnished."

As will be noticed, the section gives to materialmen liens only upon the property "upon which they have * * * furnished materials." It is the furnishing of material to be used or consumed in the construction, alteration, addition to, or repair of the particular building upon which the lien is claimed that creates the lien. The statute does not contemplate that a lumber merchant should have the right to follow the materials which he has sold to another, in general terms, and assert a lien upon any building to which the materials may happen to have been applied.

The record before us is barren of any evidence tending to support the finding that plaintiff furnished the materials for use in the construction, remodeling, or erection of this particular building. All that the evidence shows is that the Santa Maria Construction Company ordered the materials of plaintiff, and that the latter shipped them from San Francisco to Santa Maria, consigned to the construction company. Nowhere is there any evidence that the materials were sold by plaintiff for the purpose of being used in the construction, remodeling, or erection of any building in particular.

The judgment is reversed, and the cause is remanded.

We concur: WORKS, J.; CRAIG, J.

63 Cal. App. 73

BUTLER v. ZEISS et al. (Civ. 4557.)

(District Court of Appeal, First District, Division 2, California. July 19, 1923.)

1. Municipal corporations ☞663(3)—Abutting owner may sue for wrongful injury to shade trees.

An owner of property abutting on a street has a property right under Civ. Code, §§ 831, 833, sufficient to permit him to maintain an action against any person, except the highway officials, who wrongfully injures or destroys shade trees growing in the highway.

2. Adjoining landowners ☞5—Cutting down overhanging trees wrongful.

The fact that shade trees growing in a street in front of the premises of an abutting landowner leaned over and were a menace to the property of an adjoining landowner did not necessarily give the latter the right to cut the trees down.

3. Trespass ☞61—Grounds for treble damages.

To entitle plaintiff to recover treble damages under Code Civ. Proc. § 733, for cutting down trees, he must allege that defendant willfully and maliciously removed the trees knowing them to be plaintiff's property.

4. Trespass ☞46(3)—Evidence held to show willful and malicious cutting of trees.

In an action under Code Civ. Proc. § 733, for treble damages for cutting trees, evidence held to sustain a finding that the cutting was willful and malicious.

Appeal from Superior Court, Marin County; Frank H. Dunne, Judge.

Action by Elizabeth M. Butler against Louis F. Zeiss and another. Judgment for plaintiff, and defendants appeal. Affirmed.

E. B. Martinelli and Jordan L. Martinelli, both of San Rafael, for appellants.

John W. Woten, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action to recover damages. She was awarded a judgment in the trial court, and the defendants have appealed. The facts are briefly stated in the findings as follows:

"(1) That on the 23d day of April, 1913, plaintiff became, and ever since has been, and now is, the owner in fee of, and as such owner was during all of said time, and now is, in possession of, that certain real property, together with the appurtenances thereunto belonging, located in the town of Inverness, county of Marin, state of California, described as follows: Lot No. 15 in block 16 according to the plat of the survey of the same now on file in the office of the county recorder of said Marin county and duly recorded in liber 1 of Maps, at page 80, thereof.

"(2) That at all the times mentioned in the complaint herein, and until on or about the 1st day of November, 1919, there were growing and standing in place on Aberdeen Way, the

street or highway in front of plaintiff's real property hereinabove described, seven trees, and that at all said times there was and now is standing upon plaintiff's said real property a house, which said house fronts upon said Aberdeen Way, and in which said house plaintiff resided, and now resides.

"(3) That on the 1st day of November, 1919, and at the time of the felling and destruction of said trees as hereinafter stated, said Aberdeen Way was, ever since has been, and now is, a public street or highway, and that on the 1st day of November, 1919, and at the time of the felling and destruction of said trees as hereinafter stated, said Aberdeen Way in front of plaintiff's said real property and house, and that part of said Aberdeen Way in front of plaintiff's said real property and house, was, ever since has been, and now is, a public street or highway.

"(4) That said trees aforesaid stood and were growing until destroyed in front of plaintiff's said real property and house and on Aberdeen Way as aforesaid.

"(5) That on or about the 1st day of November, 1919, and within two years preceding the commencement of this action, defendants maliciously, willfully, wrongfully, and without any lawful authority, or any authority, cut down, felled, and destroyed said seven trees aforesaid, and all of them.

"(6) That thereby, and by reason of such destruction of said trees, plaintiff was, and thereafter continued to be, deprived of the said shelter afforded by said trees, and of the pleasure, comfort, and enjoyment derived from said trees in front of her said house. That prior to the destruction of said trees plaintiff had for many years enjoyed the same, and the beauty thereof, and the shade and shelter afforded thereby.

"(7) That, by reason of said destruction of said trees, the value of plaintiff's said house and real property above described became and was lessened to the extent of \$350, and that plaintiff's enjoyment of her said house on said real property has been ever since the destruction of said trees materially and substantially lessened.

"(8) That, by reason of the premises and said wrongful act of defendants in cutting down said trees, plaintiff has been and is damaged in the sum of \$350 actual damages suffered and sustained by plaintiff in the premises.

"(9) That it is not true that said trees aforesaid were of a dangerous nature, or were dangerous to the person and property, or to the person or property of defendant Zeiss and the members of his family, or of defendant Zeiss or the members of his family, as alleged in defendants' answer herein, or at all.

"(10) That it is not true that said trees aforesaid rendered the premises of defendant Zeiss unhealthful or unfit for human habitation as alleged in the answer herein or at all.

"(11) That, by reason of the foregoing premises and the above findings, it becomes and is unnecessary to find or make any findings herein as to any other facts involved or in issue herein or involved upon the issues made and joined by the pleadings herein, and that such other facts in issue herein are immaterial.

"And this court now concludes that said plaintiff is entitled to have judgment in her favor

against said defendants, and each of them, for treble and the amount of her damages aforesaid or for the sum of \$1,050, as provided for by section 733 of the Code of Civil Procedure. Let judgment herein be entered accordingly."

[1, 2] There being nothing in the record to the contrary, it will be presumed that the plaintiff's title extended to the center of Aberdeen Way. Civ. Code, § 831. Trees whose trunks stand wholly upon the land of one owner belong exclusively to him. Civ. Code, § 833. In the case of *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. Rep. 549, the Supreme Court of New York had under consideration a set of facts quite similar. Following some earlier cases in that state, the court held that the plaintiff had a property right sufficient to permit him to maintain an action against any person, except the highway officials, who might wrongfully injure or destroy the trees. See, also, 3 Dillon, Municipal Corporations (5th Ed.) § 1126. The defendants claimed that the trees leaned over the property of the defendant Zeiss and were a menace to his property. The trial court found against him on that contention. Even though the trial court had found the fact the other way, the defendant would not necessarily have had the right to cut the trees down. *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623. To the same effect is *Scarborough v. Woodill*, 7 Cal. App. 39, 93 Pac. 383.

[3, 4] Having the right to some relief, the plaintiff filed her action under the provisions of section 733, Code of Civil Procedure. That section authorizes the trial court to award treble damages. But to entitle a plaintiff in one of these cases to treble damages under section 733 of the Code of Civil Procedure he must allege that the defendant wilfully and maliciously removed the trees knowing them to be the property of the plaintiff. *Stewart v. Sefton*, 108 Cal. 197, 41 Pac. 293. The plaintiff in the case at bar pleaded that the acts of the defendants were done wilfully and maliciously, and the court so found. However, the appellants claim that there is no evidence in the record that the defendants' acts were both wilful and malicious. The respondent replies that such evidence is in the record, and she cites and relies upon the testimony of Mrs. Barton, a sister of the plaintiff. That witness testified that about two months before the date of the cutting she had a conversation with the defendant Zeiss concerning the trees. That conversation was as follows:

"Mr. Zeiss said he was going to cut this tree down. 'You better not,' I said. 'If you do, there will be war in camp. Mrs. Butler would have a fit.' He said, 'I will take the initiative and let her do the fighting.' I said, 'I wouldn't do that; she will be awful wild.' 'Well,' he said, 'the district attorney is a particular friend of my brother's. He said if I considered these

trees a menace to my property I can cut them down.' I said, 'There is not a menace to your property. There is not one tree leaning towards your house. There are some branches reaching over to my house. There isn't one leaning towards yours.'"

It appears from the evidence that the plaintiff and her family, and the defendant Zeiss and his family, did, during the summer months, occupy their respective residences at Inverness. When the summer had come to a close and the plaintiff had left the neighborhood, the defendant Zeiss gave directions to his codefendant, Reeves, and, acting on such directions, the defendant Reeves executed the act. If the trial court believed the foregoing testimony (and from its findings we must assume that it did), then it had the power to make a finding that the cutting was done wilfully, and maliciously. *Davis v. Hearst*, 160 Cal. 143, 163, 116 Pac. 530. Having found the facts accordingly the trial court had the power to treble the damages.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

63 Cal. App. 69

HOLSON et al. v. BUTLER et al. (Civ. 4043.)

(District Court of Appeal, Second District, Division 2, California. July 18, 1923.)

1. Reformation of instruments ⇨36(2)—Essentials of complaint seeking reformation of deed stated.

A complaint, seeking reformation of the description in a deed on the ground of fraud, to be good as against a demurrer must show the original agreement as relates to the description of the property, and show wherein the description in the deed differs from the property agreed to be conveyed, and that such difference was caused by defendant's fraud.

2. Reformation of instruments ⇨37—Cross-complaint seeking reformation of description in a deed held sufficient as against demurrer.

A cross-complaint, seeking the reformation of a description in a deed on the ground of fraud, which alleged that cross-defendants had "sold" to cross-complainant a lot designated as No. 130 and 25 feet of lot 131, but that only lot 130 was actually conveyed, and that the failure to include the addition of 25 feet of lot 131 was done "intentionally and purposely," and "with the express purpose and intention of defrauding" cross-complainant, held sufficient as against a demurrer.

3. Reformation of instruments ⇨13(1)—Description in deed may be reformed for fraud when it does not describe property intended.

Under Civ. Code, § 3399, equity will reform the description in a deed whenever, through fraud of the grantor, it fails to convey all the

property intended by the parties to be conveyed.

4. Appeal and error ⇐907(3) — Where evidence not record, court's findings assumed supported.

Where the appeal is on the judgment roll alone, and the evidence is not before the appellate court, it must assume that the court's findings are supported by the evidence.

5. Trial ⇐396(1) — Finding held not subject to objection that it made new contract between parties.

Where by cross-complaint the defendants, in an action to quiet title to land, asserted title to the easterly 25 feet of the lot involved by reason of purchasing from plaintiff, a finding that the easterly 20.20 feet of the lot involved was sold as alleged in the cross-complaint held not erroneous as being tantamount to making a new contract for the parties.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Albert B. Holson against John N. Butler and Rebecca J. Butler, wherein the last-named defendant filed a cross-complaint, joining as cross-defendant Nellie Holson. From judgment for cross-complainant, plaintiff appeals. Affirmed.

J. H. Shankland, R. L. Hogan, and D. S. Hammack, all of Los Angeles, for appellant.

Gates & Randles, of Los Angeles, for respondent.

FINLAYSON, P. J. Albert B. Holson brought this action against John N. Butler and Rebecca J. Butler, husband and wife, to quiet title to lot 131 of Holson Heights, in the city of Los Angeles. The defendants answered, denying that plaintiff possesses any title to the easterly 25 feet of the lot. The defendant Rebecca J. Butler filed a cross-complaint, wherein she alleged that she purchased from the plaintiff and his wife, Nellie Holson, whom she made a cross-defendant, all of lot 130 of Holson Heights and the easterly 25 feet of the lot in controversy, i. e., the easterly 25 feet of lot 131, but claimed that, by reason of fraud on the part of her vendors, the deed to her incorrectly described the property, in that it failed to mention the easterly 25 feet of lot 131, wherefore she prayed that the deed to her be reformed so as to include that property in the description of the land conveyed to her, and that her title thereto be quieted. The trial court found that plaintiff and his wife sold to cross-complainant all of lot 130 and the easterly 20.20 feet of lot 131, and that, through fraud on the part of the vendors, the deed, while duly conveying lot 130, omitted to mention the easterly 20.20 feet of lot 131. Judgment passed for cross-complainant accordingly and plaintiff appeals.

Appellant's principal points are: (1) That

the cross-complaint does not state a cause of action for reformation based on fraud; (2) that, because cross-complainant alleged that the cross-defendants sold to her all of the easterly 25 feet of lot 131, the finding that it was the easterly 20.20 feet of that lot which was sold to her was tantamount to making a new contract for the parties. We find no merit in either point.

The material allegations of the cross-complaint are substantially as follows:

On January 4, 1919, cross-complainant "bought" from cross-defendants and the latter "sold" to cross-complainant lot 130 and the easterly 25 feet of lot 131 of Holson Heights, for a total consideration of \$3,300, which was paid by cross-complainant to cross-defendants. Thereafter, but on the same day, cross-defendants, by a deed executed by them as grantors, conveyed to cross-complainant lot 130 of Holson Heights. The property conveyed by said deed does not include all of the property "sold" by cross-defendants to cross-complainant, in that the easterly 25 feet of lot 131 of Holson Heights was not included therein. The omission from the deed of this easterly 25 feet "was intentionally and purposely made by the plaintiff, with the express purpose and intention of defrauding the said defendant and cross-complainant, * * * and the said plaintiff knew at said time that said deed did not include all of the property sold by him, * * * to wit, lot 130 of the Holson Heights and the said easterly 25 feet of lot 131." Cross-complainant at the time believed that the description in the deed did in truth and in fact contain the easterly 25 feet of lot 131, as well as all of lot 130. She did not discover the omission until April 20, 1920, which was 43 days before the action was commenced. She would not have purchased any part of the land nor have paid her money for the same had she not believed that the easterly 25 feet of lot 131 was included in the property described in the deed. The land omitted from the deed is reasonably worth the sum of \$1,000. Had she known that the deed did not convey to her the entire property purchased by her, she would not have accepted the deed or have paid the consideration of \$3,300.

[1-3] A complaint for reformation of the description in a deed on the ground of fraud, to be good as against a demurrer, must show the original agreement, in so far, at least, as it relates to the description of the property to be conveyed, and should point out wherein the description in the deed differs from the description of the property agreed to be conveyed, and that such difference was caused by defendant's fraud. The cross-complaint before us sufficiently shows what was the real antecedent agreement between the parties respecting the property to be conveyed, and points out the difference between the description as agreed upon and the description of the property as actually conveyed. This that pleading does by alleging that the cross-defendants "sold" to the cross-com-

plainant, for a consideration of \$3,300, all of lot 130 and the easterly 25 feet of lot 131, but that only lot 130 was actually conveyed. The allegation that the cross-defendants "sold" to the cross-complainant the easterly 25 feet of lot 131, as well as all of lot 130, is sufficient to convey to the mind of a person of common understanding the idea that the pleader intended to charge that the cross-defendants had contracted, for a valuable consideration, to transfer to cross-complainant their title and interest in and to all of the property so "sold" by them. *Radebaugh v. Scanlan*, 41 Ind. App. 109, 82 N. E. 544. Equity will reform the description in a deed whenever, through fraud on the part of the grantor, it does not convey all of the property which the parties intended should be conveyed. Civ. Code, § 3399. Here the cross-complaint, by sufficient averment, shows that the discrepancy between the agreement to convey and the actual conveyance was due to cross-defendants' fraud, it being alleged that the omission of the easterly 25 feet of lot 131 from the description in the deed was done "intentionally and purposely," and "with the express purpose and intention of defrauding" cross-complainant, who believed that the description in the deed did in truth contain the omitted property.

[4, 5] It cannot be said that the court's findings and decree made a new contract for the parties. True, the trial court found that the cross-defendants sold to cross-complainant the easterly 20.20 feet of lot 131, and not, as cross-complainant alleged, the easterly 25 feet of that lot. The evidence is not before us, the record on appeal consisting of the judgment roll alone. We must assume, therefore, that the court's finding was supported by the evidence; that is, we must assume that the evidence showed that the cross-defendants "sold," i. e., that the parties contracted for the conveyance of, lot 130 and the easterly 20.20 feet of lot 131. The decree reforming the deed follows this description. Therefore, so far from making a contract for the parties, the decree follows the terms of their contract as disclosed by the evidence. What seems to be the situation is that there was a variance between the cross-complaint and the evidence; that is, it is quite probable that the evidence, if it were before us, would show that the land which the parties contracted to convey was of an area somewhat less than that alleged in the cross-complaint. Such variance, however, was not a material one. We do not see how it could have actually misled the cross-defendants in maintaining their defense on the merits to Mrs. Butler's cross-action for reformation.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

(63 Cal. App. 80)

STEVENS et ux. v. HINES et al. (Civ. 4613.)

(District Court of Appeal, First District, Division 2, California. July 20, 1923.)

1. Tender ⇐15(3)—Insufficiency of tender by check as not lawful money waived by refusal on other grounds.

One refusing a tender by check on grounds other than that it does not constitute an offer of lawful money will be held to have waived such objection. Civ. Code, § 1501.

2. Tender ⇐11—Tender by check dated before due date not insufficient because received before date of check.

A check dated August 30 for principal and interest due August 31 on a note held not an insufficient tender because received by mail on August 22, especially where the same practice had been followed on other occasions without objection, and several of such checks had been cashed when received, though by payee's attorney, who had no authority to accept and cash postdated checks; they being antedated with respect to the obligation.

3. Tender ⇐14(1)—Tender by telegraph not insufficient because of telegraph company's demand that payee identify himself.

A tender by telegraph held not conditional, and hence not insufficient, because of the telegraph company's refusal to pay the money unless payee identified himself as required by the party making the tender.

4. Costs ⇐260(4)—Judgment enjoining sale of realty under deed of trust securing note and directing reconveyance to maker on payment of amount due only affirmed with damages for frivolous appeal.

A judgment enjoining a sale of realty worth \$15,000 under a deed of trust securing a note on which \$2,500 was due, and directing reconveyance to plaintiff by defendant, as trustee, on payment of such sum only, without expenses of advertising the sale, trustee's and attorneys' fees, etc., affirmed, with damages for a frivolous appeal, in view of evidence that plaintiff did all she could to make a payment, on which she was alleged to be in default, in time, and that defendant obstructed her in so doing.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Suit by C. B. Stevens and wife against Gabriel Hines and another. Judgment for plaintiffs, and defendants appeal. Affirmed, with damages for frivolous appeal.

Joseph E. Bien and Werner Olschewski, both of San Francisco, for appellants.

Edwin V. McKenzie, of San Francisco, for respondents.

LANGDON, P. J. This is an appeal by the defendants from a judgment enjoining them from selling under a deed of trust certain real property owned by plaintiffs, and

situated in the county of Sacramento, and also decreeing that the plaintiffs deposit in court the sum due to defendants upon a certain promissory note secured by said deed of trust, which sum was to be paid to defendants upon the reconveyance to the plaintiffs by defendant G. Hines, as trustee under said deed of trust, of said real property. The following facts appear from the record:

On December 5, 1915, respondents executed a note to the defendant P. C. Company for the principal sum of \$3,750, payable in gold coin on December 31, 1917. This note bore interest at the rate of 8 per cent. per annum, payable in gold coin on the last day of each month, in advance. Said promissory note was secured by a deed of trust of certain real property in Sacramento county. The defendant Gabriel Hines, an officer of the P. C. Company, was named as a trustee under said deed of trust. On October 23, 1917, the time for the payment of said promissory note was extended to and including October 31, 1921. Interest was to be payable monthly, in advance, at the rate of 8 per cent., and with each interest payment a payment of \$25 was to be made upon the principal. All payments due upon the promissory note up to and including the payment due on July 31, 1921, were admitted by the defendants, and found by the court to have been made by plaintiffs, and accepted by the defendant P. C. Company. It is with reference to the payment of \$41.50, due on August 31, 1921, including interest for one month in advance and \$25 upon the principal, that the trouble arose.

On August 11, 1921, the plaintiff Bessie Stevens, acting for herself and for C. B. Stevens, wrote the defendant Hines from Saratoga Springs, New York, as follows:

"Enclosed find check for \$41.50, and would like you to change my post office address from box 79 to P. O. box 966, S. F. Calif., which I have changed for a larger box, and oblige."

In this letter was inclosed a check payable to G. Hines for \$41.50. The check was dated August 30, 1921, a day before the payment upon the note was due. This letter and check were delivered to Hines in due course of mail. Evidently he retained the same for a few days, for it was not until August 22, 1921, that he returned the check to Mrs. Stevens with the following letter:

"I return your check on the Crocker National Bank, dated August 30th, for \$41.50, as post-dated checks for interest are not acceptable."

Upon the receipt of this letter by Mrs. Stevens on August 29, 1921, she went immediately to the Western Union Telegraph Company, and paid into that company \$41.50 for transmission to Hines by telegraph. The Western Union Company issued its receipt to Mrs. Stevens as follows:

"August 29, 1921. Received from Bessie R. Stevens \$41.50 to be paid to Gabriel Hines at P. C. Company, 718 Howard Building, Post and Grant St., subject to terms and conditions of money transfer of this date. Charges paid \$2.50. R. McTerry, Transfer Agent."

The money was regularly transmitted, and, in response to notice from the Western Union Company, Gabriel Hines, on August 30, 1921, appeared at the office of the Western Union Telegraph Company with a written notice of transfer of money, and presented the same to the clerk. The clerk testified that she asked him for personal identification. The clerk's testimony as to the incident follows:

"The transfer required 'personal identification,' and I asked him from where it was coming. He said he did not know, and I asked him from whom he thought it was coming. He said he didn't know that. I said, 'Well, this is sent "Require personal identification," positive evidence that you are Gabriel Hines.' He says, 'I don't know how you are going to get it.' I says, 'Are you a stranger here,' and he says, 'I am not.' I says, 'Can you not get some business person to identify you,' and he did not say. He simply pulled out a check. He says, 'You can accept this or not, pay it on this identification or not,' and walked out. * * * I could not have paid him without identification. I would have paid him gold if requested. There was gold in the drawer at the time—something like \$300."

Since Mr. Hines had declined to identify himself and receive the money, the same was returned to Mrs. Stevens in New York. She, in the meantime, had wired her father, James S. Morrow, who was in San Francisco, to go in and see Hines and pay the money if it had not been paid by the telegraph company. About September 2d or 3d Mr. Morrow called upon Hines. Morrow told Hines that he had received a wire to pay the amount due, and he offered to do so, but Hines replied that he would not receive the money. Mr. Morrow then stated to Hines that he understood Mrs. Stevens had wired the money, to which Hines replied that he had not received it. On September 6, 1921, Mrs. Stevens, upon learning that Hines had not received the money sent by telegraph, wired to him as follows:

"Just received canceled money order. Returning check. Please wire collect if satisfactory Western Union 16 Dey street."

In response, Mr. Hines sent the following message to Mrs. Stevens:

"I do not understand your telegram dated September sixth."

At the time Mr. Hines sent the foregoing illuminating telegram, Mrs. Stevens' property was being advertised for sale by him, but he evidently thought it unnecessary to mention that fact to Mrs. Stevens. On September 3, 1921, notice was published of a sale under

the deed of trust for failure to pay the interest and principal due on August 31, 1921. The sale was advertised to take place on September 24, 1921, but before that time Mrs. Stevens, fortunately, arrived upon the scene, and by injunction of the superior court stopped the sale of the property.

The only issue upon the trial was whether or not the plaintiffs were in default under the deed of trust. They contended that they had made a valid tender of the amount due, and were not in default. The trial court found that on or about August 22, 1921, the plaintiffs tendered the amount due to the P. C. Company, and that upon August 30, 1921, plaintiffs again tendered the amount due to said defendant, and that on August 31, 1921, the tender was again made, and that the said defendant refused to accept the same; that the plaintiffs at the time of said tender and ever since have been ready, willing, and able to pay the amount due the defendant P. C. Company, and have deposited the said sum with the clerk of the court.

The finding as to the tender of August 22, 1921, was based upon the facts heretofore set out with relation to the check of Bessie Stevens. Appellants contend that a check is not legal tender of a debt payable in gold coin; that, even though the objection to the form of payment had been waived by the course of dealing between the parties and by the failure to object to the form of the tender, nevertheless the fact that the check was sent prior to August 22d and dated August 30th would destroy its efficacy as a tender of the amount due.

[1] The record contained evidence that all payments had been made by Mrs. Stevens by checks similar to the one sent for the last payment; that these checks had been received by Hines without objection, and promptly paid by the bank; that there were sufficient funds in the bank to pay the check in question; that no objection was made to the form of the tender. It is well settled as a general proposition that, where a tender by check is made and refused on grounds other than that it does not constitute an offer of lawful money, the person so refusing will be held to have waived the objection as to the form of the tender. 26 R. C. L. 628; McGrath v. Gegner, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; Moulton v. Kolodzik, 97 Minn. 423, 107 N. W. 154, 7 Ann. Cas. 1090; Bundy v. Wills, 88 Neb. 554, 130 N. W. 273, Ann. Cas. 1912B, 900; Schaeffer v. Coldren, 237 Pa. 77, 85 Atl. 98, Ann. Cas. 1914B, 175; Gunby v. Ingram, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232; Moore v. Twin City Ice, etc., Co., 92 Wash. 608, 159 Pac. 779, Ann. Cas. 1918D, 540. The rule is statutory in this state. Civ. Code, § 1501.

[2] The statement of the facts herein made discloses that the tender was refused by Hines because the check was, as he states,

"postdated," and not because it was a check. This brings us to the next point. The trial court pointed out what seems obvious to any one except appellants, that the check offered was not postdated with respect to the obligation. The obligation accrued on August 31st; the check was dated August 30th. With respect to the obligation, the check was antedated. If appellants have anything to give them aid and comfort in the circumstances surrounding the tender of this check, it must arise from the fact that the check, payable on August 30th, was physically in the hands of Mr. Hines by August 22d, but by its terms was not applicable by him upon the debt until August 30th. Appellants are then reduced to the position of contending that Mrs. Stevens must, at her peril, determine accurately just when she should deposit her letter in the mails at New York in order to have it arrive at the office of the P. C. Company in San Francisco on August 31, 1921. Under such a condition Mrs. Stevens must suffer from an excess of caution. She stated that, due to the irregularity of the mails, she always sent her check in time to reach Hines before its date, although it was dated a day earlier than the obligation. But, says Hines, the check must be in my hands on the 31st, neither a day earlier nor later. The plaintiff must not protect herself against delays in the mail. On that matter she must take her chance. A mere statement of this position is sufficient to demonstrate its absurdity. Appellants seek to bolster it up by saying that the payment due on August 31st was composed of principal and interest; that, while a borrower might possibly send interest in advance of the due date, he might not force a creditor to accept a payment of principal a day before it was due. Conceding this to be true, Hines was not forced to cash the check on August 22d. He was not entitled to cash it before August 30th by its very terms. It would be a distressing state of affairs, indeed, if the effort of Mrs. Stevens to insure the arrival of the check in ample time, resulting in its coming into the possession of Hines before it was actually due and before it could properly be cashed by him, should be fraught with such serious consequences to her property rights as the appellant is here contending for.

Furthermore, there is also ample evidence in the record that in the instance under consideration Mrs. Stevens followed exactly the same practice as she had on numerous other occasions without objection from Hines. She testified that she had always sent her checks a week or so in advance of the time when they were due, and had dated them the day before the money was due and payable; that no objection had ever been made to this practice until the last payment was sought to be made. The evidence of the canceled checks in the record is that such checks were, on several occasions, cashed when they were

received, and before their actual date, and before the date when they were due. True, appellants make the point that, as to such checks, the indorsement thereon was not by Hines, personally, but by his attorney, and that, while the attorney had authority to endorse checks for Hines, he did not have authority to accept and cash postdated checks. This contention, however, is of no significance whatever, even though we concede it to be based upon facts, for the reason that the checks are not postdated with respect to the obligation. If they had been, there might have been a different question presented.

[3] We are of the opinion that the finding of the trial court that a valid tender was made on or about August 22, 1921, is proper because all objections which might have been urged to such tender had been waived by the course of dealing between the parties, and by the failure of the defendant Hines to object to the form of the tender. But, even if every possible technical objection of the appellants were sustained to said tender of August 22, 1921, the judgment is warranted by the finding that a tender was made on August 30, 1921, and refused by P. C. Company. The ingenious attack of appellants upon this finding is that, because the Western Union Telegraph Company asked Mr. Hines to identify himself as a condition of paying the money over to him, this made the offer a conditional tender, insufficient under our Code. It would follow from this contention that the Western Union Telegraph Company would be forced to pay Mrs. Stevens' money to any one who presented himself, without any identification whatsoever, in order not to invalidate the tender. Mrs. Stevens would be in rather a difficult situation under this theory. Her money might be paid to an imposter, and she, relying upon such payment, would allow the due date to pass, and find, to her sorrow, that the P. C. Company had not actually been paid. Had she sent gold coin by the American Express Company, by the same reasoning, that company, if it did not wish to invalidate the tender, must not ask for identification before paying the money over, but must take a chance of paying the gold coin to the wrong person, thus, again, putting Mrs. Stevens in default. Indeed, if we adopt appellants' reasoning, there was no possible way for Mrs. Stevens to save her property by anything she might do in the way of payment of her obligations after she left the state. She might not send a check payable to the company early enough to insure its arrival in ample time despite delays in mail; she might not send money by telegraph, nor gold by express, and require identification, but she must order her money to be paid at random, relying upon chance that it be paid to the proper party, and, if chance failed her, she forfeited her property.

[4] That this position should be taken by

appellants is not so surprising after a review of the entire record. "Out of the fullness of the heart, the mouth speaketh," and it is obvious that the desire and effort of Hines was to place Mrs. Stevens in a position where she must have her property sold regardless of how she acted. Out of such a desire and effort grows the contention that the effort has been successful. Two things are clear from the record before us: First, that Mrs. Stevens did everything she could possibly do to make this payment in time, that she desired to make the payment, and was able to do so, and was diligent about doing so; second, that Hines was equally diligent to obstruct her in accomplishing her object.

We had occasion to remark at the oral argument of this cause that no more reprehensive conduct than that of the defendant Hines has ever come to the attention of this court in a civil case. The evidence shows that the property involved was of the value of \$15,000. There was \$2,500 due upon the promissory note secured by the deed of trust. Appellants were forced to admit that plaintiffs were entitled to redeem their property by paying the full amount due under the deed of trust, but, they contend that, because of the resourcefulness of Mr. Hines, there has become due and payable under said deed of trust, in addition to the interest and principal upon the note, expenses of advertising the sale, trustee's fees, attorney's fees, etc., all of which they ask this court to award to them against Mrs. Stevens. The principle invoked, we suppose, is that those who are extremely diligent upon their own behalf, regardless of the nature of their activities, should reap a reward.

Our reply to this contention of the appellants is: The plaintiffs appealed to a court of equity for a distinctly equitable remedy against the bad faith of the defendants. The defendants came into that court to present a most technical defense with most unclean hands. The trial court promptly and properly decided against the defendants. They have now brought this appeal to this court without justification of either law or equity. The record in this case is one to bring the law into disrepute among fair-minded citizens. The plaintiffs have been subjected to the delay and annoyance of an appeal, the title to their property has been clouded, and its merchantability destroyed for a considerable period of time. They have incurred attorney's fees and costs for printing brief, etc., upon this appeal. Mildly characterized, the appeal is frivolous. We affirm the judgment, with the addition of \$250 to be recovered by the plaintiffs against Gabriel Hines and P. C. Company as damages for a frivolous appeal.

We concur: NOURSE, J.; STURTEVANT, J.

(62 Cal. App. 753)

Petition of FURNESS et al. (Civ. 4058.)

(District Court of Appeal, Second District, Division 2, California. July 3, 1923.)

1. Judgment ☞485—Decree may be attacked collaterally only when it appears void on its face.

A decree may be successfully attacked collaterally only when it appears to be void upon its face.

2. Judgment ☞485—Court may look to judgment roll only to determine whether decree is void on face.

To decide whether a decree is void upon its face, the court may consider the judgment roll only, which, when defendant has defaulted, ordinarily includes, under Code Civ. Proc. § 670, the complaint, summons, affidavit of service, memorandum of defendant's default indorsed on the complaint, and the judgment.

3. Judgment ☞489—May be attacked and vacated any time lack of jurisdiction appears upon face of record.

Where lack of jurisdiction appears upon the face of the record, the judgment may be attacked collaterally, and it may be vacated at any time.

4. Judgment ☞485 — Petitioner attacking decree void on face need not excuse himself for negligence in not asserting his claim.

In attacking a decree based upon an application to have land registered under the Torrens Title Act, and void upon its face, petitioner held not required to excuse himself for negligence in not asserting his claim; the fact that he failed to answer the application, in the absence of other facts creating an estoppel, being immaterial.

5. Judgment ☞485—Description in application to have land registered and in supplemental decree held to refer to different property and decree void on face.

Description in application to have land registered and in supplemental decree held to differ so materially as to indicate they referred substantially to different pieces of property, and hence decree was void on its face and subject to collateral attack.

6. Judgment ☞252(5)—Prayer for general relief does not confer jurisdiction beyond issues stated in complaint.

The prayer for general relief does not confer jurisdiction to determine matters beyond the issues stated in the complaint.

7. Records ☞9(10½)—Decree under Torrens Act, adjudicating title to land other than that presented by application, is void.

The purpose of a proceeding under the Torrens Title Act is to adjudicate title to specific land, and one of the essential issues is the identity and description of the property; hence, where the descriptions in the application and decree are so dissimilar as to establish a marked difference, it cannot be said that the decree adjudicating title to the land described in it has passed upon an issue presented by the application.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Proceeding by Frank Furness and others, for registration of land under the Torrens Title Act, in which proceeding Edgar J. Sharpless filed a petition to have a supplemental decree vacated. From an order granting a motion to dismiss, petitioner appeals. Reversed.

Frederick W. Smith and D. L. Di Vecchio, both of Los Angeles, and G. Randolph Miller, of Whittier, for appellant.

W. T. Craig and Ronald H. Loenholm, both of Los Angeles, for respondents.

CRAIG, J. This appeal is taken under the provisions of section 953a of the Code of Civil Procedure. It is from an order of the superior court dismissing the amended petition of Edgar J. Sharpless to set aside the supplemental decree rendered by that court in this proceeding. The original petition of Frank Furness et al. for registration of their lands under the Torrens Title Act (St. 1915, p. 1932) was filed June 26, 1919. It contained a number of applications, among which was that of Sylvester W. Barton and Lelia Adelaide Barton, his wife, which sets forth that they have had actual, adverse, exclusive possession of certain land, and prays for a decree determining the title thereto to be in themselves. The premises therein described are as follows:

"One separate parcel of land described as commencing at the northeasterly corner of lot 1 of the subdivision of lot 19 of Gunn and Hazard's plat of the Cullen tract, in the county of Los Angeles, state of California, as per map recorded in book 42, p. 28, of Miscellaneous Records, in the office of the recorder of said county; thence north 39° 41' east 181.2 feet; thence south 55° 30' east 556.2 feet; thence south 39° 41' west 623.8 feet; thence north 51° 40' west 556.9 feet; thence north 39° 41' east 393.2 feet to the point of beginning. Reserving therefrom those portions within the bounds of public roads."

The application also makes the following representations concerning the adjoining landowners:

"A. Northerly: County of Los Angeles for public road purposes. Southerly: B. Sharpless, Whittier, Cal. Easterly: E. J. Sharpless, Whittier, Cal. Westerly: County of Los Angeles for public road purposes."

A copy of this application was served personally upon Edgar J. Sharpless. Subsequently, and on June 30, 1920, the trial court rendered a supplemental decree adjudging Sylvester W. Barton and Lelia Adelaide Barton to be the owners of land described as follows:

"A. One separate parcel of land being that portion of lot 19 and of that tract marked '17

40/100' as both are shown on map of resurvey of Gunn and Hazzard's plat of the Cullen tract, county of Los Angeles, state of California, in book 34, p. 64, of Miscellaneous Records, in the office of the recorder of said county, described as commencing at the intersection of the center line of the Los Angeles and Santa Ana road, as said road is shown on county surveyor's map No. 7239 (on file in the office of the county surveyor Los Angeles county) with the northeasterly prolongation of the northwesterly line of said lot 19; thence south 55° 05' east along the center line of said Los Angeles and Santa Ana Road, 298.00 feet; thence south 57° 13' 45" east along the center line of said road, 261.03 feet; thence south 39° 09' west 623.57 feet; thence north 52° 12' west 556.90 feet to a point in the northwesterly line of said lot 19; thence north 39° 09' east along the said northwesterly line of lot 19 and the northeasterly prolongation of said line 585.55 feet to the point of beginning. Reserving therefrom a strip of land 30 feet in width along the northwesterly side thereof and a strip of land 20 feet in width along the northwesterly side thereof for public road purposes."

July 1, 1921, Edgar J. Sharpless filed a petition asking that the supplemental decree be vacated and set aside. A demurrer interposed by Sylvester W. and Lelia Adelaid Barton was sustained. After this, an amended petition was filed by Sharpless which alleged:

"That the land described in said supplemental decree is not capable of being identified as the land described in said application No. 13a, and in fact and in truth is not the land described in said application; that the description as given in said supplemental decree does not conform to the county surveyor's report made and filed in said action; that in the description given in said supplemental decree two distances exceed those in the petition; that the said land described in said supplemental decree includes and covers land belonging to the petitioner herein."

The petition then asked that the supplemental decree be set aside upon the legal grounds of lack of jurisdiction over the subject-matter of the premises described and of the person of the petitioner. Thereupon the respondents moved to dismiss the amended petition. The trial court granted the motion, and from the order so made Sharpless appeals.

[1, 2] It is said that the petition to vacate the supplemental decree is collateral in its nature. If so, such an attack will be successful only where the decree appears to be void upon its face. To decide whether or not the decree is so void upon its face, the court may consider the judgment roll only. *Canadian, etc., Co. v. Clarita, etc., Co.*, 140 Cal. 672, 74 Pac. 301. Where the defendant has defaulted, the judgment roll ordinarily includes the complaint, summons, affidavit of service, memorandum of default of defendant indorsed on the complaint, and the judgment. Section 670, Code Civ. Proc.

[3, 4] Where lack of jurisdiction appears upon the face of the record the judgment may be attacked collaterally (*Rue v. Quinn*, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732), and it may be vacated at any time (*Wharton v. Harlan*, 68 Cal. 422¹). Respondent argues that for the petition to set aside the supplemental decree to state a cause of action in favor of Sharpless it must not only allege that he is the owner of land included in said decree, but it must further be made to appear that the land described by the decree and so belonging to petitioner was not described in the application. Where the decree is void upon its face, no reason is suggested for holding that it must be shown that the land of the petitioner described in the decree was not also included in the application. In attacking a decree void upon its face, the petitioner is not required to excuse himself for negligence in not asserting his claim. The fact that he failed to answer the application, where no other facts are involved creating an estoppel, is immaterial.

[5] But, without considering the maps, we think the description in the application and supplemental decree differ so clearly and materially as to indicate that they refer to substantially different pieces of property. The descriptions begin at different points. They do not agree as to a single call; the directions are not always the same; in only one instance do they coincide as to distances; the calculation of the distances, calls, and directions shows the lines of the two lots to be more than 1,100 feet apart. To uphold a decree under such circumstances would be equivalent to ruling that it may affirm the applicant's title to any land, whether described in the application or not.

[6, 7] Respondent claims that the prayer for general relief contained in the application gave the court jurisdiction of the subject-matter of the suit; hence, that, under the rule stated in *Fox v. Hall* and other cases cited, the supplemental decree is not void upon its face or susceptible to collateral attack. The cases mentioned only hold that a prayer for general relief authorizes the court to grant any relief within the issues presented by the allegations of the complaint; it does not confer jurisdiction to determine matters beyond the issues stated in the complaint. This is especially true where, as in the instant proceeding, there is no answer. *Staacke v. Bell*, 125 Cal. 309, 57 Pac. 1012. The purpose of the proceeding under the Torrens Title Act is to adjudicate title to specific land. One of the essential issues is the identity and description of the property. Where the descriptions in the application and decree not only do not so correspond as to indicate that they refer to the same premises, but are so dissimilar as to establish a marked difference, it cannot be said that the decree adjudicating title to land described in it has passed

¹ 9 Pac. 727.

upon an issue presented by the application. In such an instance, which is the case here, the decree, having adjudicated title to property by a different description than that named in the application, is void. The appellant had no notice that the court would hear evidence concerning any other property than that described in the application. It cannot be said that a prayer for general relief authorizes the adjudication by the court of the title to property other than that mentioned and described by the applicant merely because it appears to be owned by the same person who petitioned for a decree under the Torrens Title Act, or perhaps includes some of the land named in the application. In re Sackett, 53 Cal. App. 592, 200 Pac. 742, is pointed to by respondent as a case almost exactly similar to the one under consideration. The following excerpt from the opinion in the decision cited is sufficient to point out the utter dissimilarity of the issues involved in the two cases: "The description contained in the decree and certificate were the same as in the petition and notice."

We conclude that the trial court should have granted a petition to vacate the supplemental decree. In order that this may be done the order appealed from is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

62 Cal. App. 781

PEOPLE, by WEBB, Atty. Gen., v. CITY OF LOS ANGELES et al. (Civ. 4173.)

(District Court of Appeal, Second District, Division 1, California. July 7, 1923. Rehearing Denied Aug. 1, 1923. Hearing Denied by Supreme Court Sept. 5, 1923.)

1. Municipal corporations ⚡657(6) — **City council's determination of public interest or convenience in vacating street held conclusive in absence of fraud.**

In passing an ordinance vacating part of a public city street on petition by an abutting owner, in the absence of fraud or collusion, the city council's decision of what constitutes public interest or convenience within St. 1889, p. 70, is legislative in character, and is generally conclusive.

2. Municipal corporations ⚡657(6) — **Facts held to constitute legal fraud by city council in vacating a portion of a city street to a motion picture corporation, permitting judicial review of the ordinance.**

Where a city council, on petition of a motion picture corporation owning all abutting property, passed an ordinance vacating part of a city street in a well built-up and improved location, and disregarding the city engineer's adverse report placing the value at \$7,000, demanded payment in advance of \$1,000 as an exaction from the corporation for the vacation, the gross abuse of discretion disclosed amounts

to a legal fraud, notwithstanding recitals in the ordinance, and the council's action is not conclusive on the courts, in view of St. 1889, p. 70, requiring such ordinances to be passed for the public benefit and convenience.

3. Injunction ⚡114(2) — **Attorney General can sue in name of people to enjoin enforcement of void ordinance vacating city street.**

The Attorney General has authority to maintain an action in the name of the people to enjoin the enforcement of a void ordinance vacating a portion of a city street.

On Rehearing.

4. Municipal corporations ⚡657(4) — **Protests against ordinance vacating street must be filed after passage of ordinance of intention.**

Under St. 1889, p. 70, protest must be filed after passage of ordinance of intention to vacate street and notice of public work is posted by the superintendent of streets.

5. Municipal corporations ⚡657(5) — **Adoption of ordinance vacating street is determination that public interest requires vacation.**

Although a final ordinance vacating a street contains no declaration that the public interest or convenience requires that the street be closed, yet the adoption of the ordinance is itself a determination by the council that the public interest or convenience requires the vacation.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by the People, by U. S. Webb, Attorney General, against the City of Los Angeles and another. From a judgment of the superior court declaring void an ordinance, and from an order denying defendant's motion to strike certain portions of the complaint and to dismiss the complaint, defendants appeal, and, from an order denying its application for a preliminary injunction plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Albert J. Sherer and Robert Young, both of Los Angeles, for plaintiff, respondent and appellant.

James, Pace & Smith, of Los Angeles, for defendant and appellant Famous Players-Lasky Corporation.

HOUSER, J. In the main this is an appeal by the defendant from a judgment declaring void an ordinance adopted by the city council of the city of Los Angeles which ordered the vacation of that part of Argyle avenue lying between Sunset boulevard and Selma avenue, a distance of 573.3 feet. This appeal further involves an order by the trial court denying defendant's motion to strike certain portions of the complaint as well as to dismiss the complaint because improperly authorized by the Attorney General; also an appeal by the plaintiff from the order denying plaintiff's application for a preliminary injunction.

Argyle avenue is 60 feet in width and 1,210 feet long. It extends from Hollywood boulevard on the north to Sunset boulevard on the south. At a distance of 573.3 feet northerly from Sunset boulevard Argyle avenue is intersected by Selma avenue, running east and west. At about 375 feet to the west and parallel to Argyle avenue is located a through street, and the same condition prevails as to another street at about the same distance to the east of Argyle avenue. The defendant Famous Players-Lasky Corporation owns all the property fronting on either side of that part of Argyle avenue which was ordered vacated by the ordinance in question. The street was originally acquired by condemnation proceedings in 1906, since which time it has been improved by grading and surfacing the roadway, by cement gutters, curbs, and sidewalks, and by shade trees planted and maintained on the parkways adjoining the sidewalks. The evidence taken at the trial showed that at the time the ordinance of vacation was adopted the lots fronting on Argyle avenue, as well as the neighborhood immediately adjacent thereto, were closely built up with residences and other structures, and that the street, although not a "main artery" of traffic, was continuously used by the public for general travel on the sidewalks and the roadway in the same manner as similar streets are ordinarily used in a thickly populated suburban district, excepting, perhaps, that the street was used for parking automobiles to a considerably greater extent than is the ordinary short street in a residence district.

On November 6, 1919, the defendant Famous Players-Lasky Corporation presented its petition to the city council of the city of Los Angeles, praying that a part of the street be vacated. The body of the petition is as follows:

"The undersigned, being the owner of all of the abutting property, petition your honorable body to vacate that portion of Argyle avenue in that portion of Los Angeles formerly known as Hollywood extending from Selma street to Sunset boulevard. The undersigned represent that this is not a thoroughfare in any sense, and that they are willing to compensate the city for this land on a fair and equitable basis."

The petition was first referred to the city engineer of the city of Los Angeles, who reported adversely to the proposed vacation, on the ground that the street was extensively used by the general public. He further reported that the area proposed to be vacated was reasonably worth the sum of \$7,839.30, and recommended that, if the street should be vacated, the petitioner be compelled to pay into the city treasury "such compensation as it deemed just." Thereafter the city council referred the petition to its committee on public works, which committee reported and recommended, among other things, as follows:

"We have been informed that there is very little traffic on Argyle (avenue) between Sunset boulevard and Selma avenue, the portion proposed to be vacated, and most of this traffic is due to the Lasky Motion Picture Corporation. We therefore recommend, subject to your approval, that the prayer of the petitioners be granted and the street vacated, providing petitioners comply with the provisions of Ordinance No. 17801, N. S., and the public service department is compensated for the expense of connecting two fire hydrants, and the petitioners furnish easements for such public utilities as are affected, particularly gas mains and poles for the Southern California Edison Company and the Telephone Company, and with the further understanding that the petitioners shall pay into the city treasury before the publication of the final ordinance the sum of \$1,000 for the street vacated."

In other words, the city's demand was that, before the final ordinance of vacation would be enacted, the petitioner must pay all actual expenses in connection with the closing of the street, and in addition thereto must pay into the city treasury the sum of \$1,000 "for the street vacated."

With the exception of two motion picture concerns, protests against the proposed vacation of the street were filed with the city council by the owners of all the lots within a district provided by order of the city council as appears in its ordinance of intention to vacate the street, which protests the said council denied, and, two days after the \$1,000 compensation for the street had been paid into the city treasury, proceeded to adopt the necessary ordinance of vacation of the street as prayed for in the petition of the defendant Famous Players-Lasky Corporation. The final ordinance of vacation of the street contained no declaration or provision, either in substance or effect, that the public interest or convenience of the city of Los Angeles, or of the inhabitants thereof, either required or justified the vacation of the street; but the ordinance did contain a provision that "there are no damages, costs, or expenses arising out of said work, and that no assessment is necessary for said work, and therefore no commissioners are appointed to assess benefits and damages for said work and to have general supervision thereof." The ordinance of intention, however, did state, among other things, that the public interest, necessity, and convenience required the closing of the said street. There is nothing in the act (St. 1889, p. 70), under which the city of Los Angeles acquired power in the premises, which requires any declaration by the ordinance of intention that the vacation or abandonment of a street is required by the public interest or convenience. Besides, such declaration and determination by the city council in the instant case was made before any protest was even filed, and, of necessity, before any hearing was had thereon. In other words, the city council determined the

case without having first heard the evidence, and, after hearing the evidence, so far as any record or official action discloses, failed to determine that "the public interest or convenience" required the "closing up" of the street in accordance with the provisions of the first section of the statute.

Among the findings of the trial court the following appears, to wit:

"That in passing said Ordinance No. 40671, New Series [the final ordinance], the city council was moved thereto by the payment and receipt from the Famous Players-Lasky Corporation of the aforesaid sum of \$1,000 for the land vacated, which said sum of \$1,000 was paid into the city treasury of the city of Los Angeles by the said Famous Players-Lasky Corporation on the 10th day of August, 1920, and prior to the passage and publication of said ordinance."

The court also found:

"That the said Famous Players-Lasky Corporation, in the payment of said money, understood that the same was paid and received as an exaction which the city council required for the street vacated and for the land occupied by such vacated street; and * * * with respect to the payment of said \$1,000, the said Famous Players-Lasky Corporation understood that the said portion of Argyle avenue would not be vacated unless it paid the said sum into the treasury of the city of Los Angeles; and, in that particular, the said Famous Players-Lasky Corporation had no free choice or means of avoiding said payment in obtaining the vacation of said portion of Argyle avenue," and that "neither the public necessity nor interest nor convenience required the abandonment of said portion of Argyle avenue, and that the public derived no benefit therefrom."

To put the matter bluntly, on the evidence adduced the finding of the court was to the effect that, without the interest or convenience of the public being considered in any way, the city council sold a public street to the Famous Players-Lasky Corporation for a consideration of \$1,000. While the actual intention of the parties to the transaction was probably not as broad as indicated, the substance of the negotiations was that the defendant Famous Players-Lasky Corporation offered "to compensate the city for this land on a fair and equitable basis," and the city, through its council, fixed the compensation at \$1,000, and required the payment of that sum before it would pass the necessary ordinance. Casting aside any consideration of public interest, the city demanded the sum of \$1,000 for the passage of the final ordinance, and required that the money be paid in advance. The moving picture concern had offered "to compensate the city for this land on a fair and equitable basis," and the city engineer had appraised the property as being of the reasonable value of \$7,839.30. Why not demand what it was worth, or \$10,000, or \$20,000? As appears by the final ordinance, the city incurred no expense in connection with the closing of the street. If the closing of

the street was for the public benefit, why require \$1,000 as "compensation" when the city actually had nothing to sell? If the demand for \$1,000 was not a "holdup," it was so closely akin thereto as not to disclose any substantial difference between ordinary "transactions" of that nature and the circumstances here involved. It is perfectly apparent that the street would not have been vacated, public interest, or not, if the \$1,000 had not been paid. The transaction bears all the indicia of a bargain and sale. If the payment of the \$1,000 was not the entire "moving cause" for the abandonment of the street, it was at least part and parcel of it.

[1] The statute to which reference has heretofore been made authorizes the vacation of a public street only "whenever the public interest or convenience may require." It appears to be conceded by counsel for the respective parties herein, and the authorities are quite uniform, that, as a general legal proposition, in the absence of fraud or collusion, the decision by the city council of what constitutes public interest or convenience in a matter of the sort here in question is legislative in character, and that a determination by the city council of such a question is conclusive. *Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224; *Wulzen v. Board*, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17; *Symons v. San Francisco*, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; *Brown v. Board*, 124 Cal. 274, 57 Pac. 82; *Pool v. Simmons*, 134 Cal. 624, 66 Pac. 872. According to the evidence and the findings by the court in this case, there was no such thing as the public interest or convenience of the public taken into consideration by the city council. So far as the record discloses, the only concern of the city council was the \$1,000 compensation and the benefit and advantage of a private motion picture corporation. There are many cases bearing on the right of the courts to inquire into the motives of the legislative body in a case of this nature. In *Albes v. Southern Ry. Co.* (1909) 164 Ala. 356, 51 South. 327, where a street was vacated on condition that the railroad company which received the benefit thereof would construct a depot on a part of the land which it received; in *People v. Wieboldt*, 233 Ill. 572, 84 N. E. 646, where an alley was vacated on the payment to the city by the beneficiary of the sum of \$100 annually and the performance by the beneficiary of certain other acts, including the paving of a certain portion of a street and the dedication of certain other property for public use; in *Island Co. v. Babcock*, 17 Wash. 438, 50 Pac. 54, where a county board located and built a county courthouse on certain property under an agreement with certain persons that, if so built, the land upon which the courthouse was constructed would be paid for by such persons; and in each of the following cited cases where similar legislative

acts were adopted for the benefit of private persons, to wit: *Tilly v. Mitchell & Lewis Co.*, 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007; *Knapp Stout & Co. Company v. St. Louis*, 156 Mo. 343, 56 S. W. 1102; *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743; *Spitzer v. Runyan*, 113 Iowa, 619, 85 N. W. 782; *Windle v. City of Valparaiso*, 62 Ind. App. 342, 113 N. E. 429; *Ponishll v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 83 Pac. 316; *City of Marshalltown v. Forney*, 61 Iowa, 578, 16 N. W. 740—it was held that the courts had no power to inquire into the motives which induced the enactment of the questioned ordinance. As distinguished from the “motive,” and depending entirely upon the “purpose,” or the “result” of a legislative act, where the intent of the legislative body, as shown by the evidence, was to disregard the public interest or convenience and to confer a benefit upon a private individual or a corporate body, the following cases are to the effect that the court has authority to review the matter and determine the validity of the ordinance: *Kansas City v. Hyde*, 196 Mo. 498, 96 S. W. 201, 7 L. R. A. (N. S.) 639, 113 Am. St. Rep. 766; *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; *Ligare v. Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179; *Corcoran v. Railway Co.*, 149 Ill. 291, 37 N. E. 68; *DeLand v. Dixon Power & Lighting Co.*, 225 Ill. 212, 80 N. E. 125; *Horton v. Williams*, 99 Mich. 423, 58 N. W. 369; *Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403; *Louisville v. Bannon*, 99 Ky. 74, 35 S. W. 120.

The case of *Kansas City v. Hyde*, 196 Mo. 498, 96 S. W. 201, 7 L. R. A. (N. S.) 639, 113 Am. St. Rep. 766, was one where it appeared, not on the face of the proceedings, but by evidence entirely outside the record of the legislative act, that the purpose was to condemn a street for the use of the railroad company. Among other things, the court said:

“The law deals with results and not with mere forms in such matters. * * * The purpose for which a thing is done is very different from the motives which may have actuated those by whom it is done, and is * * * a legitimate subject of judicial investigation, for the right to exercise the power of eminent domain is in all cases limited by the purpose for which it shall be exercised—as thus, private property may be condemned for public use, but it may be shown that the use in fact is not public, but private.”

Later in the opinion the court said:

“But suppose the council, intending the condemnation to be really for the sole benefit of the individual, in order to give it validity, should say in the ordinance that the property was to be condemned for a public street; would such a false recital in the ordinance be conclusive? Would it put the man whose property was to be taken, and the people in the district who were to be taxed to pay for it, beyond the protection of the constitutional guaranty that their property should not be taken for private

use? Could the city council, by a false recital in the ordinance, give it a validity which it would not have if it recited the truth? And when the city comes to ask the aid of the court to carry the ordinance into effect, is it possible that the court must be a mere tool to do the will of the council, with no power to inquire into the truth of the matter? What protection has a citizen for his constitutional rights if the courts cannot look through a sham and see the truth? And how can the courts learn the truth if they must take the recitals in the ordinance as conclusive and reject all evidence to show their untruth? What a reproach it would be to our system of jurisprudence and how humiliating would be the attitude of our courts if they were so powerless! But our law is not so lame, and our courts not so impotent. The courts in such case will hear the evidence and find the facts. If the truth lies only in an unwritten agreement or understanding, it can be proven only by oral testimony, and that being the best evidence of which the fact is susceptible the court must receive it and weigh it.”

It is said in *Horton v. Williams*, 99 Mich. 423, 58 N. W. 369, that—

“The advantage which the public derives from the discontinuance of a way must arise from the vacation itself, rather than from the use to which the property is put, or from the fact that the city, through a deal with the individual specially interested, is to have an interest in the property acquired by such vacation. A city cannot barter away streets and alleys, nor can it do indirectly, by invoking its power of vacating ways, what it cannot do directly. Streets and alleys are not to be vacated at the instance of individuals interested only in the acquisition of the vacated property, and the exercise of legislative discretion in such matters must, at least upon the face of the record, be free from affirmative evidence that such discretion was invoked for individual gain, and its exercise influenced by an offer to divide the property acquired.”

Treating of the subject having to do with supervision by the courts of legislative acts by city councils, McQuillan, in his work on *Municipal Ordinances* (volume 1, § 378, p. 881) says:

“While the rule of non judicial interference in the respects mentioned is well established, certain limitations are recognized. Municipal corporations are not completely beyond judicial review and control, even in the exercise of the jurisdiction and discretion delegated to them by the Legislature. True, that discretion must and will be accorded broad scope and great deference. The honest judgment of municipal authorities as to what is promotive of the public welfare must ordinarily control, although not in accord with the views of the courts. Nevertheless the delegation of legislative power to subordinate political divisions of the state is solely for public purposes, and must be exercised with reference to them. If the act be so remote from every such purpose that no relation thereto can within human reason be discovered, such act must be deemed excluded from the delegation. To that extent, then,

courts will inquire into the purpose and policy of municipal conduct, and will hold unauthorized and invalid acts which are wholly unreasonable."

In volume 3, § 1403, on page 2985, the same author says:

"There are three rules often declared in the decisions in regard to the purpose and motive for vacating a street and the power of the courts to investigate the motives or interfere with the discretion of municipal authorities in regard thereto. The first rule is that a street or alley cannot be vacated for a private use, that is, for the purpose of devoting it to the exclusive use and benefit of a private person or corporation, but it may only be vacated to promote the public welfare. Thus, there is no power, it is generally held, to vacate a street or alley on payment of a cash consideration by an abutter."

Further dealing with the subject, Mr. McQuillan, after stating the general rule that the motives of the municipal authorities cannot be inquired into by the courts, says the courts "may consider the purpose accomplished and, if the purpose effected thereby is illegal, as where a street is vacated for the sole purpose of benefiting abutters, may set it aside." And on page 2989 he adds:

"Other courts proceed on the theory that while the common council has discretion to determine when private property shall be taken for public use and such discretion is final and exempt from the control of the courts, yet it is the duty of the judiciary to decide whether the use for which the property is taken by vacating a street or alley is public or private, and, if the use is a private one, to declare the ordinance invalid."

The case of *Van Witsen v. Gutman*, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403, contains the statement that—

"Whether the use is public or private is a question for the judiciary to decide. * * * Where * * * ordinances are drawn in question, it is the duty of the judiciary to decide whether the use for which private property is taken is public or private, in the same manner and on the same principles as it would decide in the case of an act of the state Legislature."

Based on the evidence on this particular point, the court found:

"That neither the public necessity nor interest nor convenience required the abandonment of such portion of Argyle avenue, and that the public derived no benefit therefrom."

[2] The defendant Famous Players-Lasky Corporation, in its petition to the city council praying for the vacation of the street, offered "to compensate the city for this land on a fair and equitable basis." The recommendation to the city council by its committee on public works was, among other things, "that the petitioner shall pay into the city treasury before the publication of the final ordinance

the sum of \$1,000 for the street vacated." The affidavits of the several councilmen who voted for the passage of the ordinance which effected the vacation of the street, and which affidavits were used only on the motion by plaintiff for a preliminary injunction (and which can be considered here only in connection with the appeal from the order denying the preliminary injunction), show that the purpose of vacating the street was "to foster and promote the motion picture industry in the city of Los Angeles as a whole, and not this defendant in particular, and to encourage the maintenance and building up of said industry by its co-operation through said action as a precedent to maintain the said industries in the city of Los Angeles, and thereby to enable the city to retain its prestige as the motion picture center of the world, and also for the mutual benefit and advantage of the city and its inhabitants and the said motion-picture industries," and "because all of the 375-foot blocks fronting on Sunset boulevard must eventually, to accommodate the growth and expansion of the motion picture industries upon said boulevard, be made into 800-foot blocks by the vacation of intersecting streets between Sunset boulevard and Selma avenue"; furthermore, that "the vacation of said portion of said Argyle avenue would not work any injury or any inconvenience to them (protestants) but would, on the other hand, tend to induce the motion picture industries in Hollywood and elsewhere to expand their business, enlarge their establishments, and thus enable the city not only to hold these establishments as a permanent asset of the city, but benefit the inhabitants of the city in many business ways and at the same time help make the city a great as it is a growing city of industry and commerce." The statute (1889, p. 70) which is the basic authority for the vacation of public streets contains a provision for the ascertainment of expenses, damages, etc., in connection with the vacation of a given street, and the levying of an assessment for the payment thereof; but in the instant case it appears by the final ordinance of vacation "that there are no damages, costs, or expenses arising out of said work, and that no assessment is necessary for said work"—again supplying the inference, at least, that the entire scheme was one for the sole benefit of the defendant Famous Players-Lasky Corporation. The evidence showed that no public benefit whatsoever accrued or was expected to accrue, from the closing of the street. So far as the record discloses, nothing was contemplated by the city council in the way of a systematic rearrangement of public streets, or the construction of any public improvement, or the platting of any public park, or anything of a similar character, which would either necessitate, or render advisable, the vacation of the street. The effect of the

abandonment of the street was to take from the public whatever advantage or convenience the use of a well-kept street afforded, and to substitute nothing of a public nature in its place.

Negating the provisions of the statute, neither the public interest nor public convenience required or in any manner necessitated or suggested the closing of the street; on the contrary, every reasonable consideration would indicate that it was altogether to the advantage and benefit of the general public that the street should remain open to public use. It follows that the only interest or convenience subserved by the act of the city council in ordering the vacation of the street was the private interest of the defendant Famous Players-Lasky Corporation. In such circumstances the precedents heretofore cited are ample authority for the action of the lower court not only in maintaining its right to inquire into the real purpose and the result of the ordinance, but in declaring such ordinance invalid. Any other rule would permit the city council to legally close any or even all the principal streets of a city. For instance, if we were to assume the true rule to be that, upon the mere recital in the ordinance of abandonment that the public interest or convenience so required, the decision by the city council, as expressed in its ordinance becomes final and conclusive, and beyond the reach of judicial inquiry, nothing would prevent the city council of the city of Los Angeles from effectually closing Broadway in its entire length, nor a similar body in the city of New York from closing Wall street. It cannot be that in such circumstances, coupled with a showing, such as here, that the whole scheme was simply one in the proposed aid of a private concern, and against real public interest and convenience, the courts would be powerless to render adequate relief and substantial justice. The rights of the public cannot be overwhelmed and defeated by any such subterfuge; they cannot be made to depend upon the exercise of either individual whims or fancies of members of the city council expressed through the medium of a legislative body. It is essentially a judicial question whether the vacation of a street be for a public or for a private benefit. Otherwise the will of the city council as expressed in its ordinance of vacation, through the simple expedient of declaring such vacation to be a public benefit, would become supreme, no matter how arbitrary such action nor how great the abuse of discretion so exercised. *New Central Coal Co. v. George's C., C. & I. Co.*, 37 Md. 560. Legal fraud may consist in a gross abuse of discretion, and the facts in the instant case indicate at least such gross abuse. That in such circumstances the act of the city council in vacating the street in question is not conclusive upon the courts, see *Ellis v.*

Commissioners, 38 Cal. 629; and the same principle of law is announced in the following cases: *Los Angeles, etc., Co. v. County of Los Angeles*, 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277; *Spring Street Co. v. City of Los Angeles*, 170 Cal. 24, 148 Pac. 217, L. R. A. 1918E, 197; *La Grange, etc., Co. v. Carter*, 142 Cal. 560, 76 Pac. 241.

By far the greater part of that portion of the appeal herein which involves the order by the trial court denying defendant's motion to strike certain portions of the complaint is disposed of by what has been said heretofore upon the question of the right of the court to inquire into the power of the city council in passing the ordinance of abandonment of the street in question. Such portions of the motion to strike as are not so covered, while possibly not necessary allegations of the complaint, were harmless as affecting the main issue.

[3] That appellant's motion to dismiss the complaint for the alleged reason that the plaintiff was improperly and unlawfully authorized by the attorney general was not well taken is settled by the rulings in the following cases: *People v. Beaudry*, 91 Cal. 213, 27 Pac. 610; *People v. Davidson*, 30 Cal. 388; *People v. Gold Run D. & M. Co.*, 66 Cal. 152, 4 Pac. 1152, 56 Am. Rep. 80; *People v. Pope*, 53 Cal. 437; *People v. Blake*, 60 Cal. 497; *People v. Reed*, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22; *People v. Hibernia Savings, etc., Society*, 84 Cal. 634, 24 Pac. 295; *People v. Oakland, etc., Co.*, 118 Cal. 234, 50 Pac. 305.

By reason of the decision herein that plaintiff is entitled to the relief demanded in the complaint, it becomes unnecessary to pass upon plaintiff's appeal from the order of the trial court denying the application for a preliminary injunction.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

PER CURIAM. [4, 5] In the petition for rehearing herein it appears that objection is taken by appellants to the statement contained in the opinion to the effect that the determination by the city council as to the question of public interest and convenience requiring the closing of the street was made before any protest was filed, and necessarily before any hearing was had thereon. The facts are that, after the petition for vacating the street was presented, and before the ordinance of intention was passed, a protest was filed, but it is only after the ordinance of intention has been passed and notice of public work has been posted by the street superintendent, protests are authorized to be filed. Section 4, Stats. 1889, p. 70. It was regardless of such protests that the city council made its determination, as expressed in its ordinance of intention, "that the public in-

terest, necessity and convenience" required that the street be closed. Other protests, which were subsequently filed, were overruled by the city council. The final ordinance contains no declaration to the effect that the public interest or convenience requires that the street be closed; but it must be conceded that the case of *Brown v. Board of Supervisors*, 124 Cal. 278, 57 Pac. 82, is authority for the rule that "the adoption of the order is a determination by the board that the public interest or convenience requires the improvement." After such modification of the original opinion herein, we are satisfied with the views of the court as therein expressed.

The petition for rehearing is denied

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SALLEE v. SALLEE. (Civ. 4038.)

(District Court of Appeal, Second District, Division 2, California. July 16, 1923. Hearing Denied by Supreme Court Sept. 13, 1923.)

1. Divorce —37(22)—"Cruelty" must cause grievous bodily injury or grievous mental suffering.

While proof of extreme cruelty, as defined in Civ. Code, § 94, is not necessarily the same as cruelty sufficient to justify the spouse upon which it is practiced leaving the one practicing it, within section 98, the acts of cruelty in either case must be such as to cause the same result, namely, grievous bodily injury or grievous mental suffering upon the other party by the one party to the marriage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cruelty.]

2. Divorce —93(4)—Complaint held defective in not alleging wife's charges of improper conduct were not true.

Complaint in divorce action, based upon desertion, under Civ. Code, § 98, held defective in failing to allege that charges made by wife of improper conduct were not true, since, if they were true, it was not cruelty to make them.

3. Divorce —93(4)—To justify leaving spouse because of false accusations, essential that they caused grievous mental suffering.

An allegation essential to a complete cause of action under Civ. Code, § 98, based upon the wife's charge of improper conduct with other women, is that the making of the accusations caused plaintiff mental suffering of a grievous character, for, in order that the conduct of the offending party be a justification for the other leaving, such conduct must meet the requirements of the statutory definition of extreme cruelty as defined by section 94.

4. Divorce —27(7)—To show "extreme cruelty," vile language must have produced grievous mental suffering.

In making out a case of extreme cruelty, under Civ. Code, § 94, it is not sufficient to allege the application of vile names, but it must be made to appear further that such language

produced grievous mental suffering upon the injured party.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extreme Cruelty.]

5. Divorce —37(22)—Decree for cruelty reversed, where no allegation or finding that charges of improper conduct caused mental suffering.

Interlocutory decree for plaintiff in divorce proceedings, based on desertion following alleged cruelty, under Civ. Code, § 98, held to require reversal in the absence of an allegation in the complaint or some finding that the making of the accusations alleged to have constituted extreme cruelty produced mental suffering on the part of plaintiff.

6. Divorce —37(19)—Offers of reconciliation to be available must be made within one year from date of unjustified leaving.

Where plaintiff left his wife without legally sufficient cause, held that, in order that offers of reconciliation by him could be availing, they must have been made within one year from date of the leaving.

7. Divorce —119—Laying of foundation for reception in evidence of letters, to show truth of charge of improper conduct were true, stated.

Where plaintiff's action for divorce under Civ. Code, § 98, was based upon constructive desertion, in that plaintiff was driven to leave home by alleged false charges by wife of improper conduct with other women, foundation for admission in evidence by defendant of letters to plaintiff, written by Miss E. would be laid by showing E. wrote them, that she was a close friend and associate of plaintiff, and that the letters came into defendant's possession before defendant's accusations against plaintiff.

Appeal from Superior Court, Los Angeles County; John W. Summerfield, Judge.

Action by D. D. Sallee against Florence V. Sallee. From an interlocutory decree for plaintiff, defendant appeals. Reversed.

Ray E. Nimmo, of Los Angeles, for appellant.

Grant Jackson, Bert Woodard, W. T. Kendrick, Jr., and Hal Hughes, all of Los Angeles, for respondent.

CRAIG, J. This is an action for divorce, and the appeal is from an interlocutory decree rendered in favor of the plaintiff.

The complaint contains four alleged causes of action, but they repeatedly cover the same ground, and, if at all, justify a decree in favor of the plaintiff upon but two theories. These are: Extreme cruelty, under section 94 of the Civil Code; or desertion, under section 98 of the Civil Code.

The cruelty charged is purely mental in character, and consists of accusations made by the defendant to the plaintiff directly, and to a third person, charging him with improper attentions to other women. The complaint includes much redundant matter. The

material incidents related are but two, the first occurring on the 25th and 26th of February, 1915, and the second on April 22, 1921; but in the last analysis the plaintiff's right of action depends upon what took place on the first of these occasions. Concerning this, the complaint alleges that on the 25th day of February, 1915, the defendant accused the plaintiff of "fooling around with other women," that she persisted in this until the plaintiff finally "went to sleep with his wife still talking about 'other women.'" It is stated that on the morning of the 26th Mrs. Sallee resumed the talk about other women, and again charged him with "running around with them." He thereupon got his effects together, and left the defendant's bed and board in the family residence. The court finds that:

"On February 26, 1915, nor at any other time did plaintiff leave the bed and board of defendant by reason of her extreme cruelty practiced upon him, but that on said day the plaintiff did depart from the bed and board and family residence of the parties hereto by reason of the following stated facts, to wit:"

[1] The finding then goes on to cover the facts which we have related above, and concludes that the plaintiff was justified in leaving the defendant "by reason of the fact that the language used to him by the defendant was cruel." It may be said here that on account of the finding first quoted, that the plaintiff did not leave the defendant by reason of her extreme cruelty practiced upon him, the issue is narrowed down to one of desertion based upon cruelty, under Civil Code, § 98. Appellant argues that the finding that plaintiff did not leave the defendant because of her extreme cruelty practiced upon him is inconsistent with the other findings to the effect that the defendant was guilty of cruelty and that the plaintiff departed from the family residence on account of it. While proof of extreme cruelty, as defined in section 94 of the Civil Code, is not necessarily the same as cruelty sufficient to justify the spouse upon which it is practiced leaving the one practicing it. (*White v. White*, 86 Cal. 219, 24 Pac. 996), the acts of cruelty in either case must be such as to cause the same result, to wit, grievous bodily injury, or grievous mental suffering, upon the other party by one party to the marriage (*Brandt v. Brandt*, 178 Cal. 548, 174 Pac. 55).

[2-4] There are two respects in which the complaint is clearly defective. It is nowhere alleged that the charges of improper conduct made by Mrs. Sallee against her husband were untrue. Of course, if they were true, and justified, it was not cruelty to make them. *Brandt v. Brandt*, 178 Cal. 548, 174 Pac. 55; *Kuhl v. Kuhl*, 124 Cal. 57, 56 Pac. 629. Another allegation essential to a complete cause of action under section 98 of the Civil Code is that the making of the accusations caused the plaintiff mental suffering of

a grievous character, for, in order that the conduct of the offending party be a justification for the other leaving, such conduct must meet the requirements of the statutory definition of extreme cruelty. *Brandt v. Brandt*, supra. And it is settled law that in making out a case of extreme cruelty under section 94, Civil Code, it is not sufficient to allege the application of vile names, but it must be made to appear further that such language produced grievous mental suffering upon the injured party. This is true, because the grievous mental suffering is the ultimate fact, and the application of the vile language is merely probative. *Smith v. Smith*, 124 Cal. 651, 57 Pac. 573; *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660.

[5] But no demurrer was interposed to the complaint; the case was tried, and the court made its findings. Evidence was introduced by the plaintiff, without objection from the defendant, to show that the accusations of improper conduct against the husband were untrue, and, under the familiar rule that where parties join issue during the trial of a case as though the pleadings presented the issues in question they will be held to have waived the right to object to a deficiency in the pleadings, it may be that the defendant is precluded from raising the point here that the complaint is defective in failing to allege that the charges made by her were false. However, this rule cannot be invoked by the plaintiff to sustain the decree, in so far as the second insufficiency of the complaint above pointed out is concerned. The question of the husband's grief and mental distress seems to have been entirely disregarded, not only in the pleadings, but in the evidence and findings, as well. There is nothing in the record before us to indicate that the making of the charges of improper conduct against the plaintiff caused him any mental uneasiness. It is related in the complaint that the plaintiff went to sleep while the wife was still talking of his attentions to other women. If such remarks served as a beneficial sedative, inducing rest and quiet, it is apparently inconsistent to assume that they also constituted cruelty toward him. Without some allegation in the complaint, or some finding, that the making of the accusations produced mental suffering on the part of the plaintiff, no cause of action was or could be stated on the ground of desertion following alleged cruelty under section 98 of the Civil Code. *Maloof v. Maloof*, 175 Cal. 571, 166 Pac. 330; *Kuhl v. Kuhl*, supra; *Nelson v. Nelson*, 18 Cal. App. 602, 123 Pac. 1099; *Cargnani v. Cargnani*, 16 Cal. App. 96, 116 Pac. 306.

We conclude that a reversal must be granted, hence it is not necessary to decide several of the points raised by the appellant.

[6] If upon another trial the court should conclude that the statements made by the defendant to and concerning her husband of

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familiarity with other women were both untrue and unjustified, and that the making of the charges in question resulted in such mental suffering upon the part of the plaintiff as to justify him in leaving the defendant, it would be unnecessary to go into the subsequent events alleged to have taken place, for the plaintiff would be entitled to a decree. On the other hand, if the court should find that the accusations were true or justified, or that, being untrue or unjustified, no mental suffering resulted to the plaintiff, it would follow from such finding that he had no right to leave the defendant following the occurrences of February 25 and 26, 1915; his departure at that time would necessarily be desertion upon his part. In order that the offers of reconciliation which the court found were made by him should be availing, they must have been made within one year from the 26th of February, 1915. There is no finding to that effect in the record before us. But, if the offers by the plaintiff to return to the defendant were made within the period we have indicated, it would then become necessary to consider the circumstances surrounding the episode found by the court to have occurred in the office of Gesner Williams on the 22d of April, 1921. The issue thus presented would be governed by the general principles already discussed herein.

[7] But, in view of the expectancy of another trial, one other point requires notice. Certain letters asserted to have been written by one Edna Fowler to the plaintiff were offered in evidence by the defendant, but denied admission by the court on the ground that they were irrelevant, immaterial, and incompetent. Without stating in detail the contents of these letters, it is sufficient to say that they at least showed sufficient intimacy between the writer of them and the plaintiff to render them relevant to the issue of Mrs. Sallee's good faith and justification in charging her husband with improper relations with Miss Fowler. If all the circumstances were such as to have justified the defendant in making the charges which she did, it was not cruelty upon her part to make them, and a considerable latitude must necessarily be allowed in such instances to establish justification. It appears to us that a sufficient foundation would be laid for the introduction of the letters, if it should be shown that Miss Fowler wrote them, that she was a close friend and associate of the plaintiff, and that they came into possession of Mrs. Sallee before she made the accusations against her husband.

The judgment is reversed, and the trial court is directed to allow an amendment of the complaint to conform to the legal principles herein announced.

We concur: FINLAYSON, P. J.;
WORKS, J.

TITLE INS. & TRUST CO. v. AMALGAMATED OIL CO. (Civ. 3938.)

(District Court of Appeal, Second District, Division 1, California. July 16, 1923.)

1. Mines and minerals ⇨77—Acts of lessee held to effect valid forfeiture of lease.

Where an oil lease reserved to the lessee the right to forfeit the lease, at any time, by the payment of \$10 as liquidated damages, *held*, that by depositing a written notice, quitclaim deed, and the sum of \$10 in legal tender in the mail box of the lessor he had thereby effected a valid forfeiture.

2. Time ⇨11—Rent due first minute of due date, and lessee may not declare a forfeit in afternoon.

Rent becomes due the first minute of the due date, and a cancellation or forfeiture by the lessee later on that day will not relieve him from paying the rental previously accruing.

3. Mines and minerals ⇨79(1)—Lessee under oil lease held to have obligated himself to pay rent during life of lease.

Under an oil lease providing "in the event lessee has not begun the operations of drilling the first well within one year from date hereof, lessor agrees to extend the time thereof one year for the additional consideration of" various graduated monthly payments, "said consideration shall be paid monthly in advance and shall cease at * * * forfeiture of this lease," and providing that the lease might be terminated by the lessee by the payment of \$10 as liquidated damages, or by the lessor upon 30 days' notice after a breach of the lease by the lessee, *held*, that the lessee was obligated to make the monthly payments provided for during the life of the lease, and that his mere failure to do so prior to a termination of the lease did not operate to relieve him from the liability, though it might have been grounds for forfeiture by the lessor.

4. Payment ⇨17—Check held not given and accepted as absolute payment of debt.

Statements and indorsements on a check *held* insufficient to constitute or establish an agreement that the check was given and accepted as an absolute payment of a debt contrary to the general rule.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by the Title Insurance & Trust Company, as executor of the estate of C. C. Conroy, deceased, against the Amalgamated Oil Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Frank M. Gunter and Janeway, Beach & Pratt, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles, for respondent.

CURTIS, J. On April 10, 1919, plaintiff's testator, C. C. Conroy, executed and delivered to one Thomas H. T. Purman a lease of certain land situated in the county of Los An-

geles. The lease gave to the lessee the exclusive right to enter upon the lands described therein, and to drill for, produce, extract, and take oil, gas, asphaltum, and other hydrocarbon substances from said land, and is what is commonly known and referred to as an oil lease. On May 9, 1919, said Thomas H. T. Purman and his wife, Jessie Purman, assigned said lease to the defendant herein, the Amalgamated Oil Company.

The portions of the lease material to a decision of this case are as follows:

"This agreement, made and entered into this 10th day of April, 1919, by and between C. C. Conroy, a single man, hereinafter called the lessor, and Thomas H. T. Purman, hereinafter called the lessee, both of the city and county of Los Angeles, state of California.

"Witneseth: For and in consideration of the sum of ten (\$10.00) dollars, in hand to the lessor paid, and of other valuable considerations, the receipt of all of which is hereby acknowledged, the lessor has leased, let and demised, and by these presents does lease, let and demise, unto the lessee the land hereinafter described.
* * *

"The lessee shall hold said lands for the period of twenty years from the date hereof, unless otherwise forfeited by the lessee in accordance with the terms of this lease; and the lessee hereby leases from the lessor the above described lands for the purposes aforesaid and upon the conditions and for the considerations herein set forth.

"The lessee agrees that within one (1) year from the date hereof he will commence to drill a first well on the demised property and continue said operation of drilling with due diligence unless prevented by causes beyond his control, till oil is found therein in paying quantities or the lease abandoned. * * *

"Upon the violation by lessee of any of the provisions, terms or conditions of this lease, lessor may, by notice to lessee as provided, cancel and set aside this lease, and said cancellation shall take effect thirty (30) days after giving such notice, and then only in the event that said provision, term or condition, or provisions, terms and conditions, has or have not in the interim been complied with by lessee.

"In the event lessee has not begun the operation of drilling the first well within one year from date hereof, lessor agrees to extend the time therefor one year for the additional considerations of six hundred (\$600) dollars for the first month, seven hundred (\$700.00) dollars for the second month, eight hundred (\$800) dollars for the third month, nine hundred (\$900) dollars for the fourth month, one thousand (\$1,000) dollars for the fifth month, eleven hundred (\$1,100) dollars for the sixth month, twelve hundred (\$1,200) dollars for the seventh month, thirteen hundred (\$1,300) dollars for the eighth month, fourteen hundred (\$1,400) dollars for the ninth month, fifteen hundred (\$1,500) dollars for the tenth month, sixteen hundred (\$1,600) dollars for the eleventh month, and seventeen hundred (\$1,700) dollars for the twelfth month thereof. Said considerations shall be paid monthly in advance and shall cease at the beginning of drilling operations or the abandonment or forfeiture of this lease.

"Lessee reserves the right to forfeit this lease, in whole or in part, at any time he may elect,

by the payment of ten dollars, as liquidated damages in full, to lessor for so doing."

It does not appear that the lessee, or his assignee, the defendant herein, ever entered into possession of the lands described in said lease, or ever commenced the drilling of any well thereon. We assume that no such entry was made, and that no well was ever drilled, for it was stipulated at the trial that the defendant, by virtue of the right given it under the assignment, had elected to keep said lease alive, by the payment of the monthly payments as provided in said lease, and had paid to the said C. C. Conroy the monthly payments provided for in said lease up to and including the payment of \$1,500 for the month of January, 1921.

The case was submitted upon an agreed statement of facts, and among other stipulations were the following:

"That, during the month of February and prior to February 9, 1921, the defendant, by its officers authorized therefor, issued its voucher check in the sum of \$1,600.00, payable at and drawn upon the Farmers' & Merchants' National Bank of Los Angeles, Cal., in payment of the monthly rental for the month of February, 1921, and sent said check to the said C. C. Conroy through the United States mail. That thereafter and in due course said check was received and accepted by said C. C. Conroy. That thereafter and on the 9th day of February, 1921, the defendant telegraphed to the Farmers' & Merchants' National Bank at Los Angeles, Cal., instructing said bank to refuse payment on said check.

"That thereafter and on the 10th day of February, 1921, during the regular banking hours, said check duly indorsed was presented by said C. C. Conroy to said Farmers' & Merchants' National Bank for payment, and payment was refused. Said voucher check with its indorsements and duly marked, 'Payment refused,' is in words and figures as follows:
"66636

"Expense Voucher Form 219-E Standard
"Amalgamated Oil Company No. 2011
"Los Angeles, Cal., Feb. 3, 1921, to C. C. Conroy, Dr. Registered in February, 1921, 1819 Montrose St., Los Angeles, Calif. For rental from February 10th, to March 10th, 1921, of property situated in the San Francisco Ranch, Los Angeles County, California, as per terms of lease dated April 10, 1919, \$1,600.00.

"Feb. 5, 1921

"Examined: W. Hutchison, for the Auditor.

"Approved: R. M. Giannini, for the Auditor.

"Approved: F. T. Wilkinson.

"Approved for payment R. F. Henley, for the Auditor.

"When signed by the treasurer or his duly authorized representative and properly indorsed by Payee, this voucher becomes a sight draft on this company for one thousand six hundred dollars (\$1,600) in full settlement of above account and is payable through Farmers' & Merchants' National Bank, Los Angeles, Cal.

"B. J. Rose, for the Treasurer."

"Indorsed with rubber stamp on the face of said check, 'Payment stopped,' also Clearing Hse. stamp.

"Reverse or back of said check: 'Indorse here: This voucher is indorsed as an acknowledgement of the receipt of payment in full of account as stated within. C. C. Conroy, Payee.'"

"It was further stipulated that on said 10th day of February, 1921, and at or about the hour of 4:00 o'clock p. m., the defendant deposited in a receptacle provided for the deposit of delivered mail at the residence of said C. C. Conroy, 1819 Montrose street, Los Angeles, Cal., a written notice, quitclaim deed and \$10.00 in legal tender, said notice, deed and tender being inclosed in an unstamped envelope addressed to said C. C. Conroy. * * *"

But said C. C. Conroy never accepted said tender or deed.

The action was instituted on said voucher check to recover the sum of sixteen hundred dollars, the amount alleged to be due thereon. The court rendered judgment in defendant's favor and plaintiff appeals therefrom.

By reference to those portions of the lease above quoted it will be seen that the term of said lease was for the period of 20 years from the date thereof, unless otherwise forfeited by the lessee in accordance with the terms of the lease. Two methods of terminating said lease are provided therein, one of which may be exercised by the lessor, and the other by the lessee. Upon the violation by the lessee of any of the provisions, terms, or conditions of said lease, the lessor might, by notice to the lessee, cancel and set aside the lease, but said cancellation could not take effect until 30 days after the giving of said notice, and then only upon the failure of the lessee to comply with the terms, conditions, or provisions, the violation of which furnished the lessor the right to cancel the lease. On the other hand, the lessee might forfeit or terminate the lease, in whole or in part, at any time he might elect, by the payment of the sum of \$10 to the lessor as liquidated damages.

[1] It is not contended that the lessor ever made any attempt to cancel the lease, so that, if the lease was ever terminated or forfeited, it was so terminated or forfeited by the act of the lessee, or rather by the act of his assignee, the defendant herein. The defendant attempted to do this on February 10, 1921, by depositing, at about 4 o'clock in the afternoon of said day, a written notice, quitclaim deed, and the sum of \$10 in legal tender, in the mail box of the lessor, said C. C. Conroy. It is not seriously contended by the appellant that these acts of the defendant did not work a forfeiture of the lease. We are of the opinion that they did, and that the lease became forfeited at the time of the deposit of said sum of \$10 for the lessor. We are further of the opinion that up to the time of said deposit the lease was a valid and subsisting contract between the parties.

[2, 3] It was provided in the lease that the lessee should commence the drilling of a

well upon the real property described in said lease within one year from the date thereof, and that upon his failure so to do the lessor agreed to extend the time of the commencement of said drilling for a period of one year upon the payment of certain sums of money, monthly in advance, on the 10th day of each month. As we have already seen, no drilling was ever commenced, and the defendant, who in the meantime had succeeded to the rights of the original lessee, began the making of said monthly payments and paid the same up to and including the 10th day of January, 1921. The next payment became due on February 10, 1921, and it is the contention of appellant that this payment became due the first minute of the day of February 10th, and that a cancellation or forfeiture of the lease by the defendant in the afternoon of said day could not relieve defendant from its obligation, if any such obligation existed, to pay said rent which accrued and became due at the very beginning of said 10th day of February. In this contention we agree with appellant. The law is well settled that rent payable on a day certain accrues and becomes due at the very beginning of said day, and that by no act of the tenant thereafter, even though performed on the same day, can the owner of the premises be divested of his right to said rent. We do not understand that respondent seriously controverts this proposition of law. Respondent does contend, however, that by the terms of the lease there is no covenant on the part of the lessee to pay any rent whatever, and that conceding the lease was not terminated by it until the afternoon of the 10th day of February, and that such termination could not affect the payment of any rent accruing or falling due on said day, still plaintiff cannot recover in this action for the reason that the lease contains no covenant on the part of the lessee whereby he expressly or impliedly agreed to pay any rent. Respondent's contention being that the terms or provisions in the lease respecting the payment of rent amount simply to a condition under which the life of the lease may be prolonged, and by the performance of which, by the respondent, it may continue its rights thereunder; that said provisions do not in any sense amount to a covenant on the part of the lessee to pay the rent, and that any failure to perform said condition, on the part of respondent, gave to the lessor the right to cancel the lease, but no right to maintain any suit to collect said rental. It must be conceded that there is not in the lease any direct promise on the part of the lessee in precise terms to pay the rent. Nowhere in the lease can there be found the words "the lessee agrees" or "the lessee promises," in so far as the payment of the rent is concerned. Appellant has called the attention of the court to the following provision of the lease:

"In the event lessee has not begun the operation of drilling the first well within one year from date hereof, lessor agrees to extend the time therefore one year for the additional consideration of * * * [then follow the graduated monthly rentals] said considerations shall be paid monthly in advance and shall cease at the beginning of drilling operations or the abandonment or forfeiture of this lease."

Appellant claims that the lessee, having signed the lease containing the above provision, made himself personally responsible for the payment of the rent until the lease was terminated by one of the parties, and that such words amount to an express agreement on his part to pay said rent, and that an action will lie on this agreement to recover the amount of rent due. The question, therefore, as to defendant's liability must be determined by a construction of this provision of the lease last above quoted.

In the case of *Preble v. Abrahams*, 88 Cal. 245, 26 Pac. 99, 22 Am. St. Rep. 301, the parties had entered into a contract whereby the plaintiffs agreed to sell to the defendant, for \$125 per acre, 40 acres of land, and upon the payment of said sum plaintiffs would execute and deliver to defendant a deed to said land. The court held that the agreement "obligated the defendant as strongly to buy and pay the price specified for the land as it did the plaintiffs to sell it for that price." This case has been approved in *King-Keystone Oil Co. v. S. F. Brick Co.*, 148 Cal. 87, 82 Pac. 849, and *Samuel v. Ottinger*, 169 Cal. 209, 146 Pac. 638, Ann. Cas. 1916E, 830.

In *King-Keystone Oil Co. v. S. F. Brick Co.*, supra, the plaintiff agreed by written contract to sell to defendant all the petroleum to be used by the latter during a certain year. Action was brought to recover damage for the breach of this contract. The only point made on appeal was that the case failed to show that the defendant agreed to buy the oil in controversy. In deciding the case in plaintiff's favor, the court said:

"The contract in this respect is precisely the same in legal effect as that construed in *Preble v. Abrahams*. * * * In that case, as in this, the contract was signed by both parties, but there was no language expressing an agreement on the part of Abrahams, the purchaser, to buy the property which the other party agreed to sell."

After quoting from *Preble v. Abrahams*, the court continued as follows:

"So in the case at bar, in which the contract is much more complete and certain in this respect than the one considered in *Preble v. Abrahams*, there is a clearly implied agreement on the part of the defendant to buy the oil which the plaintiff thereby agreed to sell."

In *Samuels v. Ottinger*, supra, the plaintiff leased to the defendant certain premises. During the term of the lease, the defendant assigned it to a third party who paid the

rent for one month and then defaulted. Plaintiff thereafter instituted three actions against the defendant to recover installments of rent accruing during three different periods of time under the lease. In deciding that the defendant was liable under the terms of the lease, the court said:

"The lease in question was executed by the lessees, as well as by the lessor. It begins by stating that the lessor leases the premises to the lessees, for the term of ten years, at the monthly rental above stated, 'payable in advance on the twentieth day of each and every month.' By subsequent clauses the lessees agree to pay all bills for water, gas, and electricity furnished to the premises, and all taxes on improvements to be erected by said lessees. The privilege of subleasing is expressly given, as is permission to erect buildings, which, if they comply with certain conditions, are to be purchased by the lessor at the expiration of the term. The lessees agree to insure the improvements, and said insurance shall be made payable to the lessor and the lessees jointly, for the purpose of securing the said lessor in the payment of the rents herein stipulated. * * * By another clause it is agreed that the improvements to be erected 'shall be security for the rent herein stipulated to be paid. * * * Finally, it is agreed that if the lessees hold over beyond the term provided in the lease, such holding over shall be deemed merely a tenancy from month to month, and at the same monthly rental that shall have been payable hereunder by said lessees immediately prior to such holding over.'

"If it is possible to express a contractual obligation to pay rent by any form of words other than a direct promise, in exact terms, to pay such rent, the language we have quoted from the lease before us imposes that obligation on the lessees. The lessor agrees to lease the premises to the lessees at a given rental, 'payable' at stated times. The writing is signed by the lessees as well as by the lessor."

The court then proceeds to refer to other terms of the lease in support of its conclusion that it contained an express agreement on the part of the lessee to pay the rent, but none of the terms, to which the court subsequently referred, were in our opinion any stronger against the lessee than those contained in the above quotation from the opinion in said case. It also reviewed a number of cases from other jurisdictions, pointing out that the decisions were not entirely in harmony upon this question, and concluded its review by adopting the reasoning of those which held that provisions, similar to those in the lease in this action, constituted a covenant to pay the rent provided therein.

Among the cases cited in *Samuels v. Ottinger*, supra, with approval by the court, were *Bussman v. Ganster*, 72 Pa. 285, and *Linn v. Ross*, 10 Ohio, 412, 36 Am. Dec. 95. The former case was one for the recovery of rent, the lease having been signed by both parties, and the only provision contained therein which could possibly be construed as

a covenant on the part of the lessee to pay the rent were the words "the rent to be paid monthly," and in holding the lessee liable, under such a lease, the court said:

"It is expressly said in this lease, the rent to be paid monthly. To be paid by whom? Surely by the lessees, the parties of the second part executing the instrument. When therefore they as such parties accept the demise of the premises at a certain annual rent, the rent to be paid monthly, it is an express covenant by them to pay the rent. * * *

The present action cannot, in our opinion, be distinguished from the foregoing cases, and we think that the same rule invoked therein should be applied by this court. The lease in the present case provides that the lessor agrees to extend the time, within which the operation of the well may be begun, one year, for certain additional considerations, and that "said considerations shall be paid monthly in advance." To be paid to whom and by whom? Unquestionably they are to be paid to the lessor, and we think with equal clearness the lease provides that they are to be paid by the lessee. In further support of this conclusion, we would call attention to the following provision in said lease:

"The lessee shall hold said land for the period of twenty years from the date hereof unless otherwise forfeited by the lessee in accordance with the terms of this lease and the lessee hereby leases from the lessor the above described land for the purposes aforesaid and for the considerations herein set forth."

This provision, read in connection with that which provides that "said considerations shall be paid monthly in advance," seems, in our opinion, to present an additional reason for holding that the lessee has bound himself by the lease to pay the rent. By these provisions of the lease, he has leased the lands upon the considerations therein set forth, and among these considerations is the payment of said sums, monthly in advance. We are therefore unable to arrive at any different conclusion than that the lessee, upon the execution of the lease, made himself personally responsible for the payment of the rent provided for therein. The defendant received a written assignment of said lease, "together with all rights and privileges, burdens and benefits in said lease set forth." It thus became liable for the performance of all the obligations agreed to by the original lessee. Civ. Code, §§ 1589, 3521.

In support of the respondent's contention that the terms of the lease contain no covenant on the part of the lessee to pay the rent, respondent's counsel have cited the following cases: *Glasgow v. Chartiers Gas Co.*, 152 Pa. 48, 25 Atl. 232; *Van Etten v. Kelly*, 66 Ohio St. 605, 64 N. E. 560; *Snodgrass v. So.*

Penn. Oil Co., 47 W. Va. 509, 35 S. E. 820; *Butcher v. Greene*, 50 Ind. App. 692, 98 N. E. 876; *Eastern Oil Co. v. Smith*, 80 Okl. 207, 195 Pac. 773; *Frank Oil Co. v. Bellevue Gas & Oil Co.*, 29 Okl. 719, 119 Pac. 260, 43 L. R. A. (N. S.) 487; *Ohio Oil Co. v. Detamore*, 165 Ind. 243, 73 N. E. 906; *U. S. v. Comet Oil & Gas Co. (C. C.)* 187 Fed. 674; *Hickernell v. Gregory* (Tex. Civ. App.) 224 S. W. 691; *Texas Co. v. Curry* (Tex. Civ. App.) 229 S. W. 643. These cases all involved the construction of so-called oil leases. The leases under consideration in the first seven of these cases, if we have read them correctly, all contained provisos that the lease should become null and void upon the failure of the lessees to make certain designated payments, and in the case of *United States v. Comet Oil & Gas Co.*, supra, being the eighth case mentioned above, the lease provided that the failure to make the payments required shall subject the lease to forfeiture without further notice to the lessees. In all these cases the courts held that these provisos were mere conditions and were not covenants which would support an action on the part of the lessor to recover the rent. They further held that, by a failure of the lessee to make the payments provided in his lease, his rights thereunder were forfeited immediately, and without any act on the part of the lessor or any other person. It would necessarily follow that after a lease is forfeited no rent could accrue thereunder. It would be the height of injustice to permit the lessor to enjoy the forfeited estate, and at the same time to permit him to recover rent for the estate during the period that he is enjoying the same. As we have already seen, the lease in the present case contains no such forfeiture clause, but on the other hand, the lease remained a binding contract between the parties after default in the payment of the installment falling due February 10, 1921, and until the lessee terminated the same by making payment of said sum of \$10 in the afternoon of said day.

The other two cases, cited by respondents, and being the two last enumerated above, were not actions for the recovery of rent at all, but were instituted for the purpose of declaring the leases forfeited, and whatever language might have been used therein by the courts in arriving at their conclusions would not, in our opinion, be applicable to the questions involved in the present case. We are of the further opinion that none of the cases cited by respondent and enumerated above sustain its contention, and particularly so, in the face of the decisions from our own Supreme Court, which all seem to be favorable to the contention of the appellant.

It is suggested by counsel for the respondent that there should possibly be a different

rule in the construction of these so-called oil leases than ordinary leases of real property, and especially should this be so when, as in the present case, the defendant did not go into possession of the leased property, but the only right it had under said lease was to enter upon said real property and explore for oil and other mineral substances. We fail to see the force of this suggestion. The lessee under the present lease was given certain rights in the leased property, and so long as he enjoyed them the lessor was deprived of the privilege either to exercise these rights personally or to dispose of them to others, and so long as the defendant, as assignee of the lessee, owned and exercised these rights under the lease, just so long was it obligated to pay for the same as provided in the lease.

[4] Appellant also contends that by the giving of the check by the defendant, and the acceptance thereof by the plaintiff, the obligation created by the lease became extinguished, and the obligation to pay the checks substituted therefor, and that no act thereafter by the defendant, even if defendant was not liable under the lease, could affect his obligation created under the check. In other words, appellant contends that the check was given and accepted in absolute payment and extinguishment of the obligation under the lease. The rule is well settled that the giving of a check for an antecedent debt is not an absolute payment and extinguishment of the debt in the absence of an agreement giving it that effect. *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15, 20 Pac. 28; *Dingley v. McDonald*, 124 Cal. 90, 56 Pac. 790. There is not in this case, in our opinion, any evidence of any agreement between the parties that the check was either given or accepted with the understanding that the debt for which it is given should thereby be extinguished. The check was received in the ordinary course of business, and if paid, the original debt, or the debt for which it was given, would be extinguished, but if, for any reason, the check was unpaid, plaintiff's testator would still have had his action upon the original indebtedness. The check bore certain statements and indorsements of the parties, but these would not, we think, constitute an agreement that the check itself was given and accepted as an absolute payment of the debt.

The check, however, having been given in payment of rent due plaintiff from the defendant, was based upon a valuable consideration, and defendant is liable for the payment of the amount thereof.

The judgment is reversed, with directions to the trial court to enter judgment in favor of plaintiff as prayed for in the complaint.

We concur: CONREY, P. J.; HOUSER, J.

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REID v. HOLCOMB et al. (Civ. 3940.)

(District Court of Appeal, Second District, Division 1, California. July 20, 1923.)

1. Corporations ⇐88—Subscriber suing to recover subscription paid held not to have waived his right to object to substitution of foreign corporation.

Plaintiff suing to recover money paid on a contract of subscription for stock of a proposed corporation, on the ground of failure of consideration, in that the corporation was not organized as stipulated therein, a foreign corporation being substituted, of which plaintiff had no knowledge, did not waive his right to object to such substitution.

2. Evidence ⇐71—Letter properly stamped and addressed received by office boy of addressee presumed properly delivered.

Letter received by an office boy within the scope of his duties for his employers, delivered at their office properly stamped and addressed, will be presumed to have been properly delivered, under Code Civ. Proc. § 1963, subds. 20 and 24.

3. Evidence ⇐586(3,4)—Mere fact that addressee of letter does not remember receiving it no evidence that it was not received.

The mere fact that addressee of a letter properly stamped and addressed does not remember receiving it is no evidence that he did not receive it.

4. Corporations ⇐88—Delay in bringing action for money paid on subscription not laches unless prejudice results.

In an action to recover money paid on a contract of subscription for stock of a proposed corporation, on the ground that the consideration had failed, where it was not shown that defendants were in any way injured or with respect to their rights or obligations to plaintiff by reason of delay in filing the complaint, the defense of laches cannot prevail.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Will J. Reid against C. E. Holcomb and others. From a judgment for defendants, plaintiff appeals. Reversed.

F. A. Knight, of Long Beach, for appellant.

Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, for respondents.

CONREY, P. J. Action to recover a sum of money paid by plaintiff on a contract of subscription for stock of a proposed corporation; plaintiff alleging, in substance, that the consideration for said payment has failed. The second count of the complaint is the common count for money had and received. Both counts relate to the same transaction. The plaintiff appeals from the judgment in favor of the defendants.

The findings, in conformity with the first

two paragraphs of the complaint, state that on or about November 5, 1919, the plaintiff entered into an agreement with the defendants wherein and whereby the plaintiff agreed to buy from the defendants, and the defendants agreed to sell to the plaintiff, 500 shares of the par value of \$10 each, of the common capital stock of a proposed corporation to be organized under the laws of the state of California, and the plaintiff then paid to the defendants the sum of \$1,000 for said stock; that a copy of said contract is attached to the complaint and marked "Exhibit A." Said Exhibit A, under the title "Subscription Contract," is a document addressed to the defendants as "Syndicate Managers, Paul Getty Oil Corporation, 1004-8 Gariand Building, Los Angeles, California." It bore the signature of "Will J. Reid, Subscriber," and was "Countersigned by W. M. Strickler, Syndicate Manager." The material parts of it read as follows:

"I hereby subscribe for one unit, or share of the preorganization syndicate being organized by you to underwrite a block of 150,000 shares of the capital stock of the proposed Paul Getty Oil Corporation, to be incorporated under the laws of the state of California, and agree to pay to C. E. Holcomb, fiscal agent of the syndicate, therefor, the sum of \$1,000 per unit, or share, or a total of \$1,000 payable as follows:

"Cash upon the signing of this subscription contract and upon the following terms and conditions; receipt of the above described payments being hereby acknowledged.

"I. That all payments made on this subscription and on similar subscriptions, shall be held by C. E. Holcomb, to be used as directed by the aforesaid syndicate managers.

"2. Each syndicate unit, or share, shall be exchangeable, upon demand for 500 shares of a par value of \$10 each of the common capital stock of the Paul Getty Oil Corporation, the total par value of said shares being \$5,000. Delivery of said shares shall be made as soon as the proposed company is duly incorporated and organized according to law, which it is hereby understood and agreed shall be about the 1st day of December, 1919, certificate or certificates of stock to be issued in my name, or to my order without transfer charges.

"I hereby authorize and instruct the abovenamed syndicate managers to make payments to J. Paul Getty, the Paul Getty Oil Corporation, or the Getty Oil Company, in such amounts and at such times as they deem fit.

"This subscription contract is not valid or binding unless accepted and countersigned by one of the syndicate managers. Dated the 5th day of November, 1919."

Appellant contends that there is no evidence to sustain certain of the findings, which, as to the matters here in controversy, are, in substance, as follows: The court found that the plaintiff did not, on the 1st day of December, 1919, and on the 17th day of May, 1920, and at other times between said dates, demand of the defendants the

said stock; that the defendants have not failed and refused to deliver to plaintiff the said shares of stock of said corporation provided to be delivered in said agreement or any stock; that it is not true that the plaintiff has not received certificates for said shares of stock or any part thereof; that it is not true that on or about the 17th day of May, 1920, the plaintiff had received nothing for his money, and demanded of the defendants the return of the \$1,000 paid to them; that it is not true that thereafter, on the 31st day of July, 1920, the plaintiff demanded of the defendants, and each of them, the return of said \$1,000; that the plaintiff did demand the return of said sum or or about the 1st day of February, 1921; that the plaintiff has been guilty of laches and unreasonable delay in bringing this action; that the plaintiff is precluded or estopped from suing on the cause of action set forth in the complaint for the reason that, on or about the 12th day of May, 1920, 2,500 shares, of the par value of \$1 per share, of the Getty Oil Company, a corporation organized in pursuance to the terms and conditions set forth in the contract attached to the complaint, were issued and tendered to the plaintiff; and that said Getty Oil Company was organized according to law on or about April 17, 1920.

It is conceded that the defendants never organized a corporation under the laws of California. It does appear from the evidence that on the 17th day of April, 1920, "the Getty Oil Company" was incorporated in Arizona under the laws of that state, with an authorized capital stock of \$5,000,000 in \$1 shares. According to the stock ledger of that corporation, on May 6, 1920, a stock certificate of 2,500 shares was "drawn" in favor of Will J. Reid. At the time of the trial that certificate was in possession of the secretary of the corporation, who had received it from his predecessor in office, who, in turn, had received it from defendant W. M. Strickler with a letter of Strickler to the company, dated July 28, 1920, wherein he stated that he was returning the certificate in accordance with his understanding with J. Paul Getty. It appears that said certificate of stock within two or three days after its date was taken by Mr. Strickler to the office of the plaintiff at Long Beach. The plaintiff was not there at that time, and Strickler took it back to Los Angeles and thereafter returned it to the Getty Oil Company. The fact that Strickler, while at plaintiff's office in Long Beach, told Mr. Hancock, "a business associate" of defendant, that he had brought down to the plaintiff the stock from the Getty Oil Company, and that Mr. Hancock said that the plaintiff was not going to take it, does not tend to prove either a tender of the certificate or an excuse for nondelivery, and

there is no evidence that Hancock was authorized to represent plaintiff.

Mr. Strickler represented the syndicate in obtaining the plaintiff's subscription. Strickler testified:

That in February, 1920, the plaintiff asked him about the progress of the incorporation, to which he replied that the delay had occurred because "Mr. Getty and Mr. Gesell, the principals in the case, had not been able to decide upon a capitalization." That again in March, 1920, the plaintiff said that if he did not get his stock, he would want his money back, to which Strickler replied that he would see that the plaintiff got either his money or the stock. That he had a third conversation with the plaintiff in April, 1920. That he then told the plaintiff that Mr. Getty had either gone or was contemplating a trip to Europe. "That I told him that I thought it was impossible to do anything at that time with Mr. Getty until his return. But I suggested that he get in touch with Mr. Gesell, and that I would also see Mr. Gesell and see if something couldn't be done to either get him his money or his stock. * * * I told him that I would get him either his money or his stock." That his next conversation with the plaintiff was in July, 1920. "Of course at that time Mr. Reid had—I mean the company had been incorporated, and I knew that Mr. Reid was not going to accept his stock. So then I told him I would try to get him his money back, when I knew he didn't want to accept the stock."

[1, 2] It thus appears that the findings are correct to this extent, that the plaintiff did not, on or before the 17th day of May, 1920, in any of said conversations, demand the shares of stock, or demand the return of his money, except in the alternative terms stated. On the other hand, however, he did make that alternative demand, and the replies which he received from Strickler evidently caused the plaintiff to postpone a more positive and specific demand, at least until May 17, 1920. There is no evidence to sustain the finding that the defendants have not failed to deliver the said shares of stock, or the finding that it is not true that the plaintiff has not received certificates for said shares of stock. In fact, the corporation provided for in the agreement, to wit, a California corporation, never has existed. The plaintiff did not know that an Arizona corporation was being substituted for the proposed California corporation, and he cannot be held to have waived his right to object to such substitution. The evidence leaves no doubt whatever that on May 17, 1920, the plaintiff addressed to the defendants a letter in which he referred to the agreement of November 5th, and said, referring to the proposed corporation:

"This corporation has not been formed, and I hereby demand the immediate return of the \$1,000 paid to you by me last November."

This letter was sent as a registered letter to the office of the defendants, where, on

May 18, 1920, receipt for it was given in their name by the office boy of the defendants. Three of the defendants testified, each for himself, that he never received said letter. The other defendant, Mr. Gesell, being asked if he had seen the letter before, replied thus:

"If I have I don't remember it; I don't remember ever seeing it; so many papers flying around in connection with that oil business."

[3] We think that reasonably it may be assumed to be within the scope of the duties of an "office boy" to receive for his employers the letters delivered at their office for them, and, in the absence of evidence to the contrary, that letters properly stamped and addressed have been delivered. Subject to contradiction, if any there be, it is to be presumed "that the ordinary course of business has been followed," and "that a letter duly directed and mailed was received in the regular course of the mail." Code Civ. Proc. § 1963, subds. 20 and 24. The mere fact that Mr. Gesell, under the circumstances stated by him, did not remember receiving the letter is no evidence that he did not receive it. His answer, as quoted above, is not a denial, but it is in effect that, for the reason stated by him, if he had received it, he would not remember the fact. Our conclusion is that the letter of May 17, 1920, was delivered to the defendants in due course of mail, and that the evidence does not sustain the finding that the plaintiff did not, on the 17th day of May, 1920, demand of defendants the return of said sum of \$1,000. It is also clear that he has never received the consideration, or any part of the consideration, for said money.

[4] This action was commenced by complaint filed on the 17th day of March, 1921. We are satisfied that the judgment should be reversed, unless the defense of laches is applicable to the case, and unless it be true, as found by the court, that the plaintiff has been guilty of laches and unreasonable delay in bringing the action. Upon the facts as they appear in the record, we are of the opinion that this defense cannot prevail. This is so because there are not any "acts or circumstances attending the delay which have operated to the injury of the defendants. *Meigs v. Pinkham*, 159 Cal. 104, 111, 112 Pac. 883; *McGibbon v. Schmidt*, 172 Cal. 74, 155 Pac. 460. The defense of laches was not pleaded except as follows: Defendants alleged "that plaintiff has been guilty of laches and unreasonable delay in bringing this action." It was not alleged, and it is not established by any of the proven facts, that the defendants were in any way injured or at all affected with respect to their rights or with respect to their obligations to the plaintiff by reason of such delay as there was in the matter of filing a

complaint in the action. If the plaintiff had known that the corporation organized by the defendants in purported compliance with his contract was in fact an Arizona corporation, and not a corporation organized under the laws of California, and if, with knowledge of those facts and with knowledge that shares of stock had been placed in his name on the books of the company, he had exercised rights of ownership thereof and had postponed his rescission of the contract, or his demand for the return of the money, in view of a possible increase in value of the stock, there might be some substance to a defense based upon those facts. But the situation thus assumed does not exist in this case.

The judgment is reversed.

We concur: HOUSER, J.; CURTIS, J.

(63 Cal. App. 63)

PEOPLE v. KNIGHT. (Cr. 968.)

(District Court of Appeal, Second District, Division 1, California. July 18, 1923.)

1. Criminal law §130(3)—Appellant should separate under distinct heads points relied upon.

A review of the case in narrative form by appellant in his brief without properly separating under distinct heads the points relied upon is improper.

2. Criminal law §1031(1)—Objection that defendant was not legally committed by magistrate before filing of information cannot be first made on appeal.

Under Pen. Code, §§ 995, 996, the objection that defendant has not been legally committed by a magistrate before filing of the information against him cannot be raised for the first time on appeal.

3. Criminal law §1144(1)—Defendant presumed legally committed by magistrate prior to filing of information.

In the absence of any showing in the record that a commitment preceding the filing of an information was issued by city recorder rather than a magistrate, as contended by defendant, it will be presumed that defendant was legally committed by a magistrate.

4. Criminal law §655(4)—Statement by court during impanelling of jury held not error.

A statement by the court while the jury was being selected, "When juries are impaneled it is for the purpose of securing verdicts, and, while a juror should not surrender his individual opinion, it would be the duty of every juror to consult freely with other jurors and see if there is evidence to change it," held not erroneous.

5. Criminal law §1166½(6)—Excusing of jurors before all prospective jurors had been examined held not error.

The action of the court in excusing a juror before all the prospective jurors then in the

jury box had been examined held a mere matter of procedure, and not prejudicial to defendant.

6. Criminal law §825(4)—Instruction as to corroboration of prosecutrix held not erroneous in absence of request for further instruction.

In a prosecution for lewd and lascivious conduct, an instruction that it is not essential to a conviction that the prosecutrix be corroborated in the testimony of other witnesses as to the particular acts constituting the offense held not erroneous for failure to include instruction that testimony of the prosecutrix, a child of tender years, should be viewed with great caution, in the absence of a request for an instruction on that point.

7. Criminal law §1172(6)—Giving of instruction relating to impeachment of witness not prejudicial, though instruction inapplicable to any evidence in case.

The giving of an instruction as to the manner in which a witness may be impeached, which conformed to Code Civ. Proc. §§ 1847, 2051, held not prejudicial, though there was no impeaching testimony in the case to which it was applicable.

8. Criminal law §823(15)—Denial of instruction as to reasonable doubt held not reversible error.

Denial of instruction that defendant was "entitled to the individual opinion of each member of this jury, and that no member should vote for a conviction * * * because of the opinion of other members of the jury so long as he had a reasonable doubt as to guilt or innocence of defendant," held not reversible error, in view of other instructions.

9. Criminal law §829(1)—Denial of instruction covered by others given is not error.

Denial of an instruction covered by others given is not error.

10. Criminal law §1174(4)—Permitting separation of jurors held not prejudicial.

A separation of the jury, during which some of the jurors conversed in a hallway where other persons were present, held not prejudicial where there was nothing in the affidavits relating thereto tending to show a discussion of the case or any fact prejudicial to defendant.

11. Lewdness §10—Evidence held to sustain conviction.

Evidence tending to establish the date of and the commission of alleged lewd and lascivious conduct with a 7 year old girl held to sustain conviction therefor.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

G. H. Knight was convicted of lewd and lascivious conduct, and he appeals. Affirmed. See, also, 216 Pac. 89.

J. W. Wright, of Tulare, and D. M. Edwards and J. C. Thomas, both of Visalia, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CONREY, P. J. This is an appeal by the defendant from the judgment and from an order denying his motion for a new trial in an action wherein he was convicted of the crime of felony, to wit, lewd and lascivious conduct committed upon the body of a female person under the age of 14 years.

[1] The brief on behalf of appellant reviews the case in narrative form without properly separating under distinct heads the points relied upon. This is a too common fault. It should not be made necessary for the court to exhume, parcel out, and number, in order to identify the propositions upon which an appellant relies. If we have successfully discovered the grounds of appeal herein, the points relied upon are those hereinafter considered.

[2, 3] It is claimed that the trial court had no jurisdiction of the case for the reason that the preliminary examination was held before the city recorder of the city of Porterville, and that said city recorder "had not jurisdiction to issue a criminal complaint or warrant of arrest on a charge of felony." The city of Porterville is a city of the fifth class. The recorder of such a city has the powers of a magistrate. Municipal Corporations Act (St. 1883, p. 265) §§ 806, 807. As a magistrate he would have authority to conduct examinations on criminal complaints. Pen. Code, §§ 811 and 872; Const. art. 1, § 8. Since it does not appear that the defendant moved to set aside the information on the ground that before the filing thereof he had not been legally committed by a magistrate, the defendant cannot now make that objection. Pen. Code, §§ 996 and 995. Moreover, the record does not show that the commitment preceding the filing of the information was a commitment issued by said city recorder. In the absence of a showing to the contrary, it will be presumed that the defendant had been legally committed by a magistrate.

[4, 5] It is suggested that while the jury was being selected the court erroneously made a statement to the effect that "when juries are impeached it is for the purpose of securing verdicts, and, while a juror should not surrender his individual opinion, it would be the duty of every jurymen to consult freely with other jurors, and see if there is evidence to change it"; that at the same time the court erroneously refused to allow counsel for defendant to further interrogate the juror then under examination; and that the court erred in peremptorily excusing said juror at the instance of the district attorney before all of the prospective jurors then in the jury box had been examined. The quoted statement contains no error. The court did not refuse to allow further questioning of the juror. The excusing of the juror at the time stated was a

mere matter of procedure, and there is nothing to show that the procedure adopted was in any way injurious to the rights of the defendant.

[6] The court instructed the jury as follows:

"The Court further instructs the jury that it is not essential to a conviction in this case that the prosecutrix * * * should be corroborated in the testimony of other witnesses as to the particular acts constituting the offense; it is sufficient if you believe from her evidence and all of the other testimony and circumstances in proof in the case, beyond a reasonable doubt, that the crime charged has been committed."

Appellant claims that this instruction was erroneous because it did not instruct the jury that the testimony of a child of tender years ought to be viewed with great care and caution, and without bias and prejudice, and that such a charge as that against the defendant in this case is one easily made, but hard to disprove. The instruction as given is a correct statement of the law. If the defendant desired to have an instruction given on the point suggested he might have asked for it; but his counsel does not claim that he made any such request.

[7] The court gave an instruction concerning the presumptions attending the testimony of a witness, and the manner in which such presumptions may be repelled, and the manner in which a witness may be impeached. Substantially, this instruction conforms to the provisions of sections 1847 and 2051 of the Code of Civil Procedure. Appellant claims that the giving of this instruction was erroneous for the reason that there was no testimony before the jury to warrant such instruction, and for the further reason that it was an instruction upon the weight of the testimony. We find nothing in the instruction that can be construed as an instruction upon the weight of testimony or upon the facts of the case. Even if, as claimed by counsel, there was no impeaching testimony in the case, appellant could not have been prejudiced by a general instruction of this kind which included a reference to the lawful methods by which witnesses may be impeached.

[8] Appellant contends that the court erred in refusing to give the following instruction requested by him:

"You are instructed that the defendant in this case is entitled to the individual opinion of each member of this jury, and that no member of this jury should vote for a conviction of the defendant because of the opinion of the other members of the jury, so long as he has a reasonable doubt as to the guilt or innocence of the defendant."

In view of the other instructions given, the refusal of this instruction, although it is correct as a statement of law, is not a suf-

ficient reason for reversal of the judgment. *People v. Kiser*, 24 Cal. App. 540, 548, 141 Pac. 1078; *People v. Perry*, 144 Cal. 748, 756, 78 Pac. 284. The court did instruct the jury that the presumption of innocence exists, and continues until the defendant's guilt is established to a moral certainty and beyond all reasonable doubt, and that this presumption attaches at every stage of the case and to every fact essential to a conviction.

[9] Appellant's claim that the court erred in refusing to give an instruction requested by him on the subject of reasonable doubt, and concerning the necessity of proving the defendant's guilt by more than a preponderance of the evidence, before the defendant can be convicted, is sufficiently answered by the fact that the court gave an adequate instruction on that subject in what might be called the common form of such instruction, which many times has been sustained.

[10] Appellant claims that he is entitled to a new trial upon the ground that, after the case was submitted to the jury, the officer in charge of the jury was guilty of misconduct in that he allowed the jury to separate, and himself entered the jury room and was with the jury on four different occasions during the time of its deliberations. The separation of the jury consisted in the fact that the officer allowed the jury to leave the jury room and go down the hall to the toilet, during which time a portion of them were talking in the hallway, where a number of other persons were present. There is nothing in the affidavits tending to show that any of these occurrences of which complaint is made included any discussion of the case or any fact prejudicial to the defendant. While it may properly be said that the officer did not strictly conform to the proprieties pertaining to his duty in caring for the jury, we are satisfied that there is nothing in the facts shown which would furnish a sufficient cause for granting a new trial.

[11] Finally, it is contended that the evidence is not sufficient to justify the conviction of the defendant; particularly that the testimony of the witnesses does not show that any of them knew the date of the alleged offense, and that there is no testimony denying the testimony of the defendant to the effect that he was not present between 1 o'clock and 5 o'clock of the 16th day of August, 1922, at the place where the prosecution claims the offense was committed. The prosecuting witness fixed the time as the afternoon of a day when her father "went to Coalinga," and the place as the Southern Pacific Depot, where defendant was employed, and near which the prosecuting witness lived. The mother of the child testified to the fact that on said 16th day of

August, her little girl, Vivian, with a companion named Mary, was out playing that afternoon, at or after half past 2, and came back at about a quarter of 4. That evening she told her mother about "this affair." The girl Mary testified that at about 3 o'clock on the day of the affair in question she and Vivian visited the depot, and that the defendant was there, but that the witness went away, and left Vivian with Mr. Knight at the depot. The testimony of Vivian, describing the conduct of the defendant, is sufficient to establish the commission of the offense as charged. While the child was only 7 years old, yet the court determined, as it was authorized to do, that she had sufficient intelligence and maturity to be accepted as a witness. The jury believed her statements. They are legally sufficient to prove the facts which establish the commission of the crime. The judgment and order are affirmed.

We concur: HOUSER, J.; CURTIS, J.

63 Cal. App. 95

CARTER v. SILL et al. (Civ. 3878.)

(District Court of Appeal, Second District, Division 2, California. July 20, 1923.)

1. Appeal and error $\S$ 694(1)—Appeals on judgment roll alone present sole question whether findings of fact support the judgment.

Where an appeal is brought upon the judgment roll alone, the sole question is whether the findings of fact support the conclusions of law adduced therefrom and the judgment entered thereon.

2. Mortgages $\S$ 302—Tender held not in effect refused by unreasonable delay in acceptance.

Mortgaged property was redeemed from purchaser at foreclosure sale by the mortgagee, who held an additional lien on the property, and mortgagor offered to redeem, but offered only the amount of the mortgage with interest, without including the amount of the additional lien under which the mortgagee had redeemed. The mortgagee referred the matter to his counsel, who stated that he would give mortgagor an answer next day, Saturday, but it was mutually agreed, because of expected absence on Saturday of mortgagor's counsel, that answer should be given the following Monday, and on Monday mortgagee notified mortgagor's counsel that the offer was accepted, but mortgagor did not make good his offer. *Held* that, even if the agreement to postpone decision on the offer be disregarded, the delay from Friday until Monday before accepting the offer was not such unreasonable delay in acceptance as to amount to a refusal of the offer, so as to render the tender effectual to discharge the lien without payment of the debt.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Suit by William Carter against Ben H. Sill and others. Judgment for defendants, and plaintiff appeals. Affirmed.

T. F. Allen, of Bakersfield, for appellant.
Fred E. Borton, of Bakersfield, for respondents.

CRAIG, J. This is an appeal on the judgment roll alone from a judgment in favor of the defendants in a suit to quiet title to certain real property situated at Bakersfield, in the county of Kern. The plaintiff claims as grantee of L. L. Bateman.

The complaint is in the usual form. The answer and supplemental answer allege, and upon a trial of the issues the court found, that the plaintiff was not the owner of an interest in, nor entitled to possession of, the property in suit, but that defendant Sill had legally acquired the title, was the lawfully constituted owner, and entitled to possession.

The facts as set forth by the defendant's pleadings and in the findings are, substantially, that on May 8, 1911, one L. L. Bateman was the owner and in possession of the property; that Bateman and wife on that date mortgaged the same to the Producers' Savings Bank, which said mortgage the bank subsequently assigned to Ben H. Sill; that Sill thereafter foreclosed this mortgage on October 24, 1918.

It is further alleged, and found by the court, that, previous to such foreclosure, and on October 24, 1913, Bateman was the owner of the property, subject to said mortgage and that on the latter date Sill signed as accommodation maker with Bateman a note to the Security Trust Company for \$2,000, the Batemans in turn executing to Sill and the bank a grant deed, conveying the same property as security; that on May 8, 1914, Sill paid the bank in full its interest on account of this obligation; that pursuant to the decree of foreclosure under the mortgage of May 8, 1911, one A. T. Lightner as commissioner named in the decree sold the property to one Fred Gunther for \$2,401.21, which Gunther paid, and received the commissioner's certificate of sale, a duplicate of which was duly recorded, and that subsequently Sill redeemed from Gunther.

The findings of fact further state: That on December 5, 1919, the plaintiff and Bateman met the commissioner in the courthouse, displaying certain money to him, and stating that Bateman desired to redeem the property from the effect of the sale under foreclosure of May 8, 1911, and that the money offered was the amount for which the property had been sold to Gunther, with interest at 1 per cent. per month from date of sale, but that it did not include the lien of Sill under which he had redeemed. Lightner informed them that before he could act he would have to confer with Sill's attorneys. That thereupon

the plaintiff, Carter, and Bateman went to Carter's attorneys, where they met Sill and his attorney. That plaintiff's attorney accompanied them, and there offered Sill 2,800, stating that it was offered to redeem, but that it did not include Sill's lien, for the reason that the latter was barred by limitation. Sill thereupon referred the matter to his counsel, who replied that he would give them an answer the next day at 10 o'clock. After some discussion it was mutually agreed that an answer should be given on the 8th, which was Monday. That Bateman thereupon took the money from Allen, and offered it to Sill and to his counsel, demanding a reply "then and there," but defendant's attorney stated that he should have his answer on the 8th, as agreed. On said 8th day of December Sill's counsel notified counsel for the plaintiff in writing that the offer was accepted, and that Sill would receive the money and convey at any time before the 15th, when the right of redemption would expire.

The court then finds that such so-called tender was not made in good faith; that neither Carter, Bateman, nor their counsel offered to pay the amount due; that the period of time between December 5th and December 8th was a reasonable one, and that none of the parties, or any one in their behalf, ever returned or availed themselves of the agreement, or of defendant's offer.

The judgment provides that the plaintiff take nothing, that the defendant Sill recover his costs, and that said Sill is the owner and entitled to possession of the lands and premises described.

The appellant contends that the tender effected a discharge of the lien, though it did not constitute a payment of the debt, whereas the respondent's position is that the law allowed him a reasonable time to ascertain the correct amount due and to consult counsel, and that a tender of redemption alone will not discharge a lien, but a tender followed by an unqualified refusal to accept, or by unreasonable delay in acceptance, is essential to such discharge.

[1] Since this appeal is brought up on the judgment roll alone, the sole question here is whether or not the findings of fact support the conclusions of law adduced therefrom and the judgment subsequently rendered and entered thereon. *O'Connell v. Behan*, 19 Cal. App. 111, 124 Pac. 1038; *Archer v. Harvey*, 164 Cal. 274, 128 Pac. 410, 412.

[2] Appellant argues that the refusal of the tender instantaneously worked a forfeiture or dissolution of the lien. But respondent contends that he did not refuse to accept; that he merely asked one day in which to decide; that appellant's counsel demurred, stating that he would be out of town next day, and that the 8th of December was mutually agreed upon between them as the date upon which Sill should accept or reject the

tender; that on Monday, the 8th, respondent offered to accept, and advised appellant in writing that he did accept, but that the latter remained silent, and did not make good his offer. The trial court found these facts to be true, and they amply support the judgment. Following the acquisition by Sill of the interests of Gunther and the bank, which constituted, so far as appears, the complete title, it would seem that defendant Ben H. Sill is the owner and entitled to possession of the lands and premises described, and that the judgment should be upheld.

There was argument by counsel, and much is indulged in the briefs, upon the question of sufficiency as a legal tender of the offer made December 5th. We are satisfied that it was not sufficient. It is further true that the findings reveal an express understanding that respondent should have until the 8th to accept or reject such offer, and that appellant then by his inaction prevented acceptance. This at least constituted a waiver by appellant of any semblance of claim to an immediate reply. Of course, the obligor was at liberty to consent to a postponement, and having done so, he is precluded from complaining that the initial offer was not instantly accepted. In *Vance v. Dingley*, 14 Cal. 53, it is said that the plaintiff agreed upon a subsequent meeting, and the Supreme Court held that no question of tender on the first occasion was presented.

Assuming, however, either alternative—the offer of December 5th and postponement to the 8th, or the offer to accept on the 8th and appellant's failure to comply as agreed—the essential features of a lawful tender of redemption, as they have been ruled upon by courts of various jurisdictions, are absent.

"To constitute a tender, there must be a definite offer to pay on the one hand and an unqualified refusal to accept on the other." *Supreme Tent, K. of M. of W. v. Fisher*, 45 Ind. App. 419, 90 N. E. 1044, 1046.

In *Cape Fear Lumber Co. v. Small*, 84 S. C. 434, 66 S. E. 880, the defendant gave plaintiff an option to purchase timber, and within the stipulated time the plaintiff undertook to perform, but defendant refused on the ground that the deed tendered for execution did not contain certain provisions. Plaintiff notified defendant of its willingness that such conditions be included in the deed, whereupon she agreed to execute it, but failed to do so. The court said there was nothing to show that if she had done so she would not have received the purchase money on delivery of the deed.

Waldron v. Murphy, 40 Mich. 668, is a case in which the legal principles here involved are well exemplified. There, one Ashbaugh mortgaged certain property to Waldron, and when considerably in arrears tendered pay-

ment to the latter's bank, which had no authority to collect, the cashier declining to accept the money, and requesting that he await Waldron's return. On learning that Waldron was in town they went in search for him, and—

"they met Waldron in the street not far from his house, going with a sister to visit a neighbor. The witnesses do not agree precisely on what took place, but in most respects concur. St. John somewhat abruptly referred to the two mortgages held by Mr. Waldron and told him there was the money to pay them. Mr. Waldron intimated that he might take it on one of the mortgages, but that he had told Mr. Ashbaugh, the owner of the land, that the other might run if he wanted it to. On the tender being pressed he objected that his house was not the place where he did business and that he did it at the bank. He said he could not see to count money in the street. On their proposing to go to the bank he objected it was past bank hours and it would be closed. They told him Stewart had agreed to keep the bank open, and Mr. St. John asked him, 'Will you take the money?' and he refused, and said he would be at the bank in the morning, and if they had any business with him he would attend to it then. They then returned and made a tender to Stewart, and, on his declining for want of authority, deposited the money, not in his bank, but in another bank, to the credit of Mr. Armstrong, but designated as Ashbaugh money. The next morning Mr. Waldron sent for and had an interview with St. John and offered to receive the money, but it was never paid, and the parties saw fit to rely on their tender. It has been held in this state that a willful and absolute refusal to accept a lawful tender discharges a lien. But there is no equity in attempting to avoid both lien and debt, and the security should not be discharged by any action in which the conduct of the creditor is not unjustifiable. If the refusal of a tender is not unreasonable or absolute, we do not think a mortgage is cut off by it. [Citing many cases.] In the present case, upon a review of the facts, we think the tender was not made under circumstances entitling it to be enforced in this way, if at all."

In the instant case, even though the agreement of the parties to delay the final decision by the respondent until the 8th be disregarded, such a delay under the circumstances was not unreasonable upon his part. The tendor was entitled to a limited but sufficient period in which to investigate any question involved, whether of law or of fact, and to reach a conclusion concerning his rights.

It is important to note that on the 5th, when the offer was made, counsel for respondent expressed willingness to give an answer on the following day, but appellant's counsel stated that this would be inconvenient for him, and suggested that the determination of the matter be delayed until the 8th. The 7th being Sunday, only one day intervened which respondent and his counsel

might be expected to devote to consideration of the matter.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

(63 Cal. App. 41)

In re GRAHAM'S ESTATE. (Civ. 4221.)

(District Court of Appeal, Second District, Division 2, California. July 16, 1923. Hearing Denied by Supreme Court Sept. 13, 1923.)

1. Charities — "Charitable trusts" defined.

A charitable trust is constituted by a donation in trust for establishing or carrying on an institution dedicated to the welfare of the public or of some definite class or part of it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charitable Trust.]

2. Charities — Detailed description of particular beneficiary and manner of application of funds held not necessary to creation of trust.

In the creation of a charitable trust, it is not necessary that the particular beneficiary be named, or the manner of the application of the trust funds be described in detail by the donor.

3. Wills — Devise to church providing that income only be used in maintaining property, held devise for charitable purpose.

A devise to a church of property in trust, the income only of which is to be used in keeping the church property in good condition, held devise for charitable purpose only.

4. Constitutional law — Statutes — 74(1), 82—Statute relating to validation of charitable devises by waiver of heirs held not unconstitutional.

Civ. Code, § 1313, as amended by St. 1919, p. 324, permitting, by waiver in writing, parent, husband, wife, child, or grandchild to validate a charitable devise of more than one-third of an estate, where, before its amendment, such devise was prohibited, held not to violate Const. art. 1, § 11, requiring uniform operation of laws of a general nature, section 21, relating to granting of privileges or immunities, and article 4, § 25, subd. 12, relating to passage of local or special laws, and subdivision 19, prohibiting granting of exclusive privileges, as against the contention that it selects certain classes of heirs and grants to them a privilege not accorded to other heirs, the privilege consisting of the right to say whether or not they will be bound by the terms of the amendment.

5. Statutes — 74(1)—Statute relative to restrictions on testamentary disposition with reference to charities held not void as not operating uniformly.

Civ. Code, § 1313, as amended by St. 1919, p. 324, relating to restrictions on testamentary disposition of property to charities, is not unconstitutional merely because it permits testators with no nearer relatives than nephews or

nieces to devise one-third of their estate to charities, if they make their wills 30 days prior to death, when it denies to testators of the same class the right to leave any of their property to charities, if they happen to have made their wills 6 months prior thereto, since the statute operates no differently upon one testator who has relatives other than parents, a husband, or wife, children or grandchildren, than upon any other testator similarly situated as to the possession of relatives.

6. Wills — Designation of charities permitted to receive bequests and restrictions affecting devises to them held within legislative discretion.

In enacting Civ. Code, § 1313, as amended by St. 1919, p. 324, it was within the province of the Legislature to permit charities other than those mentioned in section 1275 to receive bequests and to provide other restrictions as the Legislature considered proper upon charitable societies affected receiving bequests.

7. Wills — Right of testamentary disposition rests in legislative discretion.

The right of testamentary disposition is not one granted by the Constitution, but rests in the legislative will.

8. Constitutional law — 70(3)—Court may not consider wisdom of statute when its purpose is valid.

The purpose of Civ. Code, § 1313, as amended by St. 1919, p. 324, relating to testamentary disposition of property to charitable institutions, being to safeguard those who might naturally become the objects of a testator's bounty from inadvertance or undue zeal upon his part for a charity, and such a purpose being valid, courts may not consider the wisdom of this or any other measure within the jurisdiction of the Legislature to enact.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Contest proceedings in the matter of the estate of Sarah J. Graham, deceased. From an order of distribution, contestants appeal. Affirmed.

Frank C. Sherrer, of Independence, for appellants.

M. F. Mitchell, of Los Angeles, amicus curiae.

Kimball Fletcher and A. P. Thomson, both of Los Angeles, for respondents Trustees of the Methodist Episcopal Church of Big Pine.

W. A. Lamar, of Independence, for administrator.

CRAIG, J. While the estate of Sarah J. Graham, deceased, was in process of probate, and within the time allowed by law, the appellants made written objections and contested the distribution of the residue thereof. Upon a hearing of the objections and contest, the court denied the same, and ordered the distribution of the residue of the estate under the terms of the will. From this order the contestants take this appeal, and especial-

ly except to that part of the order distributing the residue under the terms of the will to the trustees of the Big Pine Methodist Episcopal Church.

The second paragraph of the will reads as follows:

"I, believing that I have no lawful heirs, give, devise and bequeath unto the trustees of the Big Pine Methodist Episcopal Church, of the Town of Big Pine, County of Inyo, State of California, to be held in trust by them and from which, the income only, is to be used in keeping the property, of the aforesaid church in good condition, and also in making any necessary improvements, the principal being kept intact, the following: * * *"

It is urged that this part of the will is invalid for two reasons: First, that it empowers the trustees of the church to devote the trust funds to other than charitable purposes; second, that it establishes a perpetuity for purposes other than charitable, and therefore violates the statute against perpetuities. The appellants insist that in providing that the income from the trust estate is to be used "in keeping the property of the aforesaid church in good condition, and also in making any necessary improvements," the will permits and provides for other than charitable uses.

[1] Whatever may be the rule in other jurisdictions, the law in this state is settled without conflict that a charitable trust is constituted by a donation in trust for establishing or carrying on an institution dedicated to the welfare of the public or of some definite class or part of it. Such an institution we must assume the Big Pine Methodist Episcopal Church to be. *People v. Cogswell*, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269. For contestants have not questioned the validity of the will by denial of the church's capacity to take as a charitable institution.

[2] In the creation of a charitable trust it is not necessary nor usually possible that the particular beneficiary be named or the manner of the application of the trust funds be described in detail by the donor.

[3] We think the purpose of keeping up the property of the church is sufficiently definite in these respects. As we construe the will, the devise is one for charitable purposes only, and therefore not subject to the objection that it permits the trust funds to be applied to uses contrary to law.

Since it must be conceded that the church itself is a charity within the definition of that term, surely "keeping the property of the aforesaid church in good condition" is a use of the funds devised for charitable purposes. This proposition seems self-evident. In a quotation from 5 R. C. L. 327, par. 50, contained in appellant's brief, it is said:

"A gift to a church is a charitable one, for it is settled law that a Christian church, lawfully existing, is a charity within the meaning

of the statute of Elizabeth. The very term 'church' imports an organization for religious purposes, and the property given to it *eo nomine* in the absence of all declaration of trust or use must, by necessary implication, be intended to be given to promote the purposes for which a church is instituted, the most prominent of which is the public worship of God. *It follows that the legitimate use by a church of property so given must result in its application for the benefit of those who attend upon, or are within the sphere of the influence of, the services of the church*, by bringing them under the influence of religion. * * * It is therefore clear that gifts for the erection, maintenance, and repair of the church buildings create charitable uses." (Italics ours.)

If it is judicially determined that the "legitimate use" by a church of property given to it must result in a charity, it seems certain that the keeping up of that same church property is a charitable use of the funds so employed. It is said by Pomeroy in his work on Equity Jurisprudence, § 1023, par. 3:

"Gifts, devises and bequests in trust for educational purposes are valid, since they are all clearly within the spirit of the statute. This class embraces all trusts for the founding, endowing, and supporting schools and other similar institutions, which are not strictly private."

The following gifts were held to be for charitable purposes, and valid: For the erection and maintenance of a church (*Appeal of Mack*, 71 Conn. 122, 41 Atl. 242); for the erection of a chapel and maintenance of mission (*Appeal of Eliot*, 74 Conn. 586, 51 Atl. 558); to a church for improvements (*French v. Calkins*, 252 Ill. 243, 96 N. E. 877).

Again, in section 1021 of Pomeroy on Equity Jurisprudence, par. 1, the author says: "The support and propagation of religion is clearly a 'charitable use.' This includes gifts for the erection, maintenance, and repair of church edifices," etc. Churches, like other institutions, are legally dependent upon funds to accomplish their charitable purposes, and require property to function as charitable organizations. Appellant is entirely correct in his contention, which is amply sustained by numerous authorities cited by him, and not contested by any cases that have been called to our attention, that in order to create a valid charitable trust in perpetuity, the language employed must require the fund to be expended for charitable purposes only. On the other hand, none of those authorities go so far as to say that the keeping up of property, which is itself necessarily involved in charitable work, is not also exclusively for a charitable purpose. We conclude that although it be conceded that the gift in question would permit the use of the fund devised to keep up property other than the church edifice and grounds, as for instance a rooming house, or an office building, it would still be valid as for a charitable purpose, for the income of the property thus sustained

would inevitably, and because of its belonging to a charitable institution, functioning for charitable purposes, be a charitable use.

[4] Appellant further insists that the amendment to section 1313 of the Civil Code enacted by the Legislature in 1919 (St. 1919, p. 324), is unconstitutional and void. The devise here in question would have been prohibited by the law as it stood prior to this amendment, because it gives more than one-third of the residue of the estate for charitable purposes. Section 1313 of the Civil Code, as amended in 1919, reads as follows:

"Provided, however, that nothing in this section contained shall apply to bequests or devises made by will executed at least six months prior to the death of a testator who leaves no parent, husband, wife, child or grandchild, or when all of such heirs shall have by writing, executed at least six months prior to his death, waived the restriction contained herein."

Appellant concedes that the testatrix did not leave any parent, child or grandchild, and that the will was made more than six months prior to her death, hence, that if the amendment of 1919 is constitutional the devise is valid. The appellant's contention that the amendment is unconstitutional is based upon the claim that it violates section 11 of article 1 of the Constitution of this state, which provides that "all laws of a general nature have a uniform operation," and also that it is contrary to section 21 of article 1 of the Constitution, which reads, "nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." And further, it conflicts with the provision of subdivision 12, § 25, of art. 4 of the Constitution, which provides: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: Affecting the estates of deceased persons, minors, or other persons under legal disabilities." And, lastly, that said amendment is contrary to subdivision 19 of the last-named section and article of the Constitution, which prohibits "granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity."

Appellant's principal contention, as expressed in the brief, is, that the statute selects certain classes of heirs, to wit, parents husbands, wives, children and grandchildren, and grants to them a privilege not accorded to other heirs. It is said that this privilege consists of the right to say whether or not they will be bound by the terms of the amendment. It is obvious that this argument is unsound, because in exercising the right to waive in writing the prohibition against the devise of more than one-third of an estate for charitable purposes, the parents or other heirs designated are acting, not opposed to, but in accord with, and pursuant to, the amendment.

[5] But it is further insisted that there is no apparent reason why all heirs, as well as parents, husbands, wives, children, and grandchildren, should not be extended the privilege of consenting to the devise of the whole of the estate for charitable purposes. The classes of heirs which the Legislature has selected as recipients of this authority are those whom experience teaches might reasonably be regarded as the most natural objects of the testator's bounty. The distinction between them and other relatives in this regard, as well as the matter of nearness in consanguinity, is sufficiently marked to make the matter one for the exercise of legislative discretion. This being so, the courts have no right to question the wisdom of the statute.

Amicus curiæ presents a different theory for contesting the constitutionality of section 1313, Civil Code. He agrees with respondent that this section may be regarded as one classifying testators and not heirs; he claims that the section divides testators into three classes, as follows:

"(1) Testators who leave no heirs; (2) testators who leave a parent, husband, wife, child, or grandchild; and (3) testators who leave heirs no nearer than nephews or nieces."

And, further, that it is not uniform in its operation upon these belonging to the third class; therefore that it is unconstitutional because:

"It permits testators with no nearer relatives than nephews or nieces to devise one-third of their estates to charity if they make their wills thirty (30) days prior to death when it denies to testators of the same class the right to leave any of their property to charity if they happen to have made their wills six months prior thereto."

We are unable to follow this reasoning. The statute operates no differently upon one testator, who has relatives other than parents, a husband or wife, children, or grandchildren, than upon any other testator similarly situated as to the possession of relatives. If the argument advanced by amicus curiæ is valid, it would apply to all statutes placing a time limit upon the performance of any act. For instance, the law requiring a creditor to present his claim against the estate of a deceased person, within a certain period after notice, would be subject to the charge that it does not operate uniformly; this would be the case, according to the contention urged, because one creditor who presents his claim in time will have it allowed, and another who is late in filing it with the executor, must be refused and fail to be paid, perhaps a just debt, and yet both may be creditors of the same class.

No one has ever doubted the right of the Legislature to say that, to be valid, a nuncupative will must be made during the last illness of the testator, or on the day of his

death. Yet such provisions necessarily result in some attempted oral directions as to the disposition of personal property being regarded as valid and others as void, although differing only in point of time when made. In such cases also the contingency upon which the difference depends is death, and, like that resulting in the instances supposed by the brief of *amicus curiæ*, the happening of the event is entirely beyond the control of the testator.

[6-8] Section 1313 of the Civil Code permits charities other than those named in section 1275, Civil Code, to receive bequests. At the same time it has provided such restrictions as the Legislature considered proper upon the charitable corporations or societies affected receiving gifts. This is a matter wholly within its province. *Bennalack v. Richards*, 116 Cal. 405, 48 Pac. 622; *Estate of Comassi*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414. Nor is this an instance where the Legislature has enacted a regulation without conceivable reason and in derogation of substantial rights. The right of testamentary disposition is not one granted by the Constitution, but rests in the legislative will. *Estate of Walker*, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104. It is plain that the purpose of section 1313 of the Civil Code was to safeguard those who might naturally become the objects of a testator's bounty from inadvertence or undue zeal upon his part for a charity. This is a reason consistent with the policy of the trend of statutory enactments in this state and elsewhere. Courts may not consider the wisdom of this or any measure within the jurisdiction of the Legislature to enact. We perceive no valid ground for questioning its constitutionality.

The judgment is affirmed.

We concur: FINLAYSON, P. J., WORKS, J.

(63 Cal. App. 108)

PACIFIC FEED CO. v. KENNEL.
(Civ. 4335.)

(District Court of Appeal, First District, Division 2, California. July 23, 1923.)

1. Sales ⇨441(3)—Finding that seller delivered pulp inferior to that agreed on and that it injured cattle held supported by evidence.

Finding that seller agreed to deliver beet pulp of good quality and in good condition, but that the buyer received pulp of an inferior quality and unfit for feeding purposes, and that injury and death of cattle were due thereto, held supported by the evidence.

2. Sales ⇨261(6)—Representation that beet pulp was "number 1" and "first class" meant it was of good quality.

Representation by seller of beet pulp that it was "number 1" and "first class" was representation that it was of good quality and in good condition, and was not of inferior quality, damaged, off grade, in bad condition, injurious, unsafe, or unfit for feeding purposes.

[Ed. Note.—For other definitions, see Words and Phrases, First Class.]

3. Sales ⇨260—Knowledge of truth or falsity of seller making representation immaterial.

A seller, representing that beet pulp was of good quality, must make good his representation, irrespective of his knowledge of the truth or falsity of his statement.

4. Witnesses ⇨271(1)—Witness having no relation to writing cannot be cross-examined regarding its contents.

A witness, being neither the author of nor having produced a paper purporting to be a chemical analysis, and having no relation thereto, cannot be cross-examined regarding its contents.

5. Sales ⇨440(3) — Tags showing chemical elements of pulp not admissible in evidence, when no issue supported thereby.

Tags on each bag of pulp sold and used for feeding purposes, showing the quantity of the several chemical elements as required by statute, are not admissible in evidence, where the issue is whether it contained harmful ingredients, when the tags do not show the absence of other elements deleterious to animal life, and when no issue involves the question of the chemical elements.

6. Evidence ⇨137—That seller told others that beet pulp was off grade admissible on question of knowledge.

Where plaintiff, suing for price of beet pulp, denied knowledge that it was unfit for feeding purposes, evidence that persons from whom he purchased were told the pulp was off grade was properly admitted, though perhaps subject to motion to strike, if not connected.

7. Trial ⇨90—Evidence admitted over objection when no motion made to strike held not error.

Where testimony as to transaction between third persons was properly admitted over objection, but on completion of the testimony it was not connected, but no motion to strike was made, there was no error.

8. Trial ⇨66—Showing of due diligence necessary to reopen case for further evidence.

A showing of due diligence must be made to reopen a case for the purpose of offering further testimony of a witness who has testified.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Pacific Feed Company against Mrs. Joseph Kennel. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

I. M. Peckham, of San Francisco, for appellant.

John D. Willard, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff sued the defendant to recover a judgment for the purchase price of beet pulp sold and delivered. Judgment was awarded the defendant, and the plaintiff has appealed.

The plaintiff's complaint alleged that the plaintiff "sold and delivered to defendant goods, wares, and merchandise," etc. In her answer the defendant pleaded as follows:

"Admits that on the 15th day of December, 1920, defendant ordered from plaintiff three hundred (300) sacks of beet pulp at the agreed price of forty and ⁵⁰/₁₀₀ (\$40.50) dollars per ton, but denies that the beet pulp delivered by plaintiff to the defendant was the same as ordered by defendant; that the beet pulp delivered to her was damaged and of an inferior quality and unfit for use. Defendant further avers that on the said 15th day of December, 1920, said plaintiff agreed to furnish and supply defendant from the Salinas Mills beet pulp of good quality, in good condition and fit for use; that on the contrary plaintiff delivered to defendant, not from the Salinas Mills, but from a firm in South San Francisco, who had sold the same to plaintiff as damaged pulp, an inferior quality, and unfit and unsafe to be fed to cows; that some of said pulp was fed by defendant to her cows, and seventeen (17) of them became sick, and four (4) of which number died. Denies that the defendant purchased or agreed to purchase from the plaintiff the beet pulp described and set forth in plaintiff's complaint herein, and delivered by plaintiff to defendant."

The defendant also pleaded a counterclaim, in which she alleged the same defective and bad condition of the beet pulp, her injuries by reason of the use thereof, and asked damages in the sum of \$2,000. The trial court made findings which included, among others, paragraph 2, which is as follows:

"(2) That on or about the 15th day of December, 1920, at Visitation, in the county of San Mateo, state of California, plaintiff agreed to sell and deliver to the defendant at her place of business at Visitation, in the county of San Mateo, state of California, three hundred (300) sacks of beet pulp from the Salinas Mills of good quality and in good condition, at

the agreed price of forty and $\frac{50}{100}$ (\$40.50) dollars per ton; that thereafter, and on or about said last-mentioned date, said plaintiff delivered to said defendant at her place of business three hundred (300) sacks of beet pulp, weighing 37,500 pounds, as alleged in said plaintiff's complaint; that the beet pulp so delivered by plaintiff to defendant was not, and is not, the kind or quality ordered by defendant or of the quality or kind which plaintiff agreed to sell and deliver to defendant; that it was, and is, of an inferior and different quality, was damaged, and was not from, nor the product of, the Salinas Mills; that the same was off grade, in bad condition, injurious, unsafe and unfit to be fed to defendant's cows, or to be used for feeding purposes."

[1] In its brief the appellant attacks said finding as not being supported by the evidence. Points 1, 2, 3, 4, 5, and 7 attack the findings, one phrase or clause at a time. We think that no one of the points is well founded. Mrs. Kennel testified that she made the purchase by talking over the telephone to Mr. Code, an agent of the plaintiff. She said that she generally used the best beet pulp she could buy for milk cows; that she generally used beet pulp from the Larrowe beet pulp factory, which has a place at Salinas and one at Los Angeles. Code told her that the beet pulp in question was from the Salinas factory and was number 1 quality. At another place in her testimony she testified that when she bought this beet pulp she bought it for first-class pulp; that Code told her that over the phone. In contradiction of Mrs. Kennel, the plaintiff called Mr. Code to the stand. On his direct examination he testified:

"I rang her up on the telephone and said I had a car of beet pulp that I could deliver down there—I think it was \$41.50 or \$40.50; I forget just what it was—in molasses. She said, 'It is all right; send it along.' I said, 'It came from Salinas.' I know now that it did not. Q. Was there anything said about the quality or grade of the beet pulp? A. Well, there is no quality on that. It is either plain or it is in molasses. * * * Mr. Riley stated it was the salvage pulp from the fire in Salinas. Q. That is the only conversation you had with Mr. Riley, what you have related here? A. You see, you specify beet pulp as beet pulp. It is either plain or in molasses. You cannot state as to the quality. There is no quality to it. It is either one thing or the other. Q. But it can be good or bad, can't it? A. Yes, sir; sure. Q. And you know, if it went through the fire, the chemicals would affect it? A. Not according to the analysis. Q. Do you know whether or not this was beet pulp that was rescued from the fire? A. That I did not know."

[2] In the first place, it will be noted that Mr. Code does not directly contradict Mrs. Kennel. Instead of stating the words she used and the words he used, he lapses into a generalization regarding trade descriptions of beet pulp. Mrs. Kennel testified that Code

had represented the beet pulp as "number 1" and as "first class." Those expressions are synonymous with, and include, "good quality" and "good condition." Roget's Thesaurus, par. 648. Those same expressions negative "inferior quality," "damaged," "off grade," "bad condition," "injurious," and "unsafe," and "unfit for feeding purposes." Roget's Thesaurus, par. 649. The defendant fed beet pulp to her cows, both before and after feeding the carload which is the subject-matter of this suit, and in so doing she had no trouble about the cows getting sick. Mr. Allen, a witness called by the plaintiff, on cross-examination stated:

"I have been in the stock business since I was a little child, and I have fed all kinds of feed, and I have never found beet pulp injurious to any animal, if fed in moderation."

Almost immediately after the carload was received from the plaintiff, the servants of the defendant commenced to feed the same to the defendant's cows, and almost immediately thereafter the cows commenced to sicken. Seventeen in all became sick, their udders commenced to swell, and during the period of the sickness many of the cows dried up and had to be replaced. Four of the cows, of the reasonable value of \$125, did not recover from the sickness, but died. The defendant continued to feed the beet pulp purchased from the plaintiff for a period of 8 or 10 days; then that beet pulp was not fed any more. On the other hand, the defendant purchased from another party a different lot of beet pulp, and proceeded to feed to the cows the same classes of feeds in the same quantity at the same time and in the same manner ordinarily followed by her. Immediately the sick cows commenced to recover, and no other cows sickened or died, and the defendant had no further trouble.

[3] In the meantime the defendant notified the plaintiff of the troubles she was encountering, and advised the plaintiff that the rest of the beet pulp was at her place, subject to the order of the plaintiff. At the time of the trial the defendant testified that the remaining portion of the carload was still in her shed, and was still subject to the order of the plaintiff. Under these circumstances we think it is immaterial whether the carload of pulp came from the Salinas Mills, or did not come from those mills, and that the finding on that subject is immaterial. Furthermore, that the findings "that the pulp delivered is of inferior quality and damaged," "that the pulp delivered was in bad condition, injurious, unsafe, and unfit to be used for feed for cows," are sustained by the evidence which we have delineated. It may be that the finding "that plaintiff well knew the pulp delivered was damaged and unfit to be fed and used by cows or cattle" was not supported by the evidence. But, as we have recited

above, there was testimony that the plaintiff's agent represented the beet pulp as number one. The plaintiff was bound to make good the representation. It is immaterial that the warranter did not know whether his statement was true or false. 35 Cyc. 378. The finding "that the injury and death of defendant's cattle was from eating and feeding on the pulp" is supported by the evidence which we have recited above.

[4] During the trial the plaintiff produced a paper purporting to be a chemical analysis of the pulp. The individual who signed the paper did not appear as a witness. The plaintiff complains because the trial court did not permit the plaintiff to cross-examine Mr. Riley on the contents of that paper. He was not the author of it, had not produced it, and bore no relation to it. The ruling was clearly correct.

[5] Pursuant to a state statute, each bag of pulp had attached to it a tag showing that the pulp contained in the bag was composed of a certain quantity of each of several chemical elements. The plaintiff sought to introduce the tags in evidence. An objection was sustained. The ruling was correct; the evidence was clearly immaterial. No issue in the case involved the question whether the pulp contained those elements, and the tags did not even purport to show that the pulp did not contain certain other elements which would be deleterious to animal life.

[6, 7] The plaintiff presented the whole case as though it was wholly uninformed regarding any fact which would tend to put the plaintiff on notice that the pulp might not be fit to feed to dairy cows. Mr. Riley, acting for a former owner of the pulp, had sold it to Allen & Pyle, from whom the plaintiff purchased it. The defendant called him as a witness, and asked him if he had informed Allen & Pyle that the pulp was off grade. The plaintiff objected; the objection was overruled. The ruling in itself was not erroneous. However, it may be that the testimony was not connected, and that a motion to strike out should have been granted; but no such motion was made.

[8] As we have shown above, Mr. Riley was in court as a witness, and was examined to some extent by the plaintiff and by the defendant. After the case had been tried and submitted, the plaintiff learned that Mr. Riley had some information which the plaintiff desired to introduce in evidence. The plaintiff thereafter made a motion to reopen the case for the purpose of calling Mr. Riley as a witness. The motion was denied. The court did not err in denying the motion. The plaintiff had made no showing of due diligence.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

63 Cal. App. 24

DAY v. LAUGHLIN et al. (Civ. 4040.)

(District Court of Appeal, Second District, Division 2, California. July 16, 1923.)

1. Brokers ⇨37 — Evidence held to sustain finding as to inability of principal represented by confidential agent to act for himself.

In an action to recover profits made by a confidential agent, evidence held to sustain a finding that plaintiff, at the time of entering into the transaction and continuously for more than 10 years past, had been afflicted with palsy, which disease, together with old age, had rendered him incapable of attending to his business or managing his property.

2. Brokers ⇨8(3)—Evidence held to sustain finding as to existence of agency.

In an action to recover profits made by a confidential agent out of a real estate transaction, evidence held to sustain a finding that defendant at the time of transaction was the general agent and trusted confidential adviser of plaintiff in all matters pertaining to plaintiff's property and business affairs.

3. Brokers ⇨8(3)—Evidence held to sustain finding that defendant negotiating sale of land, acted for plaintiff and not for himself under an option to purchase.

In an action to recover secret profits made by a confidential agent in a real estate transaction, evidence held to sustain a finding that defendant was agent for plaintiff and not a purchaser under his option.

4. Brokers ⇨37 — Letters written by agent held admissible to show confidential nature of agency, though written after transaction complained of.

In an action to recover secret profits made by a confidential agent in negotiating a sale of real property, the admission in evidence of letters written by the agent after the date of the transaction involved, as tending to establish the confidence reposed in defendant by plaintiff at the time of the transaction, held proper.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Alfred Day against William T. Laughlin, Deane Laughlin, and others. Judgment for plaintiff, and the named defendants appeal. Affirmed.

A. B. Bigler, of Santa Maria, for appellants.
F. J. Feeney, of Santa Maria, and E. W. Squier, of Santa Barbara, for respondent.

WORKS, J. The evidence showed without dispute that plaintiff gave to defendant William T. Laughlin an option to purchase certain real property for a consideration of \$10,000, deed to be made to Laughlin or to such person as he might designate, and that Laughlin sold the property to defendant Filippini for \$21,612, paid to plaintiff \$10,000, and kept the excess. The action was instituted to recover the amount retained by Laughlin, upon the theory that he was the

confidential agent and adviser of plaintiff, and plaintiff's special agent for the sale upon commission of the property described in the option. Deane Laughlin was made a party defendant, for the reason that William T. Laughlin, his relative, had conveyed to him a part of the avails of the transaction with Filipponi. The latter was made a defendant because, at the time the complaint was filed, he had not paid the entire consideration for the purchase of the land. He later paid into court the amount yet due, and was not an active party to the litigation. Judgment went for plaintiff, and the defendants William T. and Deane Laughlin appeal. It will be understood henceforth that all references to the appellant in the singular contemplate appellant William T. Laughlin.

With two exceptions, the point made by appellants are that certain findings of the trial court are not supported by the evidence. These findings, however, are so amply sustained by the record that we shall not be at pains to refer at great length to the facts developed at the trial. The evidence quoted in the briefs, a large part of it uncontradicted, and much of it coming from the lips of appellant and from letters written by him, shows that the judgment is eminently equitable and just. From the record presented we cannot doubt that appellant was guilty of a shameful and heartless breach of the confidence which respondent had reposed in him.

[1] It is first contended that the evidence does not support a finding that "continuously for more than 10 years last past the plaintiff * * * has been and still is afflicted with palsy, and on and continuously for several years preceding" the date of the option, "by reason of said disease and old age, and greatly enfeebled physically and mentally and by reason thereof, incapable of attending to his business or of managing his property." There was testimony that respondent had been palsied for 15 years, that he had been in poor health for that length of time, that "for a good many years" he had been unable to attend to his business and had attended to none of it, and that he got about at all with great difficulty. The trial judge, of course, had an opportunity to observe respondent's age and physical and mental condition. While the latter was on the witness stand he was questioned thus by the judge:

"Q. How long have you been that way? A. I have been that way for 10 years, easily. Q. As bad as you are now? A. As bad as I am now. Q. Are you not able to sit quietly at all? A. No."

We ourselves are able to determine, from some of respondent's answers on the witness stand, that he was not at the time mentally alert.

[2] Another contention of appellants is that the evidence is insufficient to sustain a

finding that, at the time of the giving of the option, for more than one year prior thereto, and until several months after the consummation of the sale to Filipponi, appellant was the "general agent and trusted confidential adviser of the plaintiff in all matters pertaining to plaintiff's property and business affairs." There is testimony in the record that when the option was given appellant was engaged to be married to respondent's daughter; that he had for some time visited the Day home three times a week, sometimes every day, and that he frequently took meals at respondent's family table; that he sometimes collected rents for respondent; that he advised respondent "as to the value of different pieces [of property] that he had, * * * and told him which he thought would in time bring him the best income, and which would give him the best results for his money"; and that he twice went to Winnemucca, Nev., on the business of respondent. The record also shows a considerable number of letters written by appellant, signed by him in his own name, and all relating to the business of respondent.

[3] It is also claimed that the evidence fails to sustain a finding that appellant was the agent of respondent for the sale of the property described in the option. There was evidence to show that appellant asked respondent to give him the first chance at the land if he determined to sell; that there followed a conversation between them as to how much appellant could get for the land; that appellant advised respondent to sell; that respondent first offered appellant a 5 per cent. commission for making a sale, but appellant said, "No; he did not want to take it on a commission basis; he did not like to do things that way; he would rather get the commission above the sum" respondent would get; that, in a discussion as to price, appellant said he could not sell the property at \$20,000, nor at \$15,000, but that he thought he could sell at \$10,000, and that he would try to sell it for that figure. Respondent's daughter, appellant's fiancée, testified:

"He said he couldn't sell this piece of land for him unless he gave him this option, because he said, 'If I go to a man and ask him if he will buy this certain piece of land, and tell him Mr. Day wants to sell it, he will say, 'What authority have you to sell it for him?' and if I say I have an option on it he will know the contract will be binding.'"

The option was signed a few days later.

Other findings are objected to as being unsupported by the evidence, but either the contentions of respondent as to those findings are disposed of by what we have already said or they find upon immaterial matters.

Appellants contend that the pleadings present no issue as to the mental and physical condition of respondent. This claim is made because of the trial court's finding in that re-

gard. An examination of the pleadings discloses that such an issue was sufficiently presented. Even if there were no such issue, however, the merits of the appeal would not be affected by the fact. Respondent was entitled to judgment upon the evidence and the findings of the trial court as to appellant's flagrant breach of his duty as the agent of respondent, entirely aside from any question as to the latter's age or condition of health.

[4] It is insisted that the trial court erred in receiving in evidence certain letters written by respondent. These were offered for the purpose of showing the relation of trust and confidence existing between respondent and appellant up to the time when the former discovered the fraud which had been practiced upon him, which was 8 or 9 months after the sale to Filipponi; the earliest of the letters having been written some time after the granting of the option. The contention of appellants is that letters written after that event are immaterial. The point is without merit. The letters all related to the business of respondent. One of them, evidently written to a tenant of respondent, may be taken as a sample. It runs:

"In re our conversation of yesterday. I again took up the matter of a doorway in the place you now occupy, with Mr. Day. After careful consideration of your request, we deem it necessary that permission be refused you to make the change."

Letters such as this, even if they were written after the date of the option, were properly admitted as in some degree showing the confidence reposed in appellant by respondent at the time the paper was executed. *Ward v. Andrews*, 44 Cal. App. 390, 186 Pac. 605. It is to be remembered that appellant was affianced to Miss Day during a continuous period running from before the date of the option to about the time of the discovery of the fraud which appellant had practiced upon her father. The actions of the parties during that entire period would surely indicate their state of mind toward each other at the time the option was granted. The trial court did not err in admitting the letters in evidence.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(63 Cal. App. 172)

GOULD v. GOULD. (Civ. 4172.)

(District Court of Appeal, Second District, Division 1, California. July 24, 1923.)

1. Appeal and error — 1010(1) — Findings supported by substantial evidence not disturbed.

Where findings are supported by evidence of a substantial character, the appellate court

will not reverse the judgment merely because there is other evidence which, if true, would have sustained a different finding of the facts.

2. Divorce — 116 — Evidence under cross-complaint as to cruelty by wife to husband's daughters properly stricken where not known to husband until five or six years afterwards.

In a wife's action for divorce, wherein the husband filed a cross-complaint alleging extreme cruelty, it was not error to strike out evidence as to mistreatment of defendant's daughters by plaintiff, where the incidents, if they occurred, were not known to defendant until five or six years after they occurred.

3. Divorce — 252 — Award to plaintiff of 70 per cent. of community property held not abuse of discretion.

An award of 70 per cent. of the community property to the wife in her suit on the ground of adultery and extreme cruelty, was not beyond the reasonable discretion of the court since Civ. Code, § 146, provides that where divorce is granted for adultery or extreme cruelty, the community property shall be assigned to the respective parties as the court, from the facts and the condition of the parties, may deem just.

4. Divorce — 253 — Finding that certain buildings were community property held supported by evidence.

In a wife's action against her husband for divorce, a finding that certain houses constituting community property were paid for with funds earned by the parties after marriage rather than out of secreted funds kept by the husband as testified by him, held supported by the evidence.

Appeal from Superior Court, Los Angeles County; John W. Summerfield, Judge.

Action by Eleanor A. Gould against Charles T. Gould for divorce with cross-complaint by defendant. From an interlocutory decree for plaintiff, defendant appeals. Affirmed.

Emmet H. Wilson, of Los Angeles, for appellant.

James P. Clark, of Los Angeles, for respondent.

CONREY, P. J. Appeal by defendant from an interlocutory decree entered in favor of the plaintiff. In her complaint plaintiff set out a cause of action for divorce on account of extreme cruelty of defendant towards her, and also as a separate cause of action made certain charges of adultery, which she alleged had been committed by the defendant. The defendant, in addition to his answer denying the various charges made against him in the complaint, filed a cross-complaint, whereby he demanded a divorce from the plaintiff on account of sundry acts of extreme cruelty of plaintiff towards him. By her answer the plaintiff denied the charges made against her in the cross-complaint.

Under his specification of insufficiency of the evidence to sustain the findings of fact, appellant has covered the principal findings relating to the charges of extreme cruelty set forth in plaintiff's complaint, and also those relating to the charges of adultery. Counsel for appellant concedes that the plaintiff gave testimony in support of substantially all of her allegations of extreme cruelty, and that the plaintiff's son (15 years old) testified in support of some of those allegations. We have examined this evidence. The corroboration given by the testimony of the plaintiff's son includes many facts which tend to establish the charge that defendant was guilty of extreme cruelty, as that offense is defined by law. There is other corroborative testimony besides that of those two witnesses.

It is not necessary to discuss appellant's claim that there is no evidence whatever to sustain the charges of adultery. All of the relief granted by the decree has a sufficient foundation in the facts authorizing a divorce on the ground of extreme cruelty.

[1] Appellant next contends that the evidence is insufficient to sustain the findings which (omitting the details) determine that the charges of extreme cruelty of the plaintiff toward the defendant, alleged in the cross-complaint, are untrue. Cross-complainant did give testimony which, if uncontradicted and duly corroborated, would sustain the allegations of the cross-complaint. Certain corroborative testimony was given by a daughter of cross-complainant and by some other witnesses. On the other hand, the accusations made by cross-complainant against his wife were denied by her, and were opposed by other evidence. There was also very positive testimony given by a former employer of appellant impeaching the reputation of appellant for integrity and veracity. The case is thus brought completely within the common rule that where findings are supported by evidence of a substantial character, this court will not reverse the judgment merely because there is other evidence which, if true, would have sustained a different finding of the facts.

[2] Appellant contends that the court erred in striking out parts of the testimony of three witnesses "bearing upon the character of the plaintiff, and upon her attitude toward the defendant and his daughter." Principally, these rulings related to incidents of alleged mistreatment of these daughters by the plaintiff, which, if they occurred, were not known to cross-complainant until five or six years after they occurred. We cannot see that any prejudicial error occurred in striking out that evidence.

[3] The court, in the interlocutory decree, made a statement of the character and value of the community property of the parties, and awarded to the plaintiff 70 per cent.

thereof. Appellant claims that the court was not justified in awarding that proportion of the community property to the plaintiff. Where a divorce is granted on the ground of adultery or extreme cruelty it is provided by section 146 of the Civil Code that "the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just." We are satisfied that the division of the community property, as provided in said decree, was made in the exercise of a reasonable discretion by the court. *Pereira v. Pereira*, 156 Cal. 7, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; *Meyer v. Meyer*, 184 Cal. 687, 195 Pac. 387.

[4] Finally, appellant contends that the evidence does not sustain the findings of the court as to the community property in this, that the court erred in determining that three houses which, after the marriage of plaintiff and defendant, were built upon a lot belonging to the defendant, and which are together worth the sum of \$4,000, are community property. In this instance, as in others to which we have referred, appellant makes the mistake of insisting that findings are not sustained by the evidence, whereas the record contains evidence abundantly supporting the findings, although there is also abundant evidence which, if the court had believed it, would have sustained a contrary finding. Thus we have here testimony of appellant that he paid for these houses with money which he had at the time of his marriage, and which he had kept in a safe deposit box. On cross-examination he said that he paid for them partly by cash and partly by check; that he had several banks where he kept money. He did not remember which bank he put that money in. On the other hand, plaintiff testified that the money paid for the construction of these houses was earned between the time of the marriage and the time of the construction of the houses. "I don't know exactly what the defendant was making; he spoke of banking not less than \$100 a month—sometimes more." The defendant was a baker. The plaintiff not only kept house, but assisted in earning money. She kept a large number of rabbits and chickens, from which she made some money. The plaintiff further testified that the defendant at the time of their marriage told her that he did not have considerable money on hand, and that they limited the extent of their wedding trip because "he said he didn't have money enough ahead." At the time the houses were constructed plaintiff and appellant were living next door to the lot upon which they were built. We think that the court was well warranted in believing that these houses were paid for with funds earned after the

marriage, rather than out of secreted funds kept by the defendant as testified by him.

The decree is affirmed.

We concur: HOUSER, J.; CURTIS, J.

63 Cal. App. 134

DERR v. BUSICK, Judge of Superior Court.
(Civ. 2658.)

(District Court of Appeal, Third District,
California. July 23, 1923.)

1. Appeal and error ☞985—Exceptions, bill of ☞51—Trial judge has wide discretion in settling bill reviewable only for abuse.

The trial judge has a wide discretion as to settling bills of exception, and it is only when such discretion clearly appears to have been abused that the higher court will intervene.

2. Mandamus ☞16(1)—Writ will be refused if no wrong can be remedied or right enforced thereby.

The issuance of a writ of mandate being not altogether a matter of right, but involving the consideration of its effect in promoting justice, if it should affirmatively appear that it would be an idle thing to issue it, that thereby no wrong could possibly be remedied, or no right could possibly be enforced, or promoted, the writ will be refused.

3. Exceptions, bill of ☞53(7)—Evidence as to duty of trial judge to settle bill held insufficient to justify issuance of writ of mandate.

On application for a writ of mandate to compel a trial judge to settle a bill of exceptions, evidence as to the showing made before the judge *held* not so clearly to show his duty to settle the bill as to justify the issuance of the writ.

4. Exceptions, bill of ☞53(5)—Writ of mandate to compel settlement of bill denied for unexcused delay of three months after refusal to settle bill.

Where more than three months had elapsed after the refusal of the trial judge to settle a bill of exceptions before application for a writ of mandate to compel him to do so was made, and no excuse was offered for the delay, the writ will be denied.

Application by John O. Derr for a writ of mandate to be directed to C. O. Busick, as Judge of the Superior Court of the State of California in and for the County of Sacramento, to require the settlement of a bill of exceptions. Writ denied.

F. W. Sawyer, of San Francisco, and A. H. Carpenter and B. M. Bainbridge, both of Stockton, for petitioner.

B. F. Driver, of Sacramento, for respondent.

BURNETT, J. An application was made to the Supreme Court for a writ of mandate

commanding respondent, as judge of the superior court of Sacramento county—

"to settle and certify the bill of exceptions in the said case of John O. Derr, plaintiff, v. Charles F. Silva, defendant, tried in the superior court and now pending on appeal in this court, or that said judge show cause before this honorable court on a day to be fixed therefor, why he has not settled and certified said bill of exceptions as by law provided."

An alternative writ was issued by the Supreme Court and made returnable before this court, and upon the day set for hearing respondent appeared and filed a demurrer and an answer. The demurrer was overruled and evidence was received upon the issues made by the pleadings, and the matter has been submitted for decision. Many of the material allegations of the petition were denied by respondent either positively or upon information and belief. Upon some of the issues, it may be said, that the evidence submitted herein is conflicting, and upon others the petitioner has failed to sustain his position. It will not be necessary to notice these in detail, but we may say that the allegations, which might imply that the judge acted arbitrarily, were not only not proven, but were shown to be untrue. As an example, we may mention this averment:

"That the defendant judge admitted at the time he refused to settle the bill as aforesaid, that the said proposed bill of exceptions had been on his desk in his chambers, from the time of its delivery to him by the clerk in March, 1922, until the time of such hearing, and that he had caused no notice of the settlement thereof to be given by the clerk, until shortly before his said refusal to settle the bill as hereinbefore averred."

To the contrary, the judge testified:

"I never knew there was a bill of exceptions until Mr. Gallup (a deputy county clerk) came up with a letter in his hand, and said he had received a letter from somebody who wanted to have settled the bill of exceptions, and he asked me if I had it, so we looked, and the bill of exceptions was lying on the desk. It was about a week before the date fixed for the settlement. At that time we fixed the date on which I would hear the application to settle the bill of exceptions."

In reply to the question "Why was this matter not heard until that date?" he replied: "Because there was never any application so far as I know from any of the attorneys. That was the first I ever heard of it. I say that is as far as I know why. If there was ever any other reason, I never heard of it." We may add that there is no evidence before us tending to discredit the foregoing statements.

The reasons assigned by respondent in his answer herein for declining to settle the said proposed bill of exceptions are as follows:

"The proposed bill of exceptions had not been delivered to defendant as such judge or to the clerk of the superior court of the state of California, in and for the county of Sacramento, within the time allowed by law, and on the ground that the amendments of defendant Silva in said case were never delivered to the clerk of said court or to said judge, and on the ground that proper notice of said hearing had not been given to defendant or his counsel in said case of *Derr v. Silva*; and on the further ground that plaintiff Derr in said case had been dilatory and negligent in not causing said proposed bill of exceptions to be presented to the court for allowance; and on the ground that for a period of 10 months after delivering said bill of exceptions to the clerk, plaintiff Derr in said case had neglected to call the attention of the court to said proposed bill of exceptions, and had failed for said length of time to cause the settlement of said proposed bill of exceptions to be set down for hearing."

As to the first of these, respondent's position cannot be maintained. It is based upon the theory that the service of the proposed bill and amendments, as required by section 650 of the Code of Civil Procedure, if made at all, was one day too late. The tenth day, however, fell upon Sunday, a legal holiday, and the law is that in such cases service upon the following day satisfies the requirement of the statute. Section 12, Code Civ. Proc.; *Frassi v. McDonald*, 122 Cal. 400, 55 Pac. 139, 772; *Lancel v. Postlethwaite*, 172 Cal. 326, 156 Pac. 486.

It appears that the proposed bill of exceptions was received by the clerk through the mail for the judge on Monday, March 20, 1922, which, as stated, was within 11 days of the service of the proposed amendments and was therefore in time. Whether the proposed amendments were sent with the proposed bill according to the requirement of the statute and were received by the clerk is somewhat in doubt, but the question is not decisive, and we shall consider it no further.

It is apparent that appellant was dilatory and negligent in failing for such length of time to call the attention of the trial judge to the bill and to request that a time be fixed for its settlement. It is true that he made some inquiry at the clerk's office, but he is uncertain as to the time, and he took no really definite step toward bringing the matter to a hearing until he sent J. D. MacGaughey from Stockton to Sacramento to investigate the situation. He testified:

"I went to the county clerk's office and stated my purpose in coming; that Mr. Derr told me he had sent up the bill of exceptions, and that it had been here for some time and he had heard nothing from it, and for me to get it and take it to Judge Busick, who was the judge in the case. I went inside and a deputy clerk got me the filing docket and we looked it over very carefully and we could find no trace of any such paper having been received in the office, so I asked him to get me the files and we looked those over carefully. We spread

them out on the desk but there was no such paper on file. I went to Judge Busick's chambers. He said Judge Busick may have them. I told him Mr. Derr said he had sent them a long time ago. So I went to Judge Busick's court room, and I went to his chambers and they were closed, and I spoke to a man coming out of one of the other departments—I think it was the bailiff—and he told me Judge Busick was away and would not be in court during the day. I think he said he was out of town. This was the 25th or 26th of November, 1922."

It is to be observed that this was more than eight months after the proposed bill was sent to the clerk's office, and nothing further in the premises seems to have been done until the judge, finding it on his desk, as before stated, set the hearing for February 12, 1923, which was by consent changed to January 30, 1923. Moreover, the judge did not have in his possession, and never saw, the proposed amendments to the bill of exceptions, and no evidence was offered before this court to show that any effort was made to supply him with it or a copy thereof. The duty of appellant to see that the proposed amendments were brought to the attention of the judge was as imperative as that relating to the proposed bill. If without negligence on the part of appellant, the draft of these amendments had been lost and an effort was made to supply a copy, the situation might be different. But no such showing has been made here, and in view of the unexplained and unexcused failure of appellant to bring such proposed amendments to the attention of the trial judge, we could hardly be expected to command him to proceed with the settlement of the bill.

It is to be remembered, of course, that in these matters the appellant is the actor, that the duty is upon him to follow up the proceedings with diligence in order that there may be a speedy hearing of the case upon its merits.

In *Miller v. Queen Ins. Co.*, 2 Cal. App. 267, 83 Pac. 287, it is said:

"The defendant was the moving party in the proceeding for a new trial, and the burden was at all times upon it to take whatever steps were necessary to enable the court to hear its motion. * * * Its contention that, after delivering the proposed bill and amendments to the clerk for the judge, it was not required to take any further steps toward procuring its settlement until it should receive notice that the judge had fixed a day therefor, is without support. It was its duty to ascertain when the judge should return to the city, and to obtain from him an order fixing a day for the settlement of the bill."

In *Re Depeaux's Estate*, 118 Cal. 522, 50 Pac. 682, it is said:

"By the rules of this court an appellant is allowed 40 days within which to file the transcript on appeal after the appeal is perfected, and the bill of exceptions, if there be one, is settled. A neglect upon the part of the appel-

lant for the period of time to take such steps as are within his power and incumbent upon him to take for the purpose of securing the settlement of the bill is equivalent to his failure to file the transcript within the time limited."

In *Dorcy v. Brodis*, 153 Cal. 673, 96 Pac. 278, it was held that a delay of four months in presenting a statement and amendments for settlement justified the trial court in dismissing the motion for a new trial on account of the inexcusable inactivity in reference to the settlement of the bill. Other decisions to the same effect need not be cited.

[1] In matters of this kind the trial judge has a wide discretion, and it is only when that discretion clearly appears to have been abused that a higher court will intervene. After a delay of 10 months in bringing the proceedings to an end, with no more persuasive palliative circumstance existing than herein disclosed, we would be entirely unwarranted in holding that the trial judge abused his privilege.

[2] Moreover, the issuance of the writ of mandate is not altogether a matter of right, but it involves the consideration of its effect in promoting justice. If it should affirmatively appear that it would be an idle thing to issue it, that thereby no wrong could possibly be remedied, or no right could possibly be enforced or promoted, the court would naturally refuse to issue the writ because it would answer no legitimate purpose in the scheme of the law. For instance, if the proposed bill had been submitted to the court and an inspection of it demonstrated beyond peradventure that it did not possess even the semblance of a bill of exceptions, or utterly failed to exhibit any error on the part of the trial court, it would be our duty to decline to encourage any further trouble and expense in litigation that could not possibly result in advantage to appellant.

But the Supreme Court has gone further and imposed upon appellant the duty of presenting to the court to which the application is made the proposed bill in order that it may determine whether there is at least a disputable question of error. It was so held even in a murder case in *People v. Kahl*, 18 Cal. 433, wherein it was said by Chief Justice Field:

"But in all such cases it must appear that there are reasonable grounds for the appeal taken, and that it is not intended merely for delay. The papers presented to us on the

present application do not contain a copy of the statement proposed, and we cannot, without its inspection, determine whether any errors in the action of the court below are alleged, which are entitled to any consideration whatever."

See, also, *People v. Dickson*, 46 Cal. 53; *Pacific Land Association v. Hunt*, 105 Cal. 202, 38 Pac. 635, and *Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540. In the last of these, authorities are cited to the effect that "a mere abstract right, unattended by any substantial benefit to the relator, will not be enforced by mandamus," and the court approved of this principle as applied in *People v. Kahl* and *People v. Dickson*. Herein we are entirely at a loss as to the contents of said proposed bill of exceptions, as it has not been brought to our attention at all.

[3] Again, in order to justify the issuance of the writ, it must appear to the court that it was clearly the duty of the trial judge to settle the bill, but we cannot so determine without knowing what evidence was submitted to him at the hearing. Petitioner did not offer any evidence of what showing was made before the judge further than to state:

"Among the various things done was subpoenaing of the county clerk to bring in his books. After having asked the county clerk a number of questions in regard to these certain documents that were presumed to have been filed with him or sent to him and presumed to be filed, my attorney then asked the judge's permission to ask him a question, which he granted. He asked him how long he had the documents in his possession. Well, he didn't know; well, for some time; yes, for some time, some considerable length of time perhaps."

Manifestly, such showing is utterly insufficient to justify the issuance of the writ.

[4] Again, more than three months elapsed after the refusal of the judge to settle the bill before this application was made. No excuse was offered herein for the delay, and the courts look with disfavor upon such lack of diligence. *Depeaux's Estate*, 118 Cal. 522, 50 Pac. 682; *McConoughey v. Torrence*, 124 Cal. 330, 57 Pac. 81. If any reason existed why the action of the reviewing court was not invoked sooner, it should have been revealed herein.

For the foregoing reasons the peremptory writ is denied, and the proceeding dismissed.

We concur: FINCH, P. J.; HART, J.

63 Cal. App. 343

**ATWOOD v. SOUTHERN CALIFORNIA
ICE CO. (Civ. 4059.)**

(District Court of Appeal, Second District,
Division 2, California. Aug. 1, 1923. Hear-
ing Denied by Supreme Court Sept. 1923.)

**1. Trover and conversion ⇨9(3)—Where de-
fendant's possession not tortious, demand and
refusal necessary to maintain conversion.**

Where defendant's possession is not tor-
tious, a demand by plaintiff and refusal by de-
fendant are necessary to maintain conversion.

**2. Trover and conversion ⇨40(5)—Finding
that plaintiff made demand sustained by the
evidence.**

Finding that plaintiff made demand for his
property before commencing suit for conversion
held sustained by the evidence, even though
made orally and without formality.

**3. Trover and conversion ⇨34(7) — Demand
not made on date laid in complaint not va-
riance.**

A failure to show that plaintiff made his
oral demands for the property on the precise
date laid in the complaint is not necessarily a
material variance in an action for conversion.

**4. Warehousemen ⇨34(5)—Demand and re-
fusal makes prima facie case of conversion.**

Where a bailor makes proof of demand and
refusal of his goods, a prima facie case of con-
version by a warehouseman is made out, and
the burden is on the warehouseman to account
for the property.

**5. Warehousemen ⇨34(5)—Evidence held in-
sufficient to place burden on plaintiff to prove
negligence of defendant.**

In an action against a warehouseman for
conversion of 998 boxes of apples, evidence to
support the contention that they were eaten
by rats is insufficient to throw burden on plain-
tiff to prove negligence, where, according to de-
fendant's theory, the boxes themselves were
missing, as such circumstance refuted such
theory of the loss.

Appeal from Superior Court, San Bernar-
dino County; Rex B. Goodcell, Judge.

Action by Leon A. Atwood against the
Southern California Ice Company. From a
judgment in favor of plaintiff, and an order
denying a new trial, defendant appeals. Af-
firmed.

Sidney J. Parsons, of Los Angeles, for ap-
pellant.

McNabb & Hodge, of San Bernardino, for
respondent.

FINLAYSON, P. J. This is an action of
trover to recover damages for the conversion
of certain boxes of apples, which plaintiff
had delivered to defendant, a warehouseman,
for storage in the latter's warehouse at San
Bernardino. Judgment passed for plaintiff.
Defendant appeals from the judgment and

from the order denying his motion for a new
trial—a nonappealable order.

The complaint alleges that plaintiff is the
owner of the boxes of apples and entitled to
their possession, that he demanded posses-
sion thereof from defendant, but that the lat-
ter failed and refused to deliver the same, and
that defendant unlawfully converted the prop-
erty to its own use. These allegations are
denied by the answer. The trial court found
plaintiff's averments to be true, save that the
number of boxes converted by defendant is
not so great as the complaint alleges.

[1] Appellant claims that the evidence is
insufficient to justify the finding that plain-
tiff made demand before suit, and also the
finding of conversion by defendant. It must
be conceded that a demand by plaintiff before
suit and a refusal by defendant were neces-
sary to the maintenance of this action for con-
version, for the apples came into defendant's
possession not tortiously but with plaintiff's
consent. There is evidence in the record
showing the following facts:

The boxes of apples in question were de-
livered by plaintiff to defendant for storage
some time in October of 1919. Defendant
stored the apples in lots, each lot bearing
an appropriate number. One of these lots
was designated lot No. 392, and another lot
No. 433. On March 16, 1920, defendant pre-
pared and plaintiff signed a receipt, which
recited that on that day plaintiff received
from defendant 864 boxes of apples from lot
392 and 134 boxes from lot 433. It is these
apples which plaintiff claims were converted
by defendant to its own use. The receipt
contains this phrase: "Lots Nos. 392 and 433
out." Plaintiff testified that, though he sign-
ed this receipt, he never received these boxes
of apples, or any part thereof—that they
were only "supposedly drawn out," and that
at the time when the receipt was given he
gave to defendant's local superintendent an
order to ship the apples to a firm at Long
Beach, but that they never were received by
the Long Beach firm. He further testified
that he made demands on defendant for the
apples upon several occasions, but that de-
fendant's local superintendent always told
him that his company did not have them—
that they had been eaten by rats. As we read
the record, these demands were made orally.
The complaint alleges a particular date upon
which demand was made, viz. September 24,
1920. On that day plaintiff mailed to the
Los Angeles Ice & Cold Storage Company, at
Los Angeles, a letter in which he set forth the
amount of his damages and demanded pay-
ment thereof. The manager of the addressee
was also the manager of the defendant cor-
poration; but the corporation to which plain-
tiff addressed his letter, the Los Angeles Ice
& Cold Storage Company, had nothing what-
ever to do with the storage of these apples,

nor did the letter contain a demand for the apples. At the trial defendant's local superintendent testified that the apples had been eaten by rats.

[2, 3] The evidence was sufficient to support the finding that plaintiff made demand for his property before commencing suit. True, the letter of September 24, 1920, addressed to the Los Angeles Ice & Cold Storage Company, was not a demand on defendant, and, were there no other evidence of a demand, we would be compelled to uphold appellant's contention that the finding of a demand before suit is not sustained by the evidence. But respondent's testimony that upon several occasions he made demands of defendant, and that the latter's local superintendent always replied that his company did not have the apples, claiming that rats had eaten them, was alone sufficient to justify the finding that a proper demand was made before the commencement of the action. No particular formality in making the demand is required. 26 R. C. L. p. 1126. There was not necessarily a material variance merely because it was not shown that plaintiff made his oral demands on the precise date laid in the complaint. *Bancroft Co. v. Haslett*, 106 Cal. 151, 39 Pac. 602.

[4, 5] The evidence is sufficient to justify the finding of conversion. When a plaintiff who has stored his goods with a warehouseman makes proof of a demand and refusal, a prima facie case of conversion is made out. Upon such proof alone the burden is cast upon the warehouseman to account for the property; otherwise, he will be deemed to have converted it to his own use. But if it appear that the property, when demanded, has been destroyed, as, for example, where it is shown that it has been consumed by rats or by fire, then the burden of proof will be on the bailor to show that the loss of the property was the result of negligence on the part of the warehouseman. *Wilson v. Southern Pacific R. Co.*, 62 Cal. 164, 172. There was no proof that defendant was negligent in its care of the apples, and, if the evidence had shown without substantial contradiction that plaintiff's property had been consumed by rats, as claimed by appellant's superintendent, a reversal would be necessary. But, though the superintendent testified that rats had eaten the apples, there were circumstances to refute any such theory of loss. Besides the 998 boxes of apples in question, there were several thousand of boxes of apples on storage with defendant. Not only were the contents of respondent's 998 boxes not delivered to him on demand, but, according to appellant's theory of the facts, the wooden boxes themselves were missing. It is fair inference that not even a ravenous rodent would gnaw to the point of extinction even so toothsome a dainty as hard, dry boxwood, when

the cravings of hunger could be sated from the abundance of luscious, succulent apples on store in the warehouse. Rats might destroy boxes, but it is hardly conceivable that they would entirely consume them—nails and all.

Since no theory other than the untenable one that rats had eaten them was advanced by appellant to account for its inability to redeliver to respondent his boxes of apples, it must be held that the latter's demand of possession and appellant's failure to comply therewith made out a prima facie case of conversion.

The appeal from the order denying a new trial is dismissed, and the judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

63 Cal. App. 164

MEYERS v. SOUTHERN PAC. CO. et al.
(Civ. 4179.)

(District Court of Appeal, Second District, Division 1, California. July 23, 1923.)

1. Railroads ⚡350(21)—Whether guest in automobile injured in collision exercised ordinary care is for jury.

Where a guest in an automobile is injured in a railroad collision at a street crossing, the question as to whether or not he exercised ordinary care for his own safety is one for the jury.

2. Negligence ⚡93(1)—When negligence of one using automobile in joint enterprise imputable to others stated.

Where persons used an automobile in a joint enterprise, the negligence of one of such persons is imputed to each of the others, but except in those cases in which the relation of master and servant, or that of principal and agent is shown, there can be no such thing as imputed negligence.

3. Negligence ⚡93(1)—Guest in automobile injured in collision held not engaged in "joint enterprise" with driver.

Where plaintiff, a guest in an automobile, was injured in a collision, and he with the driver and a third person were on their way to visit at the home of plaintiff's aunt, plaintiff was not engaged with others in a joint enterprise, since to constitute a "joint enterprise" there must be a community of interest, and an equal right to direct and govern the movements and conduct of each other in respect thereto.

Appeal from Superior Court, Los Angeles County, Chas. Monroe, Judge.

Action by M. H. Meyers against the Southern Pacific Company and another. From an order granting a new trial, defendant named appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Rudolph & Warne and Isaac Pacht, all of Los Angeles, for respondent.

HOUSER, J. The matter before the court herein is an appeal by the defendant Southern Pacific Company from an order granting a new trial. The order granting the motion for a new trial, from which the appeal is taken, is in the words following:

"The motion for new trial, heretofore submitted, at this time it is ordered, that the motion for a new trial be and is hereby granted on the sole ground that the court left the question of common enterprise to the jury and did not instruct the jury that the negligence of the driver could not be imputed to the plaintiff."

On the evening of February 2, 1921, between 9 and 9:30 o'clock, plaintiff and two companions, named, respectively, Torry and Rouden, were traveling in a single-seated automobile in a southerly direction, following the car tracks on the westerly side of Alameda street in the city of Los Angeles, where the automobile collided with a train of cars operated by the defendant Southern Pacific Company that was being backed or "kicked" "against traffic" on the westerly side of Alameda street—and from which accident plaintiff received injuries of which he complains in this action.

The evidence relating to the question of joint enterprise, or whether the negligence of the driver could be imputed to plaintiff, is substantially as follows: M. H. Meyers, the plaintiff, testified on direct examination that on the 2d day of February he and Rouden were riding with Torry, in a car which was owned and which was being driven by Torry. Plaintiff was sitting on Rouden's lap, and Rouden was sitting to the right of Torry. They were traveling on the westerly side of Alameda street, between Seventh and Eighth streets, and were going out to Fifty-sixth street to the home of an aunt of plaintiff for the purpose of calling upon plaintiff's grandmother, who was celebrating a birthday anniversary on that day. Torry had been out to that house with plaintiff about a week or so previously, and at that time he was invited back to the house by plaintiff's aunt. Plaintiff and Rouden were on very friendly terms and had been together practically all that day. They were also very friendly with Torry. Plaintiff and Torry were at the aunt's house about 6 o'clock on the evening of the accident. They had gone there in Torry's automobile. Plaintiff's aunt said, "You boys come out to-night." Torry and plaintiff met Rouden later that evening at Third and Main streets and plaintiff invited Rouden to go with him and Torry. Neither Torry nor Rouden was related to plaintiff; all of which testimony was substantially corroborated by the wit-

ness Torry, who also stated that both Meyers and Rouden were riding in the automobile at Torry's request; that the party left Third and Main streets at about 9 o'clock; that plaintiff's aunt invited Torry to the party, and that it was to go to that party that the three men got into the car and started out.

The witness Rouden corroborated the testimony of the other two witnesses, and added that Torry was driving; that neither Meyers nor Rouden had anything to do with the driving, and that when Meyers invited Rouden, he said, "Come on, we are going out to my aunt's house."

The court refused an instruction, proffered by plaintiff, upon the question of imputed negligence and joint enterprise. There were, however, in the instructions two references thereto, as follows:

"As you are elsewhere instructed, the negligence of the driver is not to be imputed to the plaintiff, unless you believe from the evidence that the plaintiff and the driver were at the time of the accident engaged in a joint and common enterprise. If you find that they were, then negligence of the driver is to be imputed to the plaintiff. * * * That negligence, as I say, cannot be imputed to plaintiff, unless plaintiff and the driver were engaged in a joint and common enterprise."

No written instructions were given to the jury defining what was meant by the expression "joint and common enterprise."

After the jury had retired to deliberate on its verdict it returned to the courtroom, when the following conversation took place:

"Foreman Swain: We would like a further instruction in regard to what constitutes a joint enterprise."

"The Court: Well, that is a matter that I have got to leave to you. I don't think it is necessarily confined to business. If it is a joint enterprise of any kind, that is where they are both interested."

"Foreman Swain: Whether it is business, social or otherwise?"

"The Court: Yes. You have heard the discussion, and I said I was not going to confine it to business, but as to details I could not answer your question. You have heard the evidence, and it is not confined to business. It is up to you folks to say whether there was any joint enterprise."

"Foreman Swain: I think we can cover it."

"The Court: * * * If you should find that that (defendant's negligence) did proximately contribute to the injury, then the defendant would be liable unless you should also find that the plaintiff was guilty of negligence himself or that the plaintiff and driver were in a common and joint enterprise, so that the negligence of the driver was imputed to the plaintiff."

The jury then retired, but again came into court for further instruction, as follows:

"Foreman Swain: We would like to have your honor read us the definition of 'enterprise,' and give it to us from the dictionary. (Dictionary produced.)"

"The Court: 'Enterprise: 1. That which one attempts to perform; any projected task or

work upon which one sets out; an undertaking; scheme; especially a bold or difficult undertaking, as the enterprise of tunneling the Alps. 2. The act of engaging, or the disposition to engage, in difficult undertakings; boldness, energy, and intention exhibited in practical affairs, especially in business; as, the railroads of the United States were built by private enterprise."

"A Juror: That don't satisfy us so we can decide it.

"A Jurymoman: Enterprise is—

"The Court: I am afraid you will have to have your discussion with the jury.

"Foreman Swain: Just read the first part of that, please.

"The Court: (Rereading dictionary definition.)"

[1] With some exceptions, the rule of law is that under ordinary circumstances a guest in an automobile is not in anywise affected by any negligence of the owner or driver in connection with the operation of the automobile. It is only when the guest as such fails to exercise ordinary care for his own safety—that is, when he either does something, or fails to do something, which an ordinarily careful person situated as the guest was situated would either have done or would have failed to do—that any question of negligence on the part of the guest can arise; and whether or not he exercised such care is a question of fact for the jury to determine. *Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460; *Bryant v. Pacific Electric Ry. Co.*, 174 Cal. 737, 164 Pac. 385, 29 Cyc. 548; *Bresee v. Los Angeles T. Co.*, 149 Cal. 136, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; *Thompson v. Los Angeles, etc., Ry. Co.*, 165 Cal. 748, 134 Pac. 709.

[2] It likewise appears to be a well-settled rule of law that where persons use an automobile in a joint enterprise, the negligence of one of such persons is imputed to each of the others; but, except in those cases in which the relation of master and servant, or that of principal and agent, is shown, there can be no such thing as imputed negligence. *Bryant v. Pacific Elec. Ry. Co.*, 174 Cal. 737, 164 Pac. 385; *Spence v. Fisher*, 184 Cal. 209, 193 Pac. 255, 14 A. L. R. 1083; *Drouillard v. So. Pac. Co.*, 36 Cal. App. 450, 172 Pac. 405; *Ilardi v. Central Cal. T. Co.*, 36 Cal. App. 493, 172 Pac. 763; *Ellis v. Central Cal. T. Co.*, 37 Cal. App. 396, 174 Pac. 407.

The case of *Bryant v. Pacific Electric Ry. Co.*, 174 Cal. 737, 164 Pac. 385, was an action for personal injuries caused by one of the defendant's cars colliding with an automobile in which plaintiff was riding and which was being driven by the son of plaintiff. The automobile was the property of a corporation of which plaintiff was the president and the principal stockholder, and the son was the secretary and manager. The automobile was used by the corporation in delivering goods. It was kept at a barn at the residence of

plaintiff. On the day of the accident, at closing time, it became necessary to make a delivery for the corporation, which place of delivery was not in a direct line to plaintiff's place of residence. It happened that plaintiff and his wife were at the place of business and, together with the son, made the delivery, the son driving the automobile. There was evidence showing that plaintiff had no control or direction in the management of the automobile, but, on the contrary, that the full control was in the son. On the trial of the case, the jury was in effect instructed that if the driver was guilty of negligence which contributed directly to the happening of the accident, such negligence was imputable to the plaintiff. The jury returned a verdict for defendant, and a new trial was granted on the ground that the court had committed error in giving such an instruction. In discussing the matter on appeal, the Supreme Court said, in part:

"It is clear, therefore, that the jury should have been permitted to pass upon the question of fact as to whether the plaintiff exercised, or had the right of exercising, control over the son in driving the automobile home at the time of the collision. Had it been properly instructed it may have found that the son, as manager of the Bryant Upholstery & Furniture Company, had full and absolute control over the movements of the machine, and recognized as his superior only the corporation, and then only such orders as might be given by its officers when acting in their official capacity. * * * It may be conceded that the plaintiff and his son were jointly interested in the conduct of the business of the corporation. But it does not necessarily follow that they possessed a joint or community interest in the matter of driving the automobile. These and other questions of similar import involve matters of fact for the jury to determine. * * *"

The following is taken from the case as an expression of opinion by the court as to what constitutes a joint enterprise:

"But in order that there be such a joint undertaking it is not sufficient merely that the passenger or occupant of the machine indicate to the driver or chauffeur the route he may wish to travel, or the places to which he wishes to go, even though in this respect there exists between them a common enterprise of riding together. The circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it. * * * [Citing cases.]"

In the case of *Martindale v. Oregon Short Line R. Co.*, 48 Utah, 464, 160 Pac. 275, which is a case somewhat similar in its facts to the one before this court, it is held that, if the driver of a team of horses attached to a wagon (in which plaintiff's intestate was riding) was guilty of negligence, his negligence could not be imputed to the deceased; the mere fact that she had accepted

an invitation of the several young people with whom she was riding to attend a dance being insufficient to charge her with being interested in a common or joint enterprise. And in this connection see, also, *Atwood v. Utah L. & R. Co.*, 44 Utah, 366, 140 Pac. 137; *Lochhead v. Jensen*, 42 Utah, 99, 129 Pac. 347.

So far as the record here discloses, plaintiff was the guest of the witness Torry in the matter of the transportation in the automobile from Third and Main streets to the home of plaintiff's aunt on Fifty-Sixth street. If driving an automobile on the westerly car tracks of the defendant Southern Pacific Company at such a time of night, or any other thing done by Torry, could be construed as a negligent act, such negligence on the part of Torry could not be imputed to plaintiff.

[3] In circumstances such as are here outlined, joint enterprise is not indicated by the fact that the guest and the driver each sought the same destination and by means of the same conveyance. There must be more than such common desire and common method of transportation. There must be:

"A community of interest in the objects or the purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management." *Cunningham v. Thief River Falls*, 84 Minn. 27, 86 N. W. 765; *St. Louis & S. F. R. Co. v. Bell*, 58 Okl. 84, 159 Pac. 336, L. R. A. 1917A, 543; *Atwood v. Utah L. & R. Co.*, 44 Utah, 366, 140 Pac. 137; *Cotton v. Willmar, etc., Ry. Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935.

While the record discloses the fact that after the jury had returned for further instructions there was some attempt on the part of the court to define what was meant by "enterprise," as set forth in the dictionary, which was produced for that purpose, still the definition therein contained as to the word "enterprise" falls far short of that accurate information to which the jury was entitled as to the legal significance of the term "joint enterprise," as used in the course of the instructions which were given by the court; besides, a part of the statements made by the court as to the meaning of the expression was misleading, if not inaccurate, as is shown by the citations to which we have already adverted. In addition thereto, from a purely legal standpoint, the judge was in error in stating to the jury, in answer to the question, that what constituted a joint enterprise was "a matter that I have got to leave to you. * * * It is up to you folks to say whether there was any joint enterprise," as it erroneously placed with the jury the power of deciding a question of law. Had there been any conflict in the evidence

produced by either side as to the relationship of master and servant, or that of principal and agent, which existed between plaintiff and Torry, or with reference to the control of the automobile in which they were riding, which was sufficient in character to indicate a probability of the proper application of the doctrine of imputed negligence, or of the existence of a joint enterprise between them, or among plaintiffs, Torry and Rouden, there might have existed reasonable legal ground for submitting to the jury, under appropriate instructions, the question either of imputed negligence or of joint enterprise. In the light of the presented evidence, any negligence of Torry could not be imputed to plaintiff. Neither was the evidence sufficient to justify the conclusion to the effect that either Torry and plaintiff, or Torry, plaintiff and Rouden, were engaged in a joint enterprise. It follows that the court was right in granting plaintiff's motion for a new trial.

Order affirmed.

We concur: CONREY, P. J.; CURTIS, J.

63 Cal. App. 128

MILLER et al. v. STRUVEN. (Civ. 4512.)

(District Court of Appeal, First District, Division 1, California. July 23, 1923. Hearing Denied by Supreme Court Sept. 20, 1923.)

1. Fixtures ⇐35(2)—Evidence held to justify finding that property was personality and not realty.

In an action for conversion of personality by taking a chattel mortgage and subsequent foreclosure, seizure, and sale, evidence held to justify a finding that the property in controversy was personality as against contention that it was affixed and was real property.

2. Fixtures ⇐4—Whether property on premises was fixtures depends largely on intent.

Whether or not property consisting of machinery, implements, and appliances, some movable and some more or less permanently affixed to the buildings and real estate whereon a factory was conducted, is to be classed as real or as personal property, depends in a large measure upon the acts and intent of the parties who, from time to time, deal with the same.

3. Fixtures ⇐27(1)—Parties may fix the character of property annexed to realty.

Parties may, in their dealings with chattels annexed to, or used in connection with, real estate, fix on them whatever character as realty or personality they desire, and the courts will give to the property the character which the parties have fixed upon it.

4. Chattel mortgages ⇨187—Conveyance absolute on face, but in fact a mortgage, assailable for fraud only by prior creditors.

A conveyance of personalty absolute on face, but in fact a chattel mortgage or a deed of trust, is good as between the parties without delivery of the property and can only be assailed by prior creditors of the grantor for fraud.

5. Trover and conversion ⇨5—Taking a chattel mortgage, and subsequent foreclosure, seizure, and sale, and purchase by mortgagee, held conversion.

Taking a chattel mortgage, and the subsequent foreclosure, seizure, and sale, and purchase of the mortgaged property by mortgagee, held such exercise of dominion as amounted to conversion.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Mary Miller and another against Berthold Struven. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hugh K. McKevitt, of San Francisco (Joseph De Martini and Royal E. Handlos, both of San Francisco, of counsel), for appellant.

Aitken, Glensor, Clewe & Van Dine, of San Francisco, for respondents.

RICHARDS, J. This appeal is from a judgment in favor of the plaintiffs in an action for damages for the conversion of personal property. The amended complaint briefly alleges that the plaintiffs' predecessor, the Mercantile Trust Company of San Francisco, at all times mentioned therein prior to October 11, 1918, was the owner and entitled to the possession of certain specific personal property, and that the defendant, on or prior to the last-named date, converted said property to his own use, to the plaintiffs' damage in the sum of \$4,000. The defendant, in his amended answer to said complaint, denies each and all of these averments, and for a further defense sets up the statute of limitations and also laches and estoppel in bar of the plaintiffs' action. The trial court found the facts to be as alleged in the plaintiffs' complaint, except as to the value of the property, and also found against the defendant upon his several pleas in bar. Judgment was thereupon rendered for the sum of \$1,500, with interest from October 13, 1915, and for costs.

[1] The facts out of which this litigation arose are somewhat complicated, but are in the main undisputed and would seem to be as follows: Prior to the year 1912, and for some time thereafter, the J. F. Bradley Company, a corporation, was the owner of certain real estate and the improvements thereon, situate in the city and county of San Fran-

cisco, which was in use by said corporation as a soap factory. On February 3, 1912, said corporation executed its deed of trust by the terms of which it conveyed said real estate to certain trustees to secure the payment of a promissory note of said corporation to one Morris Windt. On the 12th day of March, 1914, said Morris Windt assigned and transferred said promissory note to Hugh McCahill and at the same time, and in conjunction with said trustees, executed a document substituting Mary Miller as the trustee in said deed of trust for the prior trustees named in said trust deed. The J. F. Bradley Company having defaulted in the payment of said note, the payee thereof directed the said substituted trustee to sell the property described in said trust deed in order to the payment and satisfaction of said note, which the said trustee proceeded to do, with the effect that on April 17, 1914, she sold and conveyed the property described in said trust deed to said Hugh McCahill for the sum of \$2,000. Thereafter, and on April 21, 1914, said Hugh McCahill conveyed the property by the same description to J. J. Thompson. On August 18, 1914, said J. J. Thompson and Sahra Thompson, his wife, made and executed their promissory note to Berthold Struven for the sum of \$6,000, and on said date also made and executed their deed of trust conveying said real estate to certain trustees to secure said note. On August 24, 1914, said J. J. Thompson and wife conveyed said described property to the Chicago Soap Company, a corporation. On October 13, 1915, one Geo. L. Miller and the Chicago Soap Company joined in a personal property mortgage to Berthold Struven of the property described in the complaint in this action, describing the same as being personal property contained in the premises of the Chicago Soap Company theretofore described in the conveyance from J. J. Thompson and wife to the Chicago Soap Company above referred to. In this chattel mortgage Geo. L. Miller is designated as the president of the Chicago Soap Company. On February 16, 1916, said Berthold Struven commenced an action for the foreclosure of said chattel mortgage against the Chicago Soap Company and Geo. L. Miller, in which the said property set forth therein was described and designated as personal property and a sale thereof as such was prayed for. The parties defendant in said action defaulted, and thereafter, and on April 27, 1916, a judgment of foreclosure and of the sale of said property as personal property was duly given and made and the said property was thereafter sold thereunder to said Berthold Struven.

In the meantime another series of transactions affecting the title of the plaintiffs in the property for the conversion of which the present action was instituted, were being

carried on. On August 22, 1912, the J. F. Bradley Company made a conveyance, absolute in form, transferring the real estate heretofore referred to, and also transferring the personal property described in the complaint in the present action, describing the same as "machinery, trade fixtures and appliances located upon said real estate," to the Mercantile Trust Company of San Francisco. The latter corporation executed of even date with the above conveyance a declaration of trust, declaring that it held the property described in said conveyance in trust to secure any indebtedness that then was or might thereafter become due from the J. F. Bradley Company to the Mercantile National Bank of San Francisco. On August 3, 1913, the Mercantile National Bank of San Francisco assigned and transferred a lengthy list of promissory notes of the J. F. Bradley Company, aggregating several thousand dollars, to Hugh McCahill, who had been the surety of the said J. F. Bradley Company upon said notes and had been called upon to pay the same and who upon such payment had by such assignment been subrogated to the rights of the Mercantile National Bank, the original payee thereof. Thereafter, and on October 11, 1918, the Mercantile Trust Company assigned, transferred, and set over to Mary Miller all of its right, title, and interest as trustee or otherwise in and to the personal property described in the conveyance by the J. F. Bradley Company to it and above referred to, together with all rights of action which had accrued to it or to Hugh McCahill for damage to, or for the conversion of, said personal property. Thereafter the present action was commenced by said Mary Miller and Hugh McCahill against Berthold Struven for damages for the conversion of said personal property, said conversion being alleged to have occurred "within three years last past and prior to October 11, 1918." The right of the plaintiff McCahill to maintain this action springs from the fact of his subrogation to the rights of the Mercantile National Bank and of its trustee, the Mercantile Trust Company, upon his payment of the notes of the J. F. Bradley Company. As to the plaintiff Mary Miller, her right to be joined as plaintiff springs from the assignment to her of the property held in trust by the Mercantile Trust Company.

[2, 3] The appellant makes several points in urging a reversal of the judgment in favor of the plaintiffs herein, but his chief contention is that the property for the conversion of which this action was instituted was not and is not personal property, but that at all of the times covered by the transactions of the parties it consisted of property affixed to the real estate described in said transactions, and hence was real estate to which the plaintiffs herein were shown to have no title. Whether or not property of the kind and

character of that enumerated in the complaint herein and consisting in machinery, implements, and appliances, some movable and some more or less permanently affixed to the buildings and real estate wherein and whereon the soap factory was conducted, is to be classed as real or as personal property, depends in a large measure upon the acts and intent of the parties who, from time to time, deal with the same. The title which the plaintiff asserts to the property in question relates back to a transaction in 1914, when the J. F. Bradley Company, then admittedly the owner, both of the said property and of the real estate upon which it was situated and used in the conduct of the business of soap making, saw fit to distinguish between these two kinds of property and to designate the former as personal property in its transfer of the title to both forms of property to the Mercantile Trust Company of San Francisco. It had a right so to do as between itself and its then grantor and as against all the world, unless it had lost that right as a result of its transactions affecting the real estate upon which such property was located and was being used in the conduct of its soap-making business. The several conveyances and deeds of trust, from or through which the defendant's title to the real estate formerly owned by the J. F. Bradley Company was derived, nowhere expressly referred to or described the chattels affected by the present action as part of said real estate. The defendant's immediate predecessor in interest, the Chicago Soap Company, while apparently claiming to own said property, did not treat the same as real estate in its dealings with the defendant herein since it first gave him as security for its indebtedness to him a deed of trust covering said real estate and a short while after gave him a chattel mortgage upon the property affected by this action, describing the same as personal property. The defendant himself not only took and held said chattel mortgage upon the property in question as personal property, but he proceeded to foreclose said mortgage, repeatedly designating the property described therein as personal property, and proceeded to buy in the same as personal property at the foreclosure sale. It is a quite well settled rule of law that the parties themselves may, in their dealings with chattels annexed to or used in connection with real estate, fix upon them whatever character, as realty or as personalty, they desire and that the courts will give to the property the character which the parties themselves have fixed upon it. *Fratt v. Whittier*, 58 Cal. 126, 132, 41 Am. Rep. 251. We think the foregoing evidence sufficient to justify the finding of the trial court to the effect that the property of which the defendant was charged with the conversion was personal property.

[4] The appellant's next contention is that the transfer of said property by the J. F. Bradley Company to the Mercantile Trust Company was void for the reason that there was no present delivery to it of the property so sought to be transferred. The conveyance to the Mercantile Trust Company, while absolute in form, was, in fact, a mortgage or deed of trust of the property described therein. In so far as it related to said personal property it was good as between the parties thereto and could only be assailed by prior creditors of the grantor upon the ground of fraud. The defendant herein has not brought himself within the category of those who would be entitled to assail said transfer upon that ground.

[5] The next contention of the appellant is that there is no evidence sufficient to show that the property in question was converted by the defendant at any time prior to the commencement of this action. This contention assumes that the property was at all times, prior to the commencement of this action, personal property, and leaves as the only question whether the taking of a chattel mortgage upon said property by the defendant and his foreclosure thereof and seizure and sale of said property upon the foreclosure sale and the purchase thereof by himself constituted such an assumption of control over and disposition of said property as to amount to a conversion thereof. We are satisfied that these acts on the part of the defendant would amount to such an exercise of dominion over the property in defiance of the rights of the plaintiffs therein as would suffice to justify the finding of a conversion thereof by the trial court. *Horton v. Jack*, 126 Cal. 526, 58 Pac. 1051.

The appellant's next and final contention is that, conceding there was a conversion, it occurred at such time prior to the commencement of this action as to constitute a bar to such action under the defendant's plea of the statute of limitations. This contention also assumes that the property in question was personal property within the contemplation of the parties at all times prior to the institution of this action. Being personal property the defendant or his predecessors herein acquired no title to nor interest in it by any transaction or conveyances prior to the making of the chattel mortgage thereon by the Chicago Soap Company to the defendant herein. The date of said mortgage was October 13, 1915, which was not only the earliest date at which the claim of interest of the defendant in said property as personal property arose, but which was also the date fixed by the trial court in its findings as the date of the defendant's conversion of the said property. This action was commenced on October 11, 1918, which date was just within the three-year period fixed by the statute for

the commencement of actions for conversion. Code Civ. Proc., § 338, subd. 3. There is no merit, therefore, in this contention. Nor do we think, without discussing the subject at length, that there is any merit in the defendant's defense of laches and estoppel.

The judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

63 Cal. App. 114

REID et al. v. NORTHERN ASSUR. CO. SAME v. SUN INS. OFFICE OF LONDON. SAME v. LONDON ASSUR. CORPORATION. (No. 4389.)

(District Court of Appeal, First District, Division 1. California. July 23, 1923. Hearing Denied by Supreme Court Sept. 20, 1923.)

1. Appeal and error ☞ 1099(3) — Supreme Court statement of law of case held to govern subsequent appeal.

In an action on a fire policy, in which the defense was that goods had been removed from the place where insured, decision on appeal, in affirming grant of new trial for error in instructions, that the instructions would have been correct, if they had based liability on notice to insurer of removal of goods, together with some act which showed request to insure at new place, so as to fasten an estoppel on insured, was the law of the case on subsequent appeal, as against contention that no consent to removal was indorsed on policy.

2. Insurance ☞ 665(8) — Evidence held to show insurer's agent consented to transfer insurance on goods to new location, estopping insurer from denying that goods were insured.

In an action on a fire policy insuring goods in a certain building which were removed to another building, evidence held sufficient to show that insurer's agent had consented to transfer the insurance to cover the new location, estopping insurer from denying that the goods were covered by the policy.

3. Insurance ☞ 76 — Evidence held to warrant finding that insurer's agent had authority to consent to transfer insurance on goods to new location.

In an action on a fire policy insuring goods in a certain building, which were removed to another building, evidence held sufficient to warrant finding that agent of insurer had authority to consent to transfer the insurance on the goods to their new location, estopping insurer from denying that goods were not insured.

4. Insurance ☞ 665(8) — Evidence held not to show consent to insure goods at new location, or conduct estopping insurer from denying consent.

In an action on a fire policy insuring goods in a certain building, which were removed to another building, evidence held insufficient to show that insurer agreed to transfer the insurance to the new location, or that it was estopped by its conduct, or that of a broker through

whom insured purchased the policy, and who consented to such transfer, from denying that such goods were insured after removed.

5. Insurance §375(1)—Insurer not estopped by acts or conduct of independent broker representing insured.

Though an insurer may be estopped by the acts or conduct of its duly authorized local agents or representatives from denying its consent to waive requirements of the policy, such estoppel cannot be created by the acts and conduct of broker having no connection with insurer, but who throughout the whole transaction represented insured.

Appeal from Superior Court, City and County of San Francisco; Daniel O. Deasy, Judge.

Actions by Lillian May Steil Reid and others against the Northern Assurance Company, against the London Assurance Corporation, and against the Sun Insurance Office of London. From judgments for plaintiffs in the first two actions, defendants appeal; and from a judgment for defendants in the last-named action, plaintiffs appeal. Judgments affirmed.

Morrison, Dunne & Brobeck, Roland C. Foerster, and R. L. McWilliams, all of San Francisco, for plaintiffs.

Redman & Alexander, of San Francisco, for defendant Sun Insurance Office of London.

Chickering & Gregory and Winfield Dorn, all of San Francisco, for defendants Northern Assur. Co. and London Assur. Corporation.

RICHARDS, J. Prior to the month of January, 1906, one Henry Steil had taken out three policies of insurance upon certain goods then situated in the Chronicle Building in the city of San Francisco, in three insurance companies; one issued by the Sun Insurance Office of London, one by the Northern Assurance Company, and one by the London Assurance Corporation. In January, 1906, Steil removed said goods to the Shreve Building in said city, where, on April 19, 1906, they were destroyed in the great fire. The several companies refused to pay the loss, whereupon Steil commenced three actions for recovery upon these policies. In the amended complaint in each of said actions the plaintiffs, after alleging the entering into the contract of insurance with the defendant therein and describing the goods covered thereby at their original location in the Chronicle Building and after averring the removal of said goods to the Shreve Building on or about January 20, 1906, proceeds to allege that the defendant had knowledge at said time of the transfer and removal of said goods to their new location, and—

“that said defendant, having knowledge and being informed that said stock of cloths, cassi-

meres, tailors' trimmings, clothing manufactured and in process of manufacture, silks, furnishing goods, and other merchandise had been so removed, duly waived any and all indorsement upon said policy of insurance, setting forth said removal and the consent of said defendant thereto; that said defendant had immediate knowledge of said removal of said goods and failed to take any action, whatsoever, within a reasonable, or other, time after acquiring such knowledge, to forfeit, rescind, or determine said contract or policy of insurance, or to return to said Henry Steil the unearned portion of the premium paid thereon, and thereby waived its right to forfeit, rescind, or determine the same; that immediately after the transfer and removal of said stock of cloths, cassimeres, tailors' trimmings, clothing manufactured and in process of manufacture, silks, furnishing goods, and other merchandise, as hereinbefore alleged, and prior to the destruction of the same by fire as hereinafter alleged, said Henry Steil notified said defendant of such removal and transfer, and upon such notification requested that said policy of insurance be transferred to cover said stock of cloths, cassimeres, tailors' trimmings, clothing manufactured and in process of manufacture, silks, furnishing goods, and other merchandise while contained in said Shreve Building, and that said insurance continue notwithstanding such removal and transfer, and thereupon said defendant, knowingly and intentionally, represented to said Henry Steil, and led and induced him to understand and believe, and said Henry Steil did in fact understand and believe, because of such representations, that his said stock of cloths, cassimeres, tailors' trimmings, clothing manufactured and in process of manufacture, silks, furnishing goods, and other merchandise was insured and covered by said policy of insurance after said transfer and removal, and while the same was contained in said rooms 301 to 307 of said Shreve Building, and said Henry Steil, because of such representations of defendant and not otherwise, and relying upon the same, did not attempt to procure and did not procure other insurance upon said stock of cloths, cassimeres, tailors' trimmings, clothing manufactured and in process of manufacture, silks, furnishing goods, and other merchandise after the removal and transfer of the same, as aforesaid, or otherwise or at all protect or attempt to protect himself against the loss or destruction of the same by fire; that by reason of the premises said defendant is now estopped and precluded from in any manner claiming or asserting that said policy is forfeited, and that said stock of cloths, cassimeres, tailors' trimmings, clothing manufactured and in process of manufacture, silks, furnishing goods, and other merchandise was not insured and covered by said policy of insurance after the removal of the same, and while located at rooms 301 to 307 of the third floor of said Shreve Building.”

The defendant in each of said actions, while admitting the issuance respectively of the insurance policy sued upon, denies each and all of the matters set forth in the portion of the plaintiffs' amended complaint above quoted. The trial before a jury in each case upon the issues as thus framed

resulted in a verdict and judgment in the plaintiffs' favor. The defendants respectively moved for a new trial upon the usual statutory grounds, which motion was granted by the court. The order granting a new trial in each case stated that the court found the evidence sufficient to justify the verdict, but that the new trial was granted because the court was of the opinion that it was in error in giving two certain instructions set forth in the order. The plaintiff in each case appealed to the Supreme Court from each of said orders granting a new trial, but which orders the Supreme Court affirmed in an opinion written by Mr. Justice Shaw and reported in the consolidated cases of *Steil v. Sun Insurance Office of London et al.*, 171 Cal. 795, 155 Pac. 72. In its said opinion affirming the orders of the trial court in said cases the Supreme Court discusses the questions raised by the pleadings of the parties relative to the alleged waiver and estoppel of the defendants arising out of the facts set forth in the above quoted portion of the plaintiffs' amended complaint and adverted to in the instructions for error in giving which the new trial had been granted in each case. In so doing the court held that there being no provision in any of these policies that the removal of the goods from the place where they were described as being located would operate to annul the policy, such would not be the effect of their removal; the only effect being that the goods would not be insured in their new location until something was done to continue the insurance upon the goods in their said new location. This, of course, might be accomplished through the consent in writing through its properly authorized officials of the insurer. This condition, however, was not claimed to exist in the instant cases; but the court proceeds to consider the question as to whether the same result might not be accomplished by the existence of facts which would suffice to create an estoppel on the part of the insurer to deny that it had consented to the removal of the goods to another location. In discussing this phase of the question the Supreme Court used this language:

"In order to continue the insurance upon the goods, or, in other words, to carry it to the goods in the new location, something more was required than a mere notification by the insured to the insurer of the fact that the goods were, or were about to be, removed. That fact alone would only suspend the insurance risk. The insurer must be informed, or be given good cause to believe, that the party insured desired to have the insurance on the goods continued in the new place, that he wished a modification of the policy to make it cover the goods in the new location, and must then, by positive act, or by failure to act, cause the insured to believe that the insurer consented to such transfer or modification, and that the goods were covered by the policy. Something in the nature of a new agreement,

either express, or implied from conduct or words, or created by estoppel, was necessary."

In the light of the foregoing language the Supreme Court proceeds to point out the defect in the instructions which had led to the orders granting new trials in these respective cases in the following words:

"The instructions informed the jury that a notification of removal, followed by silence and failure to cancel the policy and return the unearned premium, would operate to estop the insurer from denying that it had consented to the removal and had agreed that the policy should cover the goods, notwithstanding such removal. They should have contained the additional premise that the assured, upon such notification, requested that the policy be transferred to the new location, or that the insurance be continued, notwithstanding the removal, or something to indicate that the notification was given under circumstances which would have given the insurer reasonable cause to believe that the assured desired or expected the matter to be so adjusted. The evidence concerning the notification referred to all indicated that such desire and expectation existed and was made known to the assured, but the instructions omitted all reference thereto. In this respect they were defective, incomplete, and possibly misleading."

Having expressed the foregoing views as to what the instructions to the jury in each of said cases should have stated as the law of the case, the Supreme Court affirmed the orders of the trial court granting a new trial in each of said cases. Thereupon a new trial was had in each. Upon the second trial the jury in each case again rendered verdicts in the plaintiffs' favor but on motion for a new trial the court again vacated the judgment in each case, from which orders no appeal was taken. A third trial of the three cases resulted in a disagreement of the jury in each case, and all of the cases were again retried. Upon the fourth trial, by stipulation of the parties, the three cases were consolidated for the purpose of trial and tried before the same jury. In the two cases wherein the Northern Assurance Company and the London Assurance Corporation were defendants, respectively, the jury rendered verdicts in the plaintiffs' favor. In the case in which the Sun Assurance Office of London was the defendant the trial court granted the defendant's motion for a nonsuit. In the first two cases the defendants have appealed. In the last-named case the plaintiff has appealed. These appeals, while separately taken, have been presented upon a consolidated transcript, but upon separate briefs. The original plaintiff having died in the meantime, the executrices of his last will and testament have been substituted in his place and stead in all three appeals.

[1] Dealing first with the appeals which have been prosecuted by the defendants Northern Assurance Company and the London Assurance Corporation, we find the first contention of the appellants to be that no

transfer of the insurance of either appellant upon the goods in question was made or indorsed in writing upon the policies of either as required by their terms, and hence there was no insurance upon said goods at said location at the time of their destruction by fire. It is, of course, conceded that these policies were not changed by any writing between the parties agreeing or consenting to the transfer of the insurance upon the goods in their new location; but, notwithstanding this admitted fact, we are of the opinion that the insurers would still be bound if the facts relied upon by the plaintiff as the basis of his recovery in each of these cases as creating an estoppel against each defendant were sufficiently proven. In support of this view it is not necessary to look farther than to the language of the Supreme Court upon the first appeal and which is quoted above; since it is there expressly held that if the instructions which were given to the jury upon that first trial had contained the element that in the oral communications between the insured and the insurer after the change of location the insurer had been informed, or had been given good cause to believe that the party insured desired to have the insurance on the goods continued in the new place, and that he wished a modification of the policy to make it cover the goods in the new location, and if the insurer, upon being so informed, had by positive act or failure to act caused the insured to believe that the insurer consented to such transfer or modification, and that the goods were covered by the policy, these facts would suffice to create an estoppel against the insurers to deny that they had consented to the change of location, and had agreed that the policy should cover the goods notwithstanding such removal. We are of the opinion that this conclusion of the Supreme Court as to what would have constituted correct instructions touching this branch of each of these cases constitutes the law of the case, and as such was binding upon the parties during the later trials thereof, and hence that the first point urged by the said appellants is devoid of merit. *Brett v. S. H. Frank & Co.*, 162 Cal. 735, 124 Pac. 437.

[2] This brings us to the second contention of said appellants, which is that the evidence fails to show facts sufficient to create an estoppel in each case. This involves a brief recital of the facts of each case, as testified to by the plaintiff and his witnesses upon the several trials thereof. Upon the first trial of these cases the plaintiff was still living, and he testified, in substantial effect, that on the 20th day of January, 1906, the date of the removal of the goods to the new location, he took the three policies of insurance and handed them to Mr. Paine, his bookkeeper, with certain instructions. He was not permitted to testify as to what these instructions to his bookkeeper were, but both the plaintiff and his daughter testified that

the bookkeeper went out, taking the policies with him, and came back later with them, and that no change of location had been indorsed on the policies when they were returned to the plaintiff. Mr. Paine had died prior to the trial, and his testimony on the subject was lost to the plaintiff; but his son, Arthur Steil, who had been the manager of his father's business for several years while its location was in the Chronicle Building, but who was absent in Portland at the time of the change of location, testified that upon his return in the following February he rang up the London Assurance Company on the telephone and talked with Mr. F. W. Tallant, an official of the company, with whom the business of placing the policy of that company upon the goods had originally been transacted, and that he asked him if "our bookkeeper had been down at their office with their policy asking for a transfer, and Mr. Tallant replied, 'Yes; the man was down at the office; we have no objection to the transfer, and just send them down.'" "Well," I said, "Mr. Tallant, you know that fire in the Chronicle Building is still in abeyance; that has not been settled, and on the advice of our lawyers we were told not to leave the policies, and I want to ask you if we are covered in this new location; and Tallant replied, 'Yes; you are covered, but send down the policies.'" Mr. Arthur Steil further testified that he also rang up the Northern Assurance Company, and asked for the city agent of said company, and was told that it was Mr. Hunter, and when the latter came to the phone "I asked him if our bookkeeper had been there with our policies, and he said, 'Yes; he was down here;' and I asked him if there was any objection to the transfer, and he said, 'No; absolutely, there was no objection,' to send the policy down; and I replied to him, the same as I did to Mr. Tallant, that on account of the fire in the Chronicle Building not being settled, and on the advice of our attorney, not to leave the policy until that settlement was made; and I asked Mr. Hunter if we were covered in the new location. He said very positively that we were covered. The same statement was made by Mr. Tallant and Mr. Hunter that we were covered in the new location." This witness further testified that he accepted and trusted these statements, and believed that they were covered, and took out no other insurance, and that they never received any further request or notice from the insurers with relation to their policies until after the fire.

In addition to the foregoing testimony, there was offered and admitted on behalf of the plaintiff the evidence of one Naughton, assistant manager of the Northern Assurance Company, to the effect that occasionally requests for approval of transfers of location were received over the telephone, and if the removal was approved the representative of the company would inform the insured that he

was covered, and ask him to send down his policy for indorsement, and that in such case the insured would be covered for a reasonable time, and until the covering note or rider could be placed upon the policy; that his company had a form of covering note approving transfers of location, and that if a request was made over the phone, and the company was agreeable to the granting of the request, it would send through the mail one of these forms, to be attached to the policy, or would require the insured to bring in his policy, in order that it might be attached thereto in the office. The officials of the defendants referred to in the testimony offered on the plaintiffs' behalf denied that they had ever received any request from the plaintiffs for an approval of the change in location of the goods covered by their respective policies, or that they had any recollection of having had the telephone communications or visits from the plaintiffs' bookkeeper, as testified to by the plaintiffs' witnesses; but the jury upon the last trial of these cases evidently believed the plaintiffs' witnesses upon the subject as indicated by their verdict, and we are of the opinion that said evidence adduced on the plaintiffs' behalf, if so believed by the jury, was sufficient to constitute an estoppel on the part of these defendants to deny that the plaintiffs' goods were covered by their respective policies in the new location from the date of their transfer thereto and up to their destruction by the great fire.

[3] The appellant London Assurance Corporation makes the further and final contention that the evidence is insufficient to show that F. W. Tallant had authority from said corporation to transfer the insurance upon said goods to their new location, or to bind said corporation by any oral statements, acts, or conduct on his part sufficient otherwise to create an estoppel. We find no merit in this contention. Mr. F. W. Tallant had been connected with the local management of the London Assurance Corporation for several years prior to January, 1906, and bore the title of "Branch Secretary," indorsed upon the policies of the company and printed upon its letterheads. The business of the plaintiff in carrying insurance in this company had always been transacted with him. He had attended to the details of the settlement made by plaintiff with the corporation for the losses occasioned by the former fire in the Chronicle Building, and there was other testimony to the effect that it was the general understanding on the street that Mr. Tallant was in charge of the city department of the London Assurance Corporation. We think this evidence sufficient to justify the conclusion, which the jury necessarily arrived at in this case as a prerequisite to their verdict, that Mr. Tallant had authority to bind his principal by his statements, acts, and conduct, to the extent of creating an estoppel in this particular case. Our conclusion from the fore-

going reasoning is that as to these defendants and appellants the judgment should be affirmed.

[4] We are next to consider the judgment of nonsuit rendered in the defendant's favor in the case against the Sun Insurance Office of London as presented for our review upon the plaintiffs' appeal. In the main, the facts recited with relation to the two former cases have application to this appeal. There is, however, this material difference as to the essential facts which led the trial court to grant a nonsuit in this particular case: The policy of insurance which the plaintiff Henry Reid held in the Sun Insurance Office of London had been negotiated and procured by him through a firm of insurance brokers known as J. B. F. Davis & Son, who were not the regularly constituted agents of said insurance corporation, but were independent brokers, placing such insurance as they were able to successfully solicit in such insurance companies as they might select and as would accept the risk. It cannot be seriously questioned but that ordinarily brokers doing this sort of business represent the insured and not the insurer. The appellants herein do not contend that in this particular transaction these brokers in procuring this insurance and placing it with the Sun Insurance Office of London were acting as the actual agents of the insurance company, having formal authority from it to issue policies of insurance or to bind the insurer by written consent to changes in their terms as to location of the property insured, as required by their express stipulations. The utmost which the appellants claim is that these brokers had ostensible authority to act for the respondent in consenting to the change of location of the goods insured and in assuring the insured that his goods would be covered by the policy in the new location.

This claim is founded upon the following facts, as shown by the evidence in the case, and which, according to the appellants' contention, were sufficient to avoid the motion for nonsuit: The testimony of Mr. Arthur Steil, who was the son and in charge of the business of Henry Steil, and who attended to the matter of placing his insurance, showed that he knew no one else in the matter of placing this particular insurance, except the firm of J. B. F. Davis & Son, as transacting business for and on behalf of the Sun Insurance Company, and supposed them to be the agents of said company, and that after the transfer of the goods to the new location he had a conversation with a Mr. Wm. Romaine, manager of said firm of brokers, who came to his father's new place of business in the Shreve Building, in which he was assured that there would be no objection to the transfer and that the goods were covered in the new location. Mr. Romaine requested the Sun policy, in order that he might take it down to the office and have the transfer indorsed thereon;

but both Mr. Steil and his father refused to allow the policy to go out of their hands, on account of the pending unsettled claim arising out of the former fire, but depended on Mr. Romaine's assurance that they were covered by the Sun policy in the new location. The original Sun policy was destroyed in the fire of April, 1906, but it was conceded upon the several trials that it was similar in form to a sample policy of said company offered in evidence at these trials, and that on the back of said policy a sticker was pasted over the place thereon where the name and address of the actual and regular local agent of the Sun Company was printed, which sticker completely covered said name and address and contained the words "J. B. F. Davis & Son, Insurance Brokers, 240 Sansome Street, San Francisco." It also appeared that this firm of J. B. F. Davis & Son had been accustomed for a good many years to paste similar stickers upon policies of whatever insurance companies were handled through their office. It also appeared that a rider had been attached to said original policy prior to the removal of the goods from the Chronicle Building, permitting certain alterations, additions, and repairs to be made in certain of the property covered by said policy, which rider had been signed by the regular local agent of said company, but across the face of which the stamp of "J. B. F. Davis & Son, San Francisco," had been prominently placed. There was also some evidence that the Sun Company had known of this custom of said firm of insurance brokers of placing their stickers and stamp upon policies passing through their office. The plaintiff offered no evidence whatever tending to show that any application had been made to the regular agent of the Sun Insurance Office of London for an approval of the transfer of location, or that any such approval had been given, or that the said regular representatives of said insurer had any notice or knowledge of the change of location of said insured goods until after their destruction by fire.

The plaintiffs' case rests solely upon the transactions with which the firm of brokers above referred to and upon the assurance of the members and employees of said firm that the insurance would be carried by the insurer in the changed location of the goods insured. We are satisfied that this evidence on the plaintiffs' part is entirely insufficient to establish either an agreement on the part of this particular insurer to continue its insurance upon the plaintiffs' goods in the new location, or to warrant the conclusion that the insurer, by any acts or conduct on its part, either through its actual or ostensible agents, was estopped to deny the existence of such an agreement. The policy which was issued to the plaintiffs' predecessor by the Sun Insurance Office of London was signed, executed, and issued by C. A. Henry, its only regular and duly authorized agent in the city of San

Francisco. The rider to said policy permitting certain alterations and repairs in certain of the property covered by its terms was also signed and executed by its said local agent. The name and title of said agent also originally appeared upon the back of said policy, printed in the space which was later occupied by the sticker which J. B. F. Davis & Son pasted thereon, and there is no evidence in the record from which it could be found or fairly inferred that the regular agent of the said insurance company ever saw the policy which it issued to the plaintiffs' predecessor with the sticker of said firm of brokers pasted thereon, over his own printed name and title as such agent. The said sticker of said firm of brokers did not purport to state that they were the agents of the insurance company issuing said policy, but simply that they were "brokers." The representative of said firm of brokers, when upon the witness stand as a witness for the plaintiffs, stated that in handling insurance as brokers his firm represented the insured, and there is no evidence to be found in the record controverting this assertion. The policy of the Sun Insurance Office of London contained the express stipulation and agreement that the property described therein and insured thereby was covered by said insurance only while the same was located in the Chronicle Building and not elsewhere. It also contained the express provision that:

"No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached."

[5] While we have held in an earlier portion of this opinion, with particular reference to the companion cases to this, that an estoppel may be created by the acts and conduct of the duly authorized local agents and representatives of an insurance company, notwithstanding the foregoing provisions in the policy, it is clear that such estoppel cannot be created by the acts and conduct of a firm of brokers having no pretense of any connection with the insurer in the capacity of official agents or representatives, and who throughout the entire transaction represented the insured and not the insurer. We are satisfied that the trial court was correct in holding as it did, in granting the said defendant's motion for nonsuit, that the plaintiffs in this particular action had not made out their case.

The judgment in each and all of the cases

included in the consolidated record herein is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

63 Cal. App. 141

**GOLDSMITH v. BOARD OF EDUCATION
OF SACRAMENTO CITY HIGH SCHOOL
DIST. et al. (Civ. 2642.)**

(District Court of Appeal, Third District,
California. July 23, 1923.)

**1. Mandamus ☞176—Relief not specially
prayed for may be granted if within pleadings
upon which issue joined.**

On application for a writ of mandate by a suspended school-teacher to compel reinstatement, payment of salary might be included in the relief granted, notwithstanding that the prayer of the complaint did not specifically mention it, where the complaint did contain a prayer for general relief, in view of Code Civ. Proc. § 580.

**2. Appeal and error ☞781(5)—Appeal will
not be dismissed, as moot, where judgment
rendered thereon will be of practical benefit
to appellant.**

On application by a suspended school-teacher for a writ of mandate to compel the board of education to reinstate him, the trial court could legally direct the board to pay the salary for the period during which plaintiff was suspended, as well as to command his restoration to his position, and hence, on appeal from a denial of the writ, the appeal would not be dismissed as moot, although the period of suspension had terminated, where no provision had been made as to payment of salary during such period.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Application by A. L. Goldsmith against the Board of Education of Sacramento City High School District and others for a writ of mandate. Judgment for defendants, and plaintiff appeals. On motion to dismiss appeal. Motion denied.

Elliott & Atkinson, of Sacramento, for appellant.

C. F. Metteer, of Sacramento, for respondents.

BURNETT, J. On September 11, 1922, certain charges of unprofessional conduct against appellant were made to the board of education of Sacramento city high school district by Charles C. Hughes, superintendent of schools of said city. The matter came on regularly for hearing on September 22 following, and after trial before said board, appellant was found guilty as charged, and by order of the board he was suspended from his position as teacher in said high school for

a term of 10 weeks without pay, beginning on said September 22 and ending on November 30. The term of suspension having expired, Mr. Goldsmith resumed his position as teacher and continued therein until January 22, 1923, when he voluntarily severed his connection with the department. While said order of suspension was in force, appellant, on October 5, 1922, brought an action of mandate in the superior court of Sacramento county, the prayer in his complaint being as follows:

"Wherefore plaintiff prays for writ of mandate commanding and requiring defendant to admit plaintiff to the use and enjoyment of the right to perform said services and duties, to reinstate plaintiff in the use and enjoyment of said right, and to allow plaintiff to perform said duties and services, and for such other or further order as is proper in the premises and for costs of this proceeding."

After issue joined, the cause was thereafter regularly tried in said superior court and a judgment rendered in favor of defendants. From this judgment the said A. L. Goldsmith on December 18, 1922, appealed to this court, and the appeal is pending herein. On May 2, 1923, respondents gave notice of motion to dismiss said appeal on the ground that the term of said suspension of appellant has expired, and "that, even if the order herein appealed from was reversed by this court, it would merely be to direct revocation of an order of the said board of education that has expired by limitation of time for which said order was made," and that said appellant, by his own election and the action of the said board in accepting his resignation as teacher, "is not and has not been, since the 22d day of January, 1923, in any wise employed by or connected with the Sacramento city high school district." The motion was regularly heard and has been submitted on the oral argument and briefs thereafter filed.

The claim of respondents is that "the only question presented to the Court in this action is now moot," and that accordingly the motion to dismiss should be granted. If the only question involved is of merely academic interest, and a reversal of the judgment can afford no practical relief to appellant, then manifestly the cause should not be retained for the purpose only of determining whether the trial court reached a correct conclusion. In *Weaver v. Reddy*, 135 Cal. 430, 67 Pac. 683, the plaintiff held the position of superintendent of the almshouse of the city and county of San Francisco and was removed therefrom by the board of health. He brought suit for reinstatement, and, while the case was pending, San Francisco adopted a new charter under which another board of health, a different entity, came into existence. The Supreme Court said:

"It follows, therefore, that the board of health, defendant in this case, is no longer in

authority or control over the almshouse, and the questions presented upon this appeal become purely academic. No judgment that could be rendered for plaintiff upon his appeal could afford him any relief, and thus it would be futile to discuss the propositions which he presents."

Among many cases to the same effect we may refer only to *Bradley v. Voorsanger*, 143 Cal. 214, 76 Pac. 1031, wherein it was held, as stated in the syllabus:

"Where a taxpayer sued to enjoin the holding of an election to fill certain offices, and the expending of money therefor, and the judgment was against the plaintiff, and before the hearing of an appeal by him the election had been held and the money expended, and the officers elected were incumbents in place of others whose terms had expired, such appeal raises merely a moot question, and no judgment which could be entered thereupon could afford plaintiff any relief, and the action will be ordered dismissed."

If reinstatement was the only relief to which appellant was entitled under the pleadings, and if the superior court in said mandate proceedings could direct said board of education to do no more than to restore appellant to his position, then, of course, no practical benefit can come from a further consideration of this case. This seems so obvious as to require no comment. Indeed, besides the fact that the suspension ceased to be operative and appellant was restored to his position, he voluntarily withdrew from the school and manifestly does not desire to return. But we are satisfied that respondents have mistaken the scope of the pleadings and the extent of the relief that the superior court was authorized to award.

Two issues are embraced within the pleadings: One, the right to have the order of suspension annulled, with the incident of restoration; and the other, the right to his salary during the period of suspension. The latter is the one in dispute, but it is to be observed that, both in the complaint in the superior court for the writ of mandate and in the stipulation of facts made by the parties, it is set forth that the annual compensation of appellant at the time of his suspension was \$2,820. The alternative writ, also, to which respondents made return, and on which they joined issue, provided:

"Whereas, it appears * * * that plaintiff has been wrongfully and unlawfully precluded and prevented from performing his services as teacher, * * * and that you wrongfully and unlawfully have prevented and precluded him from his right to receive and the receiving of the salary and compensation attached to such position: * * * Now, therefore, we * * * do command * * * that you immediately after receipt of this writ admit plaintiff to the use and enjoyment of the right to perform his services, * * * together with his right to compensation and salary to which plaintiff is

entitled, or that you show cause to the contrary."

[1] Respondents answered the writ, setting up as justification for their conduct the order and judgment of said board of education suspending appellant as aforesaid. The right to compensation and salary was therefore as much involved as the right to perform his services as teacher, and both could be legally and regularly determined in the same action. Indeed, if the trial court had determined that the said order of suspension was void, it would necessarily follow that appellant was entitled to be restored to his position and also receive his salary for that period. Having determined that the order was legal and operative, the court's action was in effect an adjudication that appellant was not entitled to be restored to his position and that he was not entitled to any salary for that period. Indeed, at the oral argument it was admitted by respondents that the judgment of the trial court constituted *res adjudicata* as to salary. This admission is tantamount to a concession that the reversal of the judgment would be of practical benefit to appellant, and that therefore the question before us is not altogether moot. It is true that in the prayer of the complaint, as we have seen, the payment of salary is not specifically mentioned; but, where issue is joined, relief embraced within the pleadings may be granted, although the complaint omits the prayer altogether. Section 580, Code Civ. Proc.; *Johnson v. Polhemus*, 99 Cal. 240, 33 Pac. 908; *Hoffman v. Pacific Coast Construction Co.*, 37 Cal. App. 125, 173 Pac. 776. Besides, as already noticed, there is a prayer for general relief, which would undoubtedly authorize the court to award any remedy within the purview of the pleadings.

[2] The next question of importance is whether the trial court could legally direct the board to pay the salary for the term during which appellant was suspended, as well as to command his restoration to his position. If it had no such authority in this action for mandamus, then a reversal herein would be of no avail to appellant, and the action should be dismissed. But, in view of the decisions, it cannot be doubted that the trial court could make such order. *Raisch v. Board of Education*, 81 Cal. 546, 22 Pac. 890; *Kennedy v. Board of Education*, 82 Cal. 483, 22 Pac. 1042; *Ross v. Board of Education*, 18 Cal. App. 222, 122 Pac. 967; *Brown v. White*, 43 Cal. App. 363, 185 Pac. 304. In the *Raisch* Case it is held, quoting from the syllabus:

"Mandamus will lie to compel the board of education of the city and county of San Francisco to draw its draft upon the school fund to pay for supplies furnished to the schools under its care, in pursuance of its contract for such supplies; and the remedy against its members by action for damages for neglect of their

duty is not so competent to afford relief upon the very subject-matter of the application, or so convenient, beneficial, and effective, as the proceeding by mandamus, and will not therefore supersede that remedy."

In the Kennedy Case, the plaintiff was transferred to another department of the school without her consent, and she brought an action for mandamus; the prayer of the complaint being:

"Wherefore plaintiff prays that a writ of mandate be issued, commanding and requiring defendants to admit plaintiff to the use and enjoyment of the right to perform said services and duties, to reinstate plaintiff in the use and enjoyment of said right, and to allow plaintiff to perform said duties and services, or for such other or further order as is proper in the premises, and for costs of this proceeding."

The form is thus shown to be identical with that in the case at bar, and an examination of the complaint therein shows a striking similarity to the one before us. The resemblance is so marked that the pleader herein, in drafting his complaint, must have had before him the pleadings in that case. Therein the trial court awarded the writ, commanding not only the reinstatement of the applicant, but also the issuance of a warrant for her salary, and the judgment was upheld by the Supreme Court.

In *Ross v. Board of Education*, supra, the plaintiff was discharged without cause before the expiration of his term of employment, and, after a careful review of the authorities, the court held that the writ of mandamus would lie to compel the board of education of the city and county of San Francisco to approve the plaintiff's demand for his salary for the full time. Therein is discussed the propriety of the ordinary action for damages, and the court, while holding that such action might have been brought, declared that:

"It cannot be said that the remedy at law is equally convenient, beneficial, and effective to the extent that it will supersede the remedy by mandamus. *Fremont v. Crippen*, 10 Cal. 211, 70 Am. Dec. 711; *Babcock v. Goodrich*, 47 Cal. 488; *Raisch v. Board of Education*, 81 Cal. 542, 22 Pac. 890; *Robertson v. Trustees*, 136 Cal. 403, 69 Pac. 88."

The foregoing cases constitute a sufficient answer to the contention of respondents that:

"Mandamus does not lie to enforce the obligations of a contract, but only to enforce the performance of an act which the law specially enjoins. In this case, it can go no further than to compel the board of education to revoke its suspension of appellant and restore him to his position as teacher."

It may be admitted that therein is correctly stated the general rule as to mandamus; but herein appellant was receiving, as before stated, a fixed salary, and it was the duty of the board of education under the law to di-

rect a warrant to issue for its payment. We may add that the practice is for the board to issue an order or requisition on the county treasurer, which is subject to the approval of the auditor and county superintendent of schools before actual payment. In such cases it is uniformly held that upon refusal to act the writ of mandamus will compel the board to issue its warrant, it being its plain ministerial duty to do so. See, also, *Bannerman v. Boyle*, 160 Cal. 197, 116 Pac. 732.

Herein lies the distinction between this case and those cited by respondents. For instance, in the *Weaver Case*, supra, the board of health could not issue a warrant for the salary of plaintiff, and the only authority it had in the matter was to reinstate him. That relief having become impossible, for the reason stated in the opinion by the Supreme Court, manifestly there was no live question remaining. In *Barber v. Mulford*, 117 Cal. 356, 49 Pac. 206, the court held that mandate would lie to compel the board of education of the city of San Diego to issue its order for the amount of the audited claim, but not for interest, as the law did not require the board to include interest, but limited its action to the amount of the claim as audited. *Howe v. Southrey*, 144 Cal. 767, 78 Pac. 259, involved a similar situation wherein a writ of mandate was issued requiring the trustees of a school district to issue a requisition for the amount of a judgment and costs against said district, but it was held that, since the petition for the writ did not show that any interest was provided for in said judgment, it was not the office of the writ of mandate to determine whether the obligation rested upon the district to pay interest thereupon. It was properly decided that the writ could direct the board to issue a requisition for the exact amount of the judgment and no more. *Sheehan v. Board of Police Commissioners*, 188 Cal. 525, 206 Pac. 70, involved also the payment of interest, and it was held not to be the duty of said board to determine that question, and that the sole function of the writ of mandate is to require the inferior board or tribunal to perform its duty prescribed by the law.

As we understand it, the case may be substantially and decisively presented in a few words. The question is whether any judgment rendered herein may be of practical benefit to appellant. The answer to this depends upon whether the trial court can do any more than to restore appellant to his position. The period of suspension has long since expired, and that feature, of course, is eliminated. But if, upon the merits, the appellate court should reverse the judgment and remand the case for a new trial, it is within the authority of the trial court to direct the board of education to issue its warrant or requisition for the unpaid salary of appellant. This it can do, because such ac-

tion is within the scope of the duty of the board of education, and is comprehended by the issues in the case. Of course, we do not mean to express any opinion as to the legal integrity of the judgment; but, as far as this matter is concerned, we must proceed as though it were certain to be reversed.

Some minor questions are discussed by the parties; but, while they may be pertinent to a consideration of the appeal upon its merits, they have no bearing upon this motion.

The motion to dismiss the appeal is denied.

We concur: FINCH, P. J.; HART, J.

exceed six months' imprisonment under St. 1921, p. 978, notwithstanding section 143 of article 17 of the Charter of Sacramento (St. 1921, p. 1963), conferring upon the police court of that city jurisdiction of all misdemeanors enumerated by the general laws or by ordinances of the city and of all other crimes cognizable by justices' courts and courts of justices of the peace and police courts under the Constitution and laws of the state.

In Bank.

Application by Louis Silva, for a writ of habeas corpus to be directed to the superior court of Sacramento county, to secure release of petitioner after conviction of offering narcotics for sale. Petitioner remanded.

Jas. F. Galliano, of Oakland, and Chauncey H. Dunn, Jr., of Sacramento, for petitioner.

J. J. Henderson, of Sacramento, and J. H. Riordan, Deputy Atty. Gen., for respondent.

WILBUR, C. J. The petitioner was convicted in the superior court of the state, in and for the county of Sacramento, of the crime of offering narcotics for sale, the punishment for which may exceed six months' imprisonment (Stats. 1921, p. 978).

It is conceded that the superior court would have jurisdiction over such a misdemeanor, unless that jurisdiction has been removed by the provisions of the city charter of the city of Sacramento. *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *People v. Y. Wong* (Cal. App.) 215 Pac. 409. It is contended, however, that the Charter of Sacramento, section 143 of article XVII (Stats. 1921, p. 1963), confers such jurisdiction upon the police court of Sacramento and that by conferring such jurisdiction on the police court the superior court no longer has jurisdiction. That section reads as follows, with reference to the jurisdiction over misdemeanors:

"Jurisdiction.

"Sec. 143. Said police court shall have jurisdiction:

"(1) Of all misdemeanors enumerated by the general laws or by ordinances of the city and of all other crimes cognizable by justices' courts and courts of justices of the peace and police courts under the Constitution and laws of the state of California. * * *

It is contended that as the offense of which the petitioner was convicted was a misdemeanor "enumerated by the general laws" of the state, jurisdiction thereof was by the charter conferred upon the police court. The question involved is whether or not the phrase "cognizable by justices' courts and courts of justices of the peace and police courts under the Constitution and laws of the state of California" modifies the phrase "of all misdemeanors enumerated by the general laws."

(191 Cal. 761)

Ex parte SILVA. (Cr. 2599.)

(Supreme Court of California. Sept. 7, 1923.)

Criminal law §90(5)—Superior court held to have jurisdiction of crime of offering narcotics for sale, notwithstanding jurisdiction of police court.

The superior court of Sacramento county has jurisdiction of the crime of offering narcotics for sale, the punishment for which may

The question is fairly debatable, but we think has been set at rest by the fact that the District Court of Appeal for the Third District determined that question in favor of the jurisdiction of the superior court, and against the jurisdiction of the police court in its decision in *People v. T. Wah Hing*, 47 Cal. App. 327, 333, 109 Pac. 662. This decision construed section 164 of the charter as adopted by the people of Sacramento, and ratified by the state Legislature in 1911 (Stats. Ex. Sess. 1911, p. 305). A petition for a transfer of that case to the Supreme Court was denied, but an examination of the file shows that the question of jurisdiction was not raised in such petition. Even if we were now disposed to question the correctness of the decision of the Third District Court of Appeal, we think that the adoption in the new Sacramento charter of 1921 in section 143 of exactly the same language which was thus contained in the charter of 1911, section 164, interpreted and construed by the District Court of Appeal in *People v. T. Wah Hing*, supra, was an adoption by the people of Sacramento of that construction, thus leaving the jurisdiction of high-grade misdemeanors in the superior court. See *Dalton v. Leland*, 22 Cal. App. 481, 135 Pac. 54. Petitioner remanded.

We concur: RICHARDS, Justice pro tem.; MYERS, J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.

191 Cal. 711

FLETCHER et al. v. DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, STATE OF CALIFORNIA, DIVISION TWO, ETC., et al. (L. A. 7608.)

(Supreme Court of California. Sept. 1, 1923.)

4. Eminent domain — 187—Order authorizing state to take possession of right of way after commencement of proceedings and deposit of security for defendants unnecessary.

Under Const. art. 1, § 14, as amended in 1918, authorizing the state, after the commencement of condemnation proceedings, the making of an order therein fixing the amount to be paid or deposited as security for defendants, and the payment of such amount, to take possession of any right of way required, it is unnecessary that the court in such proceedings make any order authorizing the taking of such possession; that right being transferred by the Constitution itself.

2. Contempt — 20—Writ of review held not to enjoin highway officers from improving highway, so as to render them liable for contempt for making such improvements.

A writ of review issued by the District Court of Appeal in eminent domain proceedings to condemn a highway requiring certification of the record by the superior court and con-

taining the provision, "in the meantime we command and require the said respondents and all persons acting under said orders to desist from further proceedings in the matter so to be reviewed," did not enjoin the highway officers from improving the highway which they had taken and retained without question under authority of Const. art. 1, § 14, as amended in 1918, so as to render them liable for contempt where they proceeded with improvements.

3. Contempt — 54(4)—Affidavit must state facts sufficient to constitute a contempt before court has jurisdiction to punish therefor.

In order to acquire jurisdiction to punish for contempt, it is essential that the affidavit charging contempt should state facts sufficient to constitute a contempt of court.

In Bank.

Petition by A. B. Fletcher and others for a writ of certiorari to annul an order of the District Court of Appeal, Second Appellate District, Division 2, and others adjudging them guilty of contempt. Writ allowed, unless order adjudging guilt of contempt annulled.

U. S. Webb, of San Francisco, John W. Maltman, of Los Angeles, C. C. Carleton, of Sacramento, and Lorrin Andrews, of Los Angeles, for petitioners.

Newby & Palmer and Grant Jackson, all of Los Angeles, for respondents.

WILBUR, C. J. This is a petition for writ of certiorari to annul an order of the respondents adjudging the petitioners guilty of contempt in violating the provisions of a writ of certiorari issued by that court.

The people of the state of California initiated condemnation proceedings to open a highway to the Malibu ranch. The trial court fixed security in the way of money deposits, and the deposits were made in accordance with the order fixing the amount thereof. Thereupon the petitioners took possession of the proposed highway and proceeded to construct the highway. The Constitution of California as amended in 1918, art. 1, § 14, provides that where a condemnation proceeding is brought by the state, the state—

"may take immediate possession and use of any right of way required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposits as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto," etc.

The writ of review issued by the respondents was directed to the judge of the superior court before whom the proceedings were pending and to that court, and after requiring the certification of the record by the superior court, contained the following provision:

"And in the meantime, we command and require the said respondents, and all persons acting under said orders, to desist from further proceedings in the matter so to be reviewed."

Among the proceedings thus sought to be reviewed was an order of the trial court made after the deposits of \$32,180 with the Citizens' Trust & Savings Bank in accordance with the previous order of the court to the following effect:

"It is hereby ordered that the plaintiff, the State of California, may take immediate possession and use of the right of way described in the complaint and in said order. * * *"

In this connection it should be noted that the respondents do not claim that the effect of the writ of review was to require the petitioners to surrender the possession that they had obtained, before the issuance of the writ. In that regard the respondents state:

"It may be noted in passing that the owners are not claiming, and have not contended at any time, that the stay of proceedings in the writ here will divest the highway commission of the possession they took under the order of possession; they only claim that the writ operated to stay work on the road and maintain the status of the parties until the validity of the order shall have been determined."

[1] The question thus presented narrows itself to the inquiry of whether or not the highway commissioners, the petitioners here, were acting under and in pursuance of the order under review in continuing the improvement of the highway of which they had taken possession. In this connection it should be observed that while the court in fact made an order purporting to authorize the state to take possession of the proposed highway, the Constitution does not require any such order. It makes the right of possession dependent upon but two things, first, the institution of the condemnation proceedings, and, second, the making of an order therein fixing an amount to be paid or deposited as security to the defendants. Upon the payment of the amount so fixed, the right of possession was transferred by the Constitution itself to the state, and no order of court was necessary to effect that transfer.

[2] We need not concern ourselves upon this application with the question of whether or not the District Court of Appeal in the exercise of its authority to review the orders of the trial court could have required the state of California to surrender possession of the highway to the defendants in the condemnation proceeding pending the hearing of the proceeding for the review of the orders

made by the trial court, nor need we consider whether or not the District Court of Appeal would have had authority in aid of its jurisdiction to review the proceedings to require the suspension of labor upon the proposed highway, if the order actually made required neither one of these things. That the mere retention of possession by the state and its officers was not a violation of the terms of the writ of review issued by the District Court of Appeal is conceded by the respondents here. Can it be fairly said that the order made by the District Court of Appeal in its writ of review had the effect to enjoin the highway officers of the state from improving the highway of which they had taken possession, their right to retain such possession being admitted? In this connection it should be stated that the orders under review made no provision whatever with reference to the improvement of the highway and did not purport to authorize the improvement thereof so that any work done for the purpose of improving the proposed highway was not in fact done under the terms of the orders made by the superior court. Nor do we think the question of the improvement of the highway was a matter germane to the proceedings before the superior court and under review by the District Court of Appeal. The only thing dealt with by the superior court was the right of possession pending in litigation to condemn the title for the state of California. The right to the possession of the property was transferred by the Constitution itself to the highway commissioners acting for the state of California upon the compliance with the terms fixed by the Constitution. If, as was subsequently held by the District Court of Appeal upon the review of the orders complained of, it was held that such orders were void, the right of possession by the state and its officers would at once terminate, because of the fact that there was no valid order fixing the amount to be deposited, and consequently the Constitution was not complied with.

We do not wish to be considered as relying wholly upon the admission of the respondents that the continuance by the highway commission of possession was not a violation of the injunctive feature of the writ of review. We think that the respondents are correct in their admission for the reason that the order does not purport to undo anything that has been done, but merely to enjoin the doing of anything further, and does not require that possession be surrendered by the state pending the termination of the proceedings for the review of the orders of the trial court. We are not dealing with a case where possession had not been taken at the time of the application for the writ of review, but with one where such possession had already been taken by the officers of the state.

We do not think it can fairly be said that

the retention of the possession by the petitioners as members of the highway commission or the attempted improvement of the highway were violations of the terms of the injunctive order contained in the writ of review. It is therefore unnecessary for us to determine the extent of the jurisdiction or power of the District Court of Appeal had it endeavored to expressly prohibit such acts by the state or its officers. It is sufficient for the purpose of this case to say that the injunctive order followed the provisions of the statute with reference to writs of review, and was in the usual form, and was not violated by the petitioners.

[3] The respondents claim that the only question that can be reviewed by this court upon these proceedings is the jurisdiction of the District Court of Appeal to punish for contempt. This is true. But it has been repeatedly held by this court that in order to acquire jurisdiction to punish for contempt of court it is essential that the affidavit charging contempt should state facts sufficient to constitute a contempt of court. *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853; *Hotaling v. Superior Court* (Cal. Sup.) 217 Pac. 73. All the facts that we have stated are shown in the affidavits charging the petitioners with contempt, and such affidavits are not sufficient to give the court jurisdiction to punish petitioners for contempt. The question before us arises on a demurrer interposed in response to an order to show cause why the writ of review should not be issued.

The demurrer is overruled, and the clerk is ordered to issue the writ of review petitioned for, unless within 30 days the respondents annul the order adjudging petitioners guilty of contempt, which they are hereby authorized and empowered to do.

We concur: MYERS, J.; LENNON, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.; RICHARDS, Justice pro tem.



192 Cal. 60

Ex parte CHUTUK. (Cr. 2567.)

(Supreme Court of California, Sept. 14, 1923.)

Health ⚡28—Permit for construction of sewer by contractor not required.

Public Health Act, § 3, requiring permit from state board of health for certain acts in connection with sewers and sewage, is restrict-

ed in its operation to the use of sewers after they are constructed, and has no application to construction of sewer by contractor, which is controlled by the Improvement Act, and hence complaint charging failure to obtain permit stated no cause of action.

In Bank.

Application of Joe Chutuk for a writ of habeas corpus against the Sheriff of Los Angeles County. Petitioner discharged.

Schweitzer & Hutton, of Los Angeles (Hartley Shaw, of Los Angeles, of counsel), for petitioner.

Hugh McNary, of Los Angeles, and J. C. MacFarland, of Sacramento, for respondent.

WILBUR, C. J. The petitioner is a subcontractor for the construction of sewers in the city of Watts, a city of the sixth class, under a contractor who had executed a contract for the construction of the sewers with the trustees of the city of Watts under and in virtue of proceedings instituted in accordance with the Improvement Act of 1911 (Stats. 1911, p. 730). A complaint was filed charging the petitioner with a misdemeanor, in that he had proceeded to excavate for the sewers in accordance with his contract with the city without having previously secured a permit from the state board of health. It was claimed that this was a violation of section 3 (Stats. 1917, p. 921) of an act of the Legislature for the preservation of public health, originally enacted in 1907 and amended in 1911 and 1913 (Stats. 1911, p. 565; Stats. 1913, p. 796; Stats. 1917, pp. 920, 921). The petitioner contends as follows:

"The proper construction of the Public Health Act, with reference to the Improvement Act of 1911 and the Municipal Corporation Act, is that the Improvement Act of 1911 should be construed as providing fully for the construction of sewers, and the Public Health Act is restricted in its application to the use of the sewers after they are constructed."

The attorneys representing the respondent, after due consideration, have concluded not to attack the petitioner's contention, and have expressed their concurrence therein. As we also concur in this view, we deem it unnecessary to further elaborate the reasons why in our judgment the complaint against the petitioner fails to state a cause of action.

Petitioner discharged.

We concur: LENNON, J.; SEAWELL, J.; KERRIGAN, J.; WASTE, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

(192 Cal. 13)

SANDERS v. TOBERMAN. (L. A. 6986.)

(Supreme Court of California. Sept. 12, 1923.)

1. New trial — 125—Notice of motion for insufficiency of evidence need not specify particulars.

A notice of motion to set aside a verdict and for a new trial on the ground of "insufficiency of the evidence to justify the verdict" was a sufficient statement of the grounds of the motion, under Code Civ. Proc. § 659, as amended by St. 1915, p. 201; a specification of the particulars in which the evidence was insufficient being unnecessary under the statute as amended.

2. New trial — 1—Proceedings statutory.

The proceedings for a new trial are statutory.

3. Municipal corporations — 706(7)—Contributory negligence of eight year old child killed by automobile at street crossing held for jury.

In an action for wrongful death of an eight year old child, struck by defendant's automobile on a street intersection over which the child was attempting to draw a little wagon, accompanied by his sister, the question of the child's contributory negligence was for the jury, notwithstanding that it might have done things which in an adult would be held contributory negligence as a matter of law.

In Bank.

Appeal from Superior Court, Los Angeles County; George E. Cryer, Judge pro tem.

Action by Allen Sanders against C. E. Toberman, for damages for the wrongful death of an infant son. After verdict for defendant, a new trial was granted, and defendant appeals. Affirmed.

George H. Moore, of Los Angeles, for appellant.

Wm. J. Palmer and Lyle W. Rucker, both of Los Angeles, for respondent.

WILBUR, C. J. This is an appeal from an order granting a new trial after a verdict of the jury in favor of the defendant in a case brought by the plaintiff to recover for the death of an infant son who was killed by an automobile operated by the defendant. The appellant presents two contentions, first, that the notice of intention to move for a new trial is defective because there are no specifications of the insufficiency of the evidence; and, second, that the evidence shows without conflict and as a matter of law that the child, Milo Wright Sanders, killed by the defendant's automobile, was guilty of contributory negligence.

[1] Before the amendment of 1915 to section 659, Code of Civil Procedure, it was required by that section that when a motion for a new trial was made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the

verdict or other decision, a notice of motion must specify the particulars in which the evidence is alleged to be insufficient. This provision was eliminated by the amendment of section 659 in 1915 (Stats. 1915, p. 201). The section now requires the moving party to designate the grounds upon which the motion will be made. The notice of motion in the case at bar was as follows:

"Take notice that plaintiff, Allen Sanders, intends to move the court to vacate and set aside the verdict rendered in the above cause, and to grant a new trial of said cause, upon the following grounds, to wit: I. Insufficiency of the evidence to justify the verdict. Said motion will be made upon the minutes of the court in said cause."

This was a sufficient statement of the grounds of the motion for a new trial. It was unnecessary to specify in detail the respects in which it was claimed that the evidence was insufficient to justify the verdict.

Appellant cites in support of his proposition that the amendment of 1915 did not abolish the requirement for specifications of the insufficiency of the evidence. *Millar v. Millar*, 175 Cal. 797, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184, and *Williams v. Bullock Tractor Co.*, 186 Cal. 32, 39, 198 Pac. 780. The case of *Millar v. Millar*, supra, dealt with a motion for a new trial made upon a bill of exceptions, notice whereof was given January 6, 1915, before the amendment to section 659 of the Code of Civil Procedure of that year became effective, consequently that decision has no application to the case at bar. The case of *Williams v. Bullock Tractor Co.*, supra, dealt with an appeal from a judgment upon a bill of exceptions and has no application to the situation here.

[2] The appellant suggests rather than argues that "the common law and equity practice in this connection is a part of the substantive law of the state." There is no merit in this suggestion. The proceedings for a new trial are statutory.

[3] We deem it unnecessary to discuss the evidence which the appellant claims establishes that the deceased child was as a matter of law guilty of negligence. The question as to whether or not a child of eight years was guilty of negligence is ordinarily a question of fact to be determined by the jury, notwithstanding the fact that the child may have done things which in an adult would be held contributory negligence as a matter of law. *Mayne v. San Diego Elec. Ry. Co.*, 179 Cal. 173, 175 Pac. 690, and cases there cited. See, also, *Cahill v. E. B. & A. L. Stone Co.*, 167 Cal. 126, 139, 138 Pac. 712. It is sufficient for the purposes of this appeal to say that the accident occurred at the intersection of two streets on one of which the defendant was traveling with his automobile, and that the deceased child was attempting to draw a

little wagon across the street, accompanied by his sister. The question of whether or not the child was negligent in failing to exercise due caution in observing the traffic at the street intersection was a question for the jury to determine under proper instructions.

The order granting a new trial is affirmed.

We concur: LENNON, J.; WASTE, J.; SEAWELL, J.; KERRIGAN, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

191 Cal. 785

SLAYDEN v. O'DEA et al. (L. A. 7129.)

(Supreme Court of California. Sept. 11, 1923.
Rehearing Denied Oct. 10, 1923.)

1. Highways ☞113(1)—Advances made by creditor to contractor held not lien on certain bonds.

Where a creditor of a contractor has a lien on certain bonds for advances made to the contractor, a finding that further advances not indorsed upon the contract are not secured by the bonds, is sustained when the evidence shows no agreement that they should be secured, in view of the fact that all other advances were indorsed upon the contract.

2. Appeal and error ☞1008(1)—Finding on question of fact is binding.

Where a question of fact is to be determined by the trial court from the evidence, its finding is binding upon the Supreme Court.

3. Judgment ☞256(1)—Finding including an item which findings and conclusions of law and judgment do not include, held inadver-tence.

A finding that the unpaid balance was \$1,991.31 "together with the additional sum of \$666.20," held an inadvertent statement as to \$666.20, where the findings and conclusions of law and judgment limited the amount of recovery to \$1,999.31, and failure to include such item in the judgment was not error.

In Bank.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

Action by H. R. Slayden against M. F. O'Dea and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Crouch & Crouch, Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for appellants.

J. W. Morin, of Pasadena, for respondent.

WILBUR, C. J. This is a second appeal from a judgment in this case, the first being reported in 182 Cal. 500, 189 Pac. 1066. Upon the first appeal it was held, that inasmuch as M. F. O'Dea did not participate in the agreement giving to the plaintiff a lien upon bonds 9 and 10 issued by the county of Los

Angeles, that the claims of plaintiff were "subject and subordinate to the prior claims of the appellant [M. F. O'Dea] for reimbursement for the balance due him from the contractor." The only question that need be considered on this appeal is whether or not the finding of the trial court that two items, one of \$232, and the other of \$466.41, advanced by M. F. O'Dea to the contractor, were secured by the bonds here involved, and thus have priority over the claims of the plaintiff.

In this connection it should be observed that under the contract by which M. F. O'Dea agreed to furnish money to the contractor, a copy of which is set in the previous opinion of the court, the amount to be furnished by M. F. O'Dea to the contractor was limited to \$6,000. Subsequently, by agreements made from time to time, the amount to be advanced was increased. With reference to the item of \$232, the arrangement for the advance was made between Mr. Farmer, acting for the construction company, and Mr. O'Dea. In regard to the transaction Mr. Farmer was not called as a witness. Mr. O'Dea testified in that regard as follows:

"Q. When he came to you about getting the money, what did he say and what did you say? A. Well, he said he needed that much more money to complete everything, and the job had been finished or about finished, and that would be the last. Q. What did you say in response to that? A. Well, I gave it to him. I don't know just what I did say. I had been out there and seen the work. I think I was out there about that day or the day before I gave it to him."

With reference to the advance of \$466.41, the witness O'Dea testified as follows:

"Q. Now, about the advance of \$466.41, that was the last amount. What did he say when he wanted that? A. He said the electric railway company bill was four hundred and sixty—was that amount for hauling the rock on the street, and he asked me to pay that bill. Q. He had already gotten the rock? A. The street had been all finished then—long finished. Q. And he wanted you to pay that bill for him? A. Yes; he asked me to pay that bill. Q. What did you say in response to that? A. I told him, all right, I would pay it. I sent the railway company a check. I think I have their bill."

[1, 2] There is nothing in this evidence which compels the conclusion that these advances were by agreement between the contractor and the money lender secured by the contract and bonds, particularly in view of the fact that all other advances were indorsed upon the contract, thus indicating their purpose and agreement that the amounts so advanced were intended to be secured by the contract and bonds issued in pursuance thereof. The question of whether or not the advances made by O'Dea to the

contractor were agreed and intended to be secured by the contract, and bonds issued in pursuance thereof was a question of fact to be determined by the trial court from the evidence, and its finding is binding upon this court.

[3] The appellant claims that the trial court erred in failing to include in the judgment an item of \$666.20 of bonus agreed to be paid by the contractor to O'Dea for the advancement of the sum of \$6,000 provided in the original contract. There is no merit in this contention, for it clearly appears from the findings that this item is included in the amount of \$1,999.31, for which judgment was rendered in favor of M. F. O'Dea. The finding of the court that the balance of the secured advances unpaid was \$1,999.31, "together with the additional sum of \$666.20," is as to the latter statement clearly an inadvertence which was corrected, both in the conclusions of law and the judgment which limits the amount of recovery of M. F. O'Dea to \$1,999.31.

Judgment affirmed.

We concur: LENNON, J.; SEAWELL, J.; MYERS, J.; LAWLOR, J.; KERRIGAN, J.; WASTE, J.

191 Cal. 782

MORRISSEY v. MORRISSEY et al.
(S. F. 10648.)

(Supreme Court of California. Sept. 11, 1923.)

1. Courts ⇨ 125—Superior court held to have jurisdiction of action for trespass to real estate by one alleging ownership.

As under Civ. Code, § 660, fruit trees, shed, and fence constituted part of realty, action for destroying the trees and removing the shed and fence, in which plaintiff alleged ownership of the land, was within jurisdiction of superior court, though answer might not controvert allegation of ownership.

2. Courts ⇨ 125—Superior court has jurisdiction, if title or right of possession of land must be decided.

If issue of title or right of possession of land is so involved that it must be decided in order to determine the case, the superior court has original jurisdiction, whether such involvement be merely incidental or not.

3. Justices of the peace ⇨ 36(3)—Statute cannot give jurisdiction in excess of constitutional jurisdiction.

Justice's court cannot exercise jurisdiction broader than that conferred on it by the Constitution by reason of Code Civ. Proc. § 112, subd. 2, giving jurisdiction of actions for injuries to real property, where no issue of title or possession is raised by verified answer.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by J. J. Morrissey against James Morrissey and another. From a judgment for defendants on demurrer, plaintiff appeals. Reversed.

F. P. Tuttle, of Oakland, for appellant.

Charles Quayle, of Oakland, for respondents.

KERRIGAN, J. The plaintiff commenced this action in the superior court on a complaint containing two causes of action. In the first cause of action he alleged that he was the owner of a certain lot of land lying in the city of Oakland, and that the defendants willfully and unlawfully and without his consent permitted goats owned by the defendants to enter upon said land and to destroy 10 fruit trees growing thereon, which were the property of the plaintiff, and which were of the reasonable market value of \$150. In the second cause of action the plaintiff alleged that he was the owner of a shed and 30 feet of fence located upon said lot of land, of the value of \$30, and it is alleged the defendants willfully and unlawfully and without the consent of plaintiff entered upon said land, and removed therefrom and converted to their own use said shed and fence. The prayer followed for judgment in the sum of \$180. The defendants demurred, upon the grounds that the court was without jurisdiction of the subject-matter of the action, and that the complaint failed to state facts sufficient to constitute a cause of action against them. This demurrer was sustained without leave to amend. From the judgment following plaintiff has prosecuted this appeal.

[1, 2] The fruit trees, shed and fence constitute part of the realty (Civ. Code, § 660), and were part of the real property alleged to belong to plaintiff. The purpose of the action is to recover damages for the injuries charged to have been committed by the defendants to said property. The case, therefore, upon its face, is within the jurisdiction of the superior court, since one of its issuable allegations is the ownership of the real property described, and a traverse of this allegation will put such ownership in issue. That the answer to be filed may possibly not raise such issue is immaterial. The issue of ownership is tendered by the plaintiff, who conceives that his right of action is based wholly or partly upon it. The jurisdiction of the superior court is thus determined, and cannot await upon the contingency that the answer of the defendant may admit the allegation. *Holman v. Taylor*, 31 Cal. 338; *Raisch v. Sausalito Land & Ferry Co.*, 131 Cal. 215, 63 Pac. 346; *Dungan v. Clark*, 159 Cal. 30, 112 Pac. 718. This is true, even if the issue is incidental. On the other hand, if such a complaint be filed in the justice's court, and an answer be filed which makes no

traverse of the allegation of title or possession of the real property, so that no question of such title or possession is involved, the justice's court will have jurisdiction of the action. *Hart v. Carnall-Hopkins Co.*, 103 Cal. 132, 37 Pac. 196. If the issue of title or possession is so involved that it must be decided in order to determine the case, the superior court has original jurisdiction of the action, whether the involution may be said to be merely incidental or not. *Hart v. Carnall-Hopkins Co.*, supra; *O'Meara v. Hables*, 163 Cal. 240, 124 Pac. 1003.

In some cases it has been said that, where title or possession of real property is merely a fact in controversy, arising incidentally or as a collateral question, it could not be held that the action involved such title or possession (*Pollock v. Cummings*, 38 Cal. 683; *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737); but the later decisions have held that this statement is too broad, and that the phrase does include cases where the title or possession is only incidentally involved, provided the issue of title or possession must be determined in order to decide the case (*Williams v. Mecartney*, 69 Cal. 556, 11 Pac. 186; *Hart v. Carnall-Hopkins Co.*, supra). The true rule seems to be this: If the issue of title or right of possession is so involved that it must be decided in order to determine the case, the superior court has original jurisdiction, whether the involution may be said to be merely incidental or not. *Dungan v. Clark*, supra; 7 Cal. Jur., pp. 600, 601, §§ 19 and 20.

[3] There is no merit in the suggestion that jurisdiction was conferred upon the justice's court in a case of this kind by the provisions of subdivision 2 of section 112 of the Code of Civil Procedure, for it has been expressly held that under this section the justice's court cannot exercise a jurisdiction which is broader than that conferred upon it by the Constitution. *King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10.

Judgment reversed.

We concur: WILBUR, C. J.; LENNON, J.; SEAWELL, J.; MYERS, J.; WASTE, J.; LAWLOR, J.

(191 Cal. 753)

ROFFINELLA v. ROFFINELLA et al.
(S. F. 10080.)

(Supreme Court of California. Sept. 7, 1923.
Rehearing Denied Oct. 4, 1923.)

1. Specific performance ⇨117—Could not be granted as to memorandum for lease of entire premises when evidence shows part was to be reserved.

Where the evidence showed and it was conceded that part of premises was to be reserved

under proposed lease, specific performance of preliminary memorandum covering the entire premises was properly refused.

2. Contracts ⇨15—Meeting of minds as to all terms of agreement essential.

To make effective agreement, there must be a meeting of the minds of the parties in one accord as to all terms of the agreement.

3. Ejectment ⇨111(1)—Finding on conflicting evidence that minds of parties never met on details of lease held to warrant finding against tenant.

In suit for specific performance of alleged agreement for lease in which defendant denied the agreement and filed cross-complaint in ejectment, finding on conflicting evidence that minds of parties never met as to extent of the premises to be included warranted findings against plaintiff on the issue raised by the pleadings in ejectment.

4. Tender ⇨14(1)—Tender of rent on condition that landlord execute agreement held insufficient.

Under Civ. Code, § 1494, requiring offer of performance to be free from conditions which creditor is not bound to perform, where minds of parties never met on agreement for lease, tender of rent on condition that landlord execute lease in accordance with certain memorandum was not a good tender.

5. Landlord and tenant ⇨118(1)—When minds of parties never met, landlord entitled to treat tenant as one at will.

Where minds of parties never met on details of proposed lease, landlord was entitled to treat tenant as one at will and to sue in ejectment after expiration of time designated in notice terminating tenancy.

6. Pleading ⇨148—In suit for specific performance of agreement to make lease, cross-complaint in ejectment held authorized.

In suit for specific performance of alleged agreement to make lease, where defendant denied the agreement and had given notice to terminate the tenancy as one at will, cross-complaint in ejectment was authorized under Code Civ. Proc. § 442.

On Petition For Rehearing.

7. Tender ⇨26—When made on unauthorized condition money did not become property of one to whom tendered.

Where tender of rent followed by deposit in bank was on condition which tenant had no right to impose, the money did not belong to the landlord, but remained tenant's property, and judgment for rental value on cross-complaint in ejectment was not erroneous because of the tender.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Filippo Roffinella against Cesare Roffinella and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Rea, Cassin & Caldwell, of San Jose (Courtney L. Moore, of San Francisco, of counsel), for appellant.

William F. James, of San Jose, and Charles J. Heggerty, of San Francisco, for respondents.

LENNON, J. This is an action to compel specific performance of an alleged agreement for the execution of a lease by the defendants to the plaintiff of certain ranch property. The controversy involves the question of whether or not an oral agreement, claimed to have been partially executed, for a lease of the entire premises, was entered into between the plaintiff and the defendants or whether the negotiations of the plaintiff and the defendants constituted no more than a mere offer, by the defendants, to lease to the plaintiff only a portion of the premises in controversy, which offer, it is claimed, was never accepted by the plaintiff.

Upon the trial of the case the court below found against the contention of the plaintiff that an agreement had been entered into. The findings of the trial court are, in effect, that the plaintiff and defendants did not enter into a verbal agreement as set forth in plaintiff's complaint, nor into any agreement at all, but, on the contrary, that the result of the negotiations between the plaintiff and the defendants was that—

"About November 1st, 1919, Cesare Roffinella verbally offered to lease to plaintiff, for a period of five years, at an annual rental of \$1,900 the said lands, excepting therefrom, however, the residence building of said defendants, the garage, woodshed, tankhouse, situate thereon, and the garden and land from said tankhouse to the county road, and on such terms and conditions as might thereafter be mutually agreed upon."

From the judgment in favor of defendants and cross-complainants denying specific performance and decreeing restitution of the premises to the defendants, plaintiff appeals.

Substantially stated, the facts out of which the controversy arises are these:

Cesare Roffinella, respondent herein and defendant and cross-complainant below, is the owner of a vineyard and orchard consisting of about 18 acres of land near Gilroy in the county of Santa Clara. On a portion of this ranch is located his residence with the appurtenances, to wit, a garage, a woodshed, a tankhouse, and a garden. In October, 1919, Cesare Roffinella made a visit to his cousin, Felippo Roffinella, appellant here and plaintiff below, who was then residing in the city of Santa Clara. On that visit Cesare inquired of Felippo Roffinella if he would care to rent the ranch at Gilroy. This was merely a general offer, and no agreement or arrangements of any kind were entered into at that time.

On November 10, 1919, Felippo visited Cesare on the ranch at Gilroy, and arrange-

ments for the leasing of the property were then discussed. According to the testimony of Cesare Roffinella, Felippo was to lease the ranch with the exception of the house, tankhouse, woodshed, and the piece of land from the tankhouse to the county road, for a period of five years at an annual rental of \$1,900, one-half of which was to be paid in January and the remaining half in October of each year. Felippo was to buy certain personal property, horses, harness, and implements and was to return to Cesare in as good condition as he received them certain other personal property to be inventoried.

The next day the defendant Cesare and Felippo with their wives went to an Italian scrivener, Carbignano by name, to have him draft a memorandum of the personal property which Felippo was to buy and a list of the personal property of which he was to take charge. Cesare had written down in a memorandum book a list of the personal property, the amount of the rental, and the period of time for which he offered to lease the property. Carbignano used this list as a basis for his memorandum. It is an undisputed fact in the case that the understanding of both parties was that this writing by Carbignano was to be merely a temporary memorandum, and that later the parties were to go to a lawyer and have the lease made out in proper form.

The defendant Cesare testified that while at Carbignano's he again mentioned to Felippo the fact that he (Cesare) intended to reserve a portion of the premises for his own use. It was also the understanding of Carbignano that the reservation of the house and the appurtenances thereto was to be made by Cesare. Carbignano did not, however, include the provision as to the reservation in the memorandum. Cesare, at the time he received the memorandum, noticed the omission, but made no objection, because, as he understood it, the memorandum was but a temporary memorandum and was not a lease. The next day Cesare drove Felippo and his wife home to Santa Clara in his machine. Felippo then gave Cesare two checks totaling \$50, which Cesare claims was in part payment on the personal property to be purchased by Felippo, but which Felippo claims was given by him to Cesare to bind the contract or lease.

On or about January 20, 1920, Felippo and his wife moved to the ranch at Gilroy. Felippo at this time paid to Cesare \$400 on account of the rent and signed the temporary memorandum previously made out by the Italian scrivener, Carbignano. Cesare did not sign the memorandum. Felippo and his wife moved into a house near the winery which had been constructed for them by Cesare, and Cesare and his wife continued to occupy their old residence.

In June Cesare went to Carbignano and

had him make out a new memorandum, which included an agreement covering the reservations. Cesare then asked Felippo to go with him to an attorney and have the lease made out as they had agreed. Felippo, however, refused to go upon the plea that he did not have time. Cesare several times thereafter requested Felippo and his wife to go with him to an attorney to sign a lease, but Felippo persistently refused, making the excuse that there was plenty of time and refusing to look at the new memorandum.

In January, 1921, Cesare again requested Felippo to go with him to have the lease executed, and at that time Felippo informed Cesare that he did not want the lease as made out from the second memorandum made by Carbignano, but that he wanted the lease as set forth in the first memorandum; that, if Cesare would make the lease according to the first memorandum, "it would be all right, otherwise he would not go to have the lease made out." Cesare treating this refusal as final, on January 20, 1921, caused to be served upon Felippo a notice to terminate the tenancy, which was ignored by the plaintiff, who thereupon filed suit for the specific performance of the lease. Answering plaintiff's complaint, the defendant Cesare denied all the material allegations thereof and having elected to consider plaintiff as a tenant at will, interposed a cross-complaint in ejectment.

[1] Plaintiff's verified complaint, after setting forth a description of the entire premises by metes and bounds, alleges that "plaintiff and defendant entered into a verbal agreement whereby the said defendant agreed to lease all of said premises to the plaintiff" and that thereafter, in compliance with said verbal understanding, "a lease in Italian language was written under the direction of both parties." A translation of the original memorandum is attached to said complaint as a "correct translation of said lease."

The evidence adduced in support of defendant's case sustains the contention of the defendant that the lease was not to include all of the premises, but that the reservations in question were to be included in the lease when it was to be finally executed. There is the direct testimony of Cesare and his wife to the effect that the residence and its immediate appurtenances were to be reserved from the operation of the lease. This testimony was in a measure corroborated by the scrivener, Carbignano, and his wife. And the testimony of Cesare in this behalf was further strengthened by evidence of the fact that a new house was erected by Cesare for Felippo and his wife, which obviously would have been unnecessary if Cesare had not reserved to himself the use and occupation of his original residence. Furthermore, there is not in the testimony of either Felippo Roffinella or his wife an express denial that the reservations were to be included in the lease.

In fact, it is now conceded by the plaintiff that a portion of the premises was to be reserved from the operation of the lease. That the offer by Cesare was to lease the ranch only upon condition that the reservations be included therein, may therefore be taken as an established fact in the case. It follows, as a matter of course, that the trial court was constrained to deny, as it did, the prayer of plaintiff's complaint that the defendant be compelled to specifically perform the agreement pleaded and purporting to be one for the lease of the entire premises. *Slater v. Howie*, 49 Kan. 337, 30 Pac. 413; *Magee v. McManus*, 70 Cal. 553, 12 Pac. 451.

[2] It is, however, argued by the plaintiff that although the evidence did not disclose the existence of the particular agreement pleaded in plaintiff's complaint, nevertheless the court had the power in the equitable action of specific performance to inquire as to what the real agreement of the parties was, and then specifically enforce it; or that, in any event, and at the very least, such an agreement might have been found to have been partially executed, and, when found, would have constituted a good defense against the cross-complaint in ejectment. Of course, it goes without saying that in order to make an effective agreement there must be a meeting of the minds of the parties in one accord as to all the terms of the agreement. The agreement which the plaintiff in the instant case pleads and relies upon in the first instance is that expressed by the written memorandum attached to and made a part of the plaintiff's complaint, and it was his contention, in effect, in the court below, as it is his contention here, that that memorandum contained all of the terms of the agreement in suit save and except the one for the execution of a written lease, and that the execution of this particular memorandum of the agreement would have satisfied that condition. Now, the defendants' understanding of the contractual relation and situation of the parties differs from that of the plaintiff in so far as it relates to these particulars: (1) The premises included or reserved; (2) the character or purpose of the written memorandum; (3) the finality of the agreement as to the terms that were agreed upon; (4) the inclusion of additional terms, such as non-assignability, etc.; and (5) the execution of a written lease different from the memorandum, including all the terms when they were agreed upon. The written memorandum in question calls for "vineyard and fruit ranch of about eighteen acres, house of three rooms, with water, wine-cellar, and appurtenances for the same," and no exception or reservations are mentioned. The plaintiff's verified complaint prays for all of the said premises, referring to an exact description by metes and bounds of the entire premises and likewise without any reservations or exceptions.

Plaintiff testified that he rented all of the property, and that nothing had been said about the defendants' house. The plaintiff's wife testified to the same effect. Upon the hearing last had before this court for a resubmission of the cause for further argument upon the issue of ejectment raised by the cross-complaint and the answer thereto, it was suggested from the bench that perhaps the written memorandum might be construed as allowing the defendant the reservation of his house and garden, because it purported to lease only a vineyard and a fruit ranch of about 18 acres and a house of three rooms. It will be noted, however, that the reservations which the defendant claimed included a part of the vineyard itself. The defendant testified that he told the plaintiff, on the occasion of their first conference concerning the execution of the lease, that he was reserving "the house, the tank house and garage, woodshed, and the piece of land surrounding the house all the way over to the county road." The defendant's wife also testified that there were to be reserved to the defendants "the tank house, garage, woodshed, garden all around the house, and also the piece of vineyard that follows around the house and winds up in the county road."

[3] Thus, it is apparent that if the trial court had the testimony last referred to in mind when making its findings, it could not have construed the written memorandum as meaning and intending to except all of defendants' reservations, nor that it was intended to express the defendants' understanding of the proposed agreement with the plaintiff. Moreover, it is obvious from the plaintiff's verified complaint demanding all of the premises, and his persistent insistence upon the execution of this written memorandum and none other, coupled with the testimony of the plaintiff and his wife, that he was either repudiating the agreement as to the reservations or else his mind and that of the defendants never met as to the extent of the premises which were to be included within the terms of the lease. The latter alternative was the one evidently adopted by the trial court, and as it is a conclusion reasonably deducible from a clear-cut conflict in the evidence, it will suffice to support the findings of the lower court upon the issue raised by the pleadings in ejectment.

[4, 5] The trial court found that plaintiff had tendered to defendant the rental remaining due only upon the condition that the defendant execute the written agreement containing the terms of the contract which he, the plaintiff, insisted had been agreed upon by them. Since the plaintiff insisted that the agreement was to lease the entire premises, this was, in effect, a tender upon the condition that the defendant execute to plaintiff a lease of the entire premises without any reservations. The plaintiff was

not entitled to make his tender conditional upon the execution by defendant of such a lease. Section 1494 of the Civil Code provides that an offer of performance must be free from any conditions which the creditor is not bound on his part to perform. The cross-complainant, therefore, was entitled to treat the plaintiff as a tenant at will, and, the time designated in the notice of termination of tenancy having expired, he was entitled to sue in ejectment.

[6] It is further contended by plaintiff that in any event a judgment in ejectment, which is legal in its aspect, could not be rightfully sought and secured in an action to enforce specific performance, which is equitable in its nature. Authorities dealing directly with modern statutory cross-complaints and prescribing when and for what purpose they may be interposed are quite meager and unsatisfactory, but the principle which covers and controls the interposition of a cross-complaint is to be found in section 442 of the Code of Civil Procedure. This section provides that when the defendant seeks affirmative relief "relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates," he may file a cross-complaint. The cause of action pleaded in the cross-complaint in the instant case certainly did relate to, arise out of and depend upon the transaction which was made the basis of the plaintiff's action for specific performance, and, certainly, it must be considered as "affecting the property to which the transaction relates." In short, the subject-matter of the cause of action pleaded in the plaintiff's complaint and the relief sought by the cross-complaint was intimately connected with the matter involved in the principal action. Consequently we are unable to conceive why, even though the cross-complaint covered and controlled an action which was legal in its nature, it could not be interposed in an action seeking to enforce the making of a lease, and thereby bring about a complete adjudication of the entire subject-matter involved in both the original and cross-complaints. It is difficult to perceive a more natural and appropriate proceeding for the expeditious adjudication of litigation arising out of a single transaction.

Judgment affirmed.

We concur: WILBUR, C. J.; WASTE, J.; MYERS, J.; KERRIGAN, J.; SEAWELL, J.; LAWLOR, J.

On Petition for Rehearing.

PER CURIAM. [7] The appellant's petition for rehearing is based upon the contention that there is no foundation for the award of \$1,000 damages. His argument is that he deposited \$1,900 with a bank in the

name of the respondents; that this covered the full rental value of the property, and the additional judgment for \$1,000 was therefore erroneous. It is sufficient to say that the \$1,900 having been conditionally tendered and deposited does not belong to the respondents, but remains the property of the appellant. The \$1,000 thus included in the judgment was for the rental value of the premises. This we may say is the view taken by the respondents in their answer to the petition for a rehearing.

Petition for a rehearing is denied.

(191 Cal. 738)

AMERICAN TRADES & SAVINGS BANK v. DUHRING et al.

**FIRST NAT. BANK OF RACINE, WIS.,
v. SAME.**

(S. F. 9569, 9570.)

(Supreme Court of California. Sept. 12, 1923.
Rehearing Denied Oct. 10, 1923.)

1. Bills and Notes ⇨92(1)—Notes executed by stockholders to corporation for use as security for payment of draft held supported by consideration.

Where stockholders of financially embarrassed corporation executed notes to it for transfer as security to bank holding for collection drafts for price of motor trucks in order to release the trucks, the mutual and interdependent advantages to all parties held legal and ample consideration for their execution and delivery to the immediate payee, though makers were not indebted to it.

2. Bills and notes ⇨92(1)—Hope or belief that notes would be paid from sales of motor trucks held not to affect makers' liability.

Where notes, executed by stockholders to corporation, and transferred as security to bank holding drafts for price of motor trucks for collection, were intended to secure and provide for payment of the drafts, makers' hope or belief that sales of the motor trucks would take care of the notes did not affect their liability.

3. Pledges ⇨9—Transfer to bank holding drafts as security for their payment not without consideration.

Where stockholders, to obtain release of motor trucks, executed notes to corporation, which transferred them as security to bank holding drafts for price of the trucks for collection, the transfer was not without consideration.

4. Bills and notes ⇨539—Findings that there was no consideration for transfer by payee to bank or by bank to another, and that makers were not indebted to bank, held immaterial.

In action on notes which stockholders, to obtain release of motor trucks, executed to corporation which transferred them as security to bank holding drafts for price of the trucks for collection, findings that there was no con-

sideration for transfer to the bank, that makers were not indebted to it, and that there was no consideration for transfer by the bank to other banks, held immaterial.

5. Bills and notes ⇨279—Bank held not to hold notes merely for collection, and to have authority to indorse them.

Where notes were executed by stockholders to corporation, and by it transferred to bank holding drafts for collection for purpose of collecting them when due, and applying proceeds to payment of the drafts, the bank did not hold them merely for collection, and had authority to indorse them to banks through which drafts were sent to it for collection.

In Bank.

Appeals from Superior Court, City and County of San Francisco, George H. Cabaniss, Judge.

Two actions, by the American Trades & Savings Bank and by the First National Bank of Racine, Wis., against Frederick T. Duhring and another, as executors of Caius T. Ryland, deceased, and others. From judgments for defendants, plaintiff appeals. Reversed.

J. H. Morris and Cushing & Cushing, all of San Francisco (Delger Trowbridge, of San Francisco, of counsel), for appellants.

T. C. Denny, of Sonoma, and Robbins, Elkins & Van Fleet, of San Francisco, for respondents.

LENNON, J. These two cases were tried together and, while separately appealed, were by stipulation submitted upon one transcript and upon identical briefs. Each of said actions was for recovery by the respective plaintiffs upon promissory notes executed by Caius T. Ryland and John Scott Wilson to Interstate Motors Company, a corporation, and by it indorsed and transferred to the First National Bank of San Francisco, which later indorsed and transferred one of said notes to the First National Bank of Racine, Wis., one of the plaintiffs herein, and the other to the Commercial & Savings Bank of Racine, Wis., the predecessor of the American Trades & Savings Bank, the other of said plaintiffs herein. The complaint in each action is in the usual form of an action for the recovery upon an indorsed promissory note. The answers of the defendants in each action are identical in form. They each admit the execution of said notes, but set up at considerable length and with much detail three separate and specific defenses to a recovery upon either of them. In the first of these defenses the defendants allege the circumstances under which each of said notes was given, and which will be more particularly hereinafter set forth. In the second of said defenses, the defendants in each case allege that each of said notes was executed by the makers thereof without consideration, and not in the ordinary course of

business, and that each of said notes was indorsed by the payee thereof to the First National Bank of San Francisco without any consideration passing to it therefor. And the defendants on information and belief aver that the plaintiffs in each of said actions received the note transferred to it without consideration, and well knowing that no consideration had passed either to the makers or to the indorsers thereof. In the third of said defenses, the defendants in each case aver that said notes were not executed in the ordinary course of business, but were executed by the makers for the sole and exclusive purpose of having the same placed with the First National Bank of San Francisco for collection, under a special arrangement as to the application of payments, and that at the time each of said notes was executed and was accepted by the said First National Bank of San Francisco it was agreed that the notes should be held by the said First National Bank of San Francisco for collection, and for no other purpose whatsoever, and which the plaintiffs in each of said actions well knew at the time said notes were transferred to it. Subsequently to the framing of the issues in each of said actions the defendants Caius T. Ryland and John Scott Wilson died, and the present defendants were duly appointed to administer, respectively, upon each of their estates. Whereupon the plaintiff in each case filed a supplemental complaint, alleging the decease of said original defendants, and the appointment of their successors, and the proper presentation of a claim in each case against their respective estates.

The cases came on for trial before the court sitting without a jury, and were tried and submitted for decision together, and the trial court thereafter filed its findings of fact and its conclusions of law in each case. In its said findings of fact the trial court found that the original defendants, Ryland and Wilson, had executed and delivered the note in question in each case to the Interstate Motors Company, their codefendant, on the 21st day of June, 1913. The court further found that the said C. T. Ryland and John Scott Wilson were not indebted to defendant Interstate Motors Company at the time they executed said note; they gave said note for the use of the defendant corporation; it was never contemplated by the parties they should pay the note; they gave the note for the purpose of lending their credit to the corporation; they were accommodation makers of said note; the note was to be paid from the proceeds of the sale of certain motor trucks, and not otherwise; that the said motor trucks have not been sold, except that one of said trucks was sold for \$1,350, and the said \$1,350 were paid upon said note, and the note was not given in the ordinary course of business as a payment from the said C. T. Ryland and John Scott

Wilson to defendant Interstate Motors Company; the said note was not executed for a consideration, and is wholly without consideration, and all of the facts found in this paragraph were known to the First National Bank of San Francisco at the time the said note was delivered to it. The court made further findings of fact which will be adverted to later. As a conclusion of law from its said findings of fact the trial court found that the plaintiffs were entitled to judgment against the defendant Interstate Motors Company, but that the defendants, other than the Interstate Motors Company, were entitled to judgment in their favor and for their costs. Judgment was entered accordingly in each case, and from such judgments the plaintiffs have respectively taken and prosecuted these appeals.

The first contention of the appellants is that there was no evidence sufficient to justify the finding of the trial court that there was no consideration for the notes sued upon. The determination of this question involves an examination of the evidence in the case. The evidence touching the execution of the notes in question and their delivery to the Interstate Motors Company, the original payee thereof, is practically all documentary and free from conflict. It may be summarized as follows: In the latter part of the year 1912 the Piggins Motor Truck Company was a corporation having its principal place of business in Racine, Wis., and being engaged in the manufacture and sale of a certain type of motor trucks designated in the record herein as "Piggins trucks." The Interstate Motors Company was at this time a California corporation, engaged in the business of dealing in motor trucks. On the 5th day of October, 1912, a contract in writing was entered into between these two corporations, by the terms of which the Piggins Motor Truck Company granted to the Interstate Motors Company the right to sell said motor trucks in certain territory embracing all of the Pacific Coast states, the Philippine Islands, the Hawaiian Islands, Alaska, Australia, New Zealand, China, and Japan, and in pursuance of said grant, the former agreed to sell to the latter 200 Piggins trucks during the life of the contract, which was to last for a little more than one year, at certain designated prices for the several sizes of said trucks. These trucks were to be consigned by the seller to the dealer from time to time as ordered, accompanied with sight drafts attached to the bills of lading, which were to be paid on presentation.

The first order given by the Interstate Motors Company under said contract was for 24 one-ton trucks, 3 two-ton trucks, and 3 three-ton trucks, and was of the date of October 26, 1912. Shipment of these trucks began shortly after the date of said order, and proceeded during the winter and spring.

of the following year. The method of business of the Piggins Motor Truck Company with relation to its drafts upon the California corporation was that of taking said drafts with attached bills of lading to one or the other of the Racine banks with which it did business, which would cash the draft, and send it to its San Francisco correspondent for collection. In the event any of said drafts was unpaid, the drawer was to reimburse the bank which had cashed it in the first instance. One of said banks was the First National Bank of Racine, Wis., one of the plaintiffs herein, the other was the Commercial & Savings Bank of Racine, Wis., the predecessor of the other plaintiff herein. The sight drafts for the earlier shipments were paid, and certain of said trucks were received by the dealer upon such payment and the release of the bill of lading. Beginning in March, 1913, the Interstate Motors Company became tardy in taking up the sight drafts which had been forwarded with truck shipments, and the Piggins Motor Truck Company began to be insistent in letters and telegrams upon the payment of said drafts. These delays arose out of the fact that the Interstate Motors Company was in financial straits, due to certain internal conditions, which are best explained by the terms of a written agreement entered into between C. T. Ryland, as the party of the first part, Samuel M. Wilson, as the party of the second part, John Scott Wilson, as the party of the third part, and the Interstate Motors Company, as the party of the fourth part. The individual parties to said agreement were stockholders in said corporation. The agreement was dated the 20th day of June, 1913, and it was recited therein that whereas, the said C. T. Ryland had, on June 16, 1913, sold to the said Samuel M. Wilson 3,751 shares of the capital stock of the said corporation, and whereas, the said Samuel M. Wilson and John Scott Wilson had paid for said stock with their joint and several promissory notes in the sum of \$26,000, and whereas, subsequent to this transaction certain questions had arisen as to the obligations of the Interstate Motors Company to the Piggins Motor Truck Company by reason of the existence of three certain unpaid sight drafts with bills of lading attached, covering nine Piggins trucks theretofore shipped by the Piggins Motor Truck Company to the Interstate Motors Company, which drafts were then overdue, now, therefore, it was agreed between the four parties to said written agreement that the party of the first part, Ryland, was to surrender the note of the parties of the second and third part, Samuel M. Wilson and John Scott Wilson, and was to take in lieu thereof a new note of said last-named parties for the same sum, but payable in four annual installments; and in consideration, and upon the execution

thereof, the party of the first part, Ryland, was to pay the sum of \$5,000 in cash for the purpose of releasing three of said Piggins motor trucks covered by the first of said drafts amounting to \$3,937.50, the balance of said cash payment to be applied upon the second of said drafts for the sum of \$5,652.50; and the said first party, Ryland, was also to make and execute with the said party of the third part, John Scott Wilson, as co-maker, two joint and several promissory notes, one for \$4,600, representing the balance remaining on said second draft, and one for \$4,952.50, representing the amount due upon the third of said drafts, the said notes to be made payable to the Interstate Motors Company, the fourth party to said agreement, and to be indorsed by it, and placed as additional security with the banks holding the bills of lading for said motor trucks, to the end that the nine Piggins motor trucks at present in the warehouse, and for which the said sight drafts were the purchase price, might be withdrawn from storage, and sold under the following arrangement, namely: the first three of said motor trucks to be withdrawn upon the cash payment of \$5,000 made by the party of the first part, Ryland, should become and be the property of said party of the first part, but should be turned over by him to the party of the fourth part, the Interstate Motors Company, for sale on terms satisfactory to the said party of the first part, the net proceeds arising out of such sale to be delivered to the party of the first part, and to be applied by him to the payment of the first said promissory note, and any excess thereof to be applied on the second of said promissory notes, to the end that another three of said Piggins trucks might be paid for, released and sold upon the same arrangement, and with a like application of the net proceeds thereof to the payment in full of the second of said promissory notes, and thereafter to the reimbursement of the said first party, Ryland, for his advancement of the cash sum of \$5,000 above referred to with interest, any balance remaining after these successive releases and sales of said Piggins motor trucks, and the application of the sums received therefor as above specified to be paid over to the Interstate Motors Company, the fourth party to said agreement. There is much more to this agreement which must be taken to have been, and which in fact expressly stated therein to have been an adjustment of the business dealings and differences of the individuals who were the first three parties thereto, and also as an intended relief of the financial embarrassment under which the Interstate Motors Company, of which said three individuals were stockholders, was laboring through its inability to pay the drafts being drawn upon it by the Piggins Motor Truck Company, and thus

release the motor trucks consigned to it for sale in the due course of its business as a dealer in such trucks, pursuant to its agency for the Piggins Motor Truck Company.

[1, 2] The first question which arises upon this appeal, and upon the face of the transactions between the parties to the foregoing agreement as thus far set forth, is as to whether or not there was any consideration for the execution and delivery of the two promissory notes above mentioned to the Interstate Motors Company as the payee thereof. It would seem that there can be but one answer to that question, and that an affirmative answer. The three individuals who were parties to the agreement last above set forth had previously thereto been engaged in dealings between themselves in the stock of the Interstate Motors Company, as a result of which they were all stockholders in said corporation at the date of said agreement, and hence deeply interested in its success as a going concern, and were also financially interested in their own individual welfare, arising out of their interdealings in the stock of the corporation, and to be subserved by its success in the handling and sale of the particular trucks for which it held the agency under its agreement with the Piggins Motor Truck Company, and which were depending for their delivery upon its ability to pay their purchase price. That these mutual and interdependent advantages to all of the parties to said agreement would constitute legal and ample consideration for the execution and delivery of the notes in question to the immediate payee thereof, we think there can be no doubt. It is true, as found by the trial court, that the said C. T. Ryland and John Scott Willson were not indebted to the Interstate Motors Company at the time they executed and delivered to it said notes; but they were stockholders in said corporation, and as such were deeply and directly interested, not only in the successful conduct of the business affairs and dealings of said corporation, but also in the fulfilment of its obligations, since whatever default occurred therein must ultimately fall as a liability upon them as its stockholders. These advantages upon the one hand, and the avoidance of these liabilities upon the other, form a sufficient consideration for the original execution and delivery of these notes, even in the absence of an existing indebtedness on the part of the makers thereof to the payee thereof, particularly in view of the fact that it was the express understanding and agreement of the parties that the payee of said notes was to indorse and transfer the same to the bank which held, and was insisting upon the payment of, the sight drafts drawn upon said payee for the purchase price of said motor trucks. The trial court was, therefore, in error in its findings that these notes were without consideration for their

original execution and delivery. It was also in error in finding upon the evidence, as above set forth, that it was never contemplated by the parties to these notes that they should pay the same. The undisputed evidence shows that these notes were so drawn as to be payable to order, one at 30 and the other at 60 days after date, and further shows that they were to be indorsed and delivered by their immediate payee to the holder of the sight drafts corresponding to the amounts for which said notes were drawn, and which sight drafts were then due and payable, and that they were intended to secure and provide for the payment thereof, and for that purpose were to be collected when due. The testimony of Mr. Frank H. Powers, the then attorney for the Interstate Motors Company, and a witness offered on behalf of the defendants, testifying as to what transpired when he delivered the notes in question to the First National Bank of San Francisco, showed that the notes were so delivered for collection, and that the proceeds of the notes were to be used as a revolving fund to redeem the trucks through the payment of the sight drafts which represented their purchase price. This testimony is in entire harmony with the agreement of the parties that said notes were to be so collected, and the proceeds so applied, and hence of necessity that said notes were to be paid when due. It is true that the parties to the agreement through which these notes came into being hoped, and probably believed, that the Interstate Motors Company would be so far successful in making sales of the released motor trucks as to take care of said notes when or even before they fell due, but that hope or belief cannot be held to affect the liability of the makers of these notes to pay the same according to their terms in the hands of the indorsee.

[3, 4] The trial court was, therefore, in error in its finding that these notes were not given by the makers thereof in the ordinary course of business, and were not intended to be paid by them when due. As to the finding of the trial court that the notes in question were delivered to the First National Bank of San Francisco without consideration, such finding is not only contrary to the evidence in the case, but is also a finding upon an immaterial issue, since if the notes were originally supported by a sufficient consideration, and were transferred by agreement to the First National Bank of San Francisco for collection, no further consideration is needed to support the transfer; and the same conclusion must be reached as to the finding of the trial court to the effect that the makers of said promissory notes were not indebted to the First National Bank of San Francisco, at or prior to the time of said transfer to it of said notes.

The Interstate Motors Company was indebted to the Racine banks, whose agent the First National Bank of San Francisco was in the holding of the then overdue sight drafts drawn by them upon the said Interstate Motors Company, which had been transmitted by them to it for collection. These notes had been executed and delivered to the Interstate Motors Company as their payee for the express purpose of securing, and hence, when due and collected, paying said sight drafts. A like conclusion must be reached as to the further finding of the trial court that there was no consideration for the transfer of said notes by the First National Bank of San Francisco to the plaintiffs herein, since the former was merely the agent of the latter in the entire transaction, and in the transfer of said notes to the plaintiffs was only fulfilling its duty to its principals, who were at all times the real parties in interest, and in said sight drafts, and in whatever of value had been received by their said agent for the purpose of securing or paying the same.

[5] There is no merit in the respondents' contention that since the First National Bank of San Francisco took and held the defendants' said notes merely for collection, it had no authority to indorse them over to the plaintiffs herein. Nor do the authorities which they cite in support of said contention have any applicability to the facts of the case at bar, for the twofold reason that said notes were not taken by the First National Bank of San Francisco merely for collection, but were taken and held by it for the purpose of applying their proceeds when collected to the payment of the sight drafts of its principals, the Racine banks, to which it was bound to return said drafts or the proceeds, if any, collected thereon with whatever security it had received to secure the payment of the uncollected portion due thereon.

It would seem from the foregoing reasoning, based upon the admitted facts as thus far stated, that the only defense available to these defendants was the defense that the original consideration for the purchase and sale of the motor trucks had failed, through some breach of the contract or warranties upon which said motor trucks had been sold and sent to the Interstate Motors Company by the Piggins Motor Truck Company, the ultimate party in interest in the collection of the sums due upon said sight drafts. The respondents herein among their other defenses pleaded specifically the breach of such contract and warranties and consequent failure of the consideration for said drafts, and hence for the giving of said notes. The trial court, however, made no specific finding as to the facts pleaded by way of such defense, its only finding in that regard being the finding which is rather in the plaintiffs' fa-

vor, to the effect that the Interstate Motors Company was indebted to the plaintiffs herein at the time said notes were delivered to them. If this finding is to be taken against the defendants upon this particular issue, it furnishes a further reason why the trial court was in error in its conclusions of law herein, and in the judgment based thereon.

The judgment in each case is reversed.

We concur: WILBUR, C. J.; WASTE, J.; MYERS, J.; LAWLOR, J.; KERRIGAN, J.

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GRAVELLY FORD CANAL CO. v. POPE & TALBOT LAND CO. (Sac. 3401.)

(Supreme Court of California. Sept. 12, 1923.
Rehearing Denied Oct. 10, 1923.)

1. Waters and water courses ⇨ 158½(2)—Evidence held to indicate owner of land had knowledge of entry by adjoining owner's employees.

In suit to enjoin interference by defendant with the construction of a canal across its land, based upon defendant's alleged tacit consent, evidence held to indicate knowledge of defendant that plaintiff's workmen entered the land.

2. Waters and water courses ⇨ 158½(2)—Evidence held to show owner of land became aware of plaintiff's entry thereon and made no objection to construction of canal across it.

In a suit to enjoin interference by defendant with construction of a canal across its lands, based upon its alleged tacit consent to construct the canal, evidence held to show that defendant became cognizant of plaintiff's entry on defendant's lands shortly after the entry, but made no objection.

3. Waters and water courses ⇨ 157—General instruction to superintendent to excavate land held to include specific instruction to enter defendant's lands.

Where defendant's lands lay between two rivers and in the path of plaintiff's proposed canal route, a general instruction, by plaintiff to its superintendent, to excavate the canal its entire length from river to river, held necessarily to include specific instructions to make entry upon defendant's lands.

4. Waters and water courses ⇨ 157—Owner's willingness to accept exchange of acreage of land held conclusively to show he did not insist upon water rights, but merely compensation for permission to build canal across land.

Where plaintiff was constructing a canal across defendant's lands and during the entire course of negotiations, covering a period of four years, only the question of compensation to defendant was discussed, held that defendant's willingness to accept an exchange of acreage of land as payment of compensation conclusively showed defendant was not insisting upon water rights in exchange for permission to build.

5. Waters and water courses ☞157—Pendency of negotiations for compensation to owner of land for construction of canal thereon held not conclusive against existence of permit to build a canal.

Where plaintiff was constructing a canal across defendant's lands under latter's assurances that an amicable agreement would be reached and the only question in the negotiations between the parties was that of compensation to defendant, *held*, that plaintiff had a right to rely on such assurances and to continue with the work, the mere fact that negotiations were pending not being necessarily conclusive that no license to build canal was given by defendant.

- 6 Waters and water courses ☞158½(2) — Evidence held to show owner of land gave irrevocable parol license to construct canal across his land.

Evidence *held* sufficient to show an irrevocable parol license by defendant to plaintiff to construct a canal across defendant's lands.

7. Appeal and error ☞931(1)—Evidence on appeal construed favorably to prevailing party.

Evidence upon appeal is to be taken in the light most favorable to the prevailing party.

In Bank.

Appeal from Superior Court, Madera County; E. N. Rector, Judge.

Suit by the Gravelly Ford Canal Company against the Pope & Talbot Land Company, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Dorsey and W. E. Cashman, both of San Francisco, for appellant.

Edward F. Treadwell, of San Francisco (H. S. Laughlin, of Los Angeles, of counsel), for respondent.

LENNON, J. Plaintiff is an incorporated water company. All of its shares of stock are owned by Miller & Lux, Inc. The latter corporation is the owner of two large tracts of land, situated between the San Joaquin river and the Fresno river, in the county of Madera, state of California. Defendant is the owner of a large tract of land situated between the two tracts of land owned by Miller & Lux, Inc. On April 8, 1911, Miller & Lux, Inc., made a survey of the lines for a canal from the San Joaquin river to the Fresno river to irrigate some 17,000 acres of Miller & Lux land included within the said two tracts of land which were theretofore unirrigated. Three sections of the land of the defendant, Pope & Talbot Land Company, 9, 21, and 22, were situated about midway between the termini of the proposed canal, so that in surveying the line of the canal it was found unavoidably necessary to cross the three sections of land owned by the defendant. Two of these sections, as well as

other lands, were at that time in the possession of Miller & Lux, Inc., as lessee. The work of constructing the canal was commenced in March, 1912, and was started simultaneously at both ends of the canal and progressed toward the defendant's lands. On May 10, 1912, the work reached defendant's lands. At the time of the commencement of the work the relations between the two corporations were friendly and when J. Leroy Nickel, president of Miller & Lux, Inc., took up with Mr. Talbot, president of the defendant company, the question of the compensation to be made by the plaintiff for the land necessary to be taken to construct the canal across defendant's lands, no opposition was offered or suggested by the defendant to the construction of the canal. The negotiations were opened by a letter from Mr. Nickel to Mr. Talbot on March 29, 1912. Letters were written in regard to the furnishing of blueprints by plaintiff, and defendant asked for a definite proposal as to what plaintiff would concede for the right of way. In his reply letter of May 13, 1912, Mr. Nickel stated that plaintiff desired to purchase outright the strip of land of the specified width necessary for the canal and stated that it would be impossible for the plaintiff to consider the granting to the defendant of any water rights in the canal since that would give to the canal the character of a public service corporation. He suggested, as an alternative proposition to the outright purchase of the strip of land, that the defendant should join with the plaintiff in the construction of the canal, and that the cost of construction and future maintenance be borne, pro rata, by each corporation according to the quantity of land owned by each corporation subject to the flow of the canal and susceptible to irrigation. Defendant did not accept this offer. It was then suggested that an exchange of land be made upon a basis of equivalent acreage with adjustment for any difference in the value of the land. If this were done, the holdings of defendant would be consolidated, and plaintiff would acquire the ownership of the sections over which the canal was to be constructed. To this offer defendant replied in a letter of October 8, 1912, expressing a willingness to exchange 10 and a fraction acres of land for 15 acres of land owned by the plaintiff. The plaintiff refused to discuss an unequal exchange of land, based upon a supposed increase in the value of the land by reason of the construction of the canal, upon the ground that although the land exchanged by the defendant would be capable of irrigation, nevertheless the increase in the value of the land was caused by the plaintiff's efforts in the creation and construction of the canal, and, furthermore, it was insisted that no exchange

but an equal one be made, because it was apparent there would not be enough water carried in the canal to supply all of the lands of Miller & Lux, Inc., which were situated contiguous to the canal, and that therefore any claimed increase in the value of the land would be more apparent than real. The negotiations came to a deadlock and remained so for some four years. During all this time plaintiff was proceeding with the construction work on its own lands. Two ditches, 30 inches deep and 30 feet in width, had been excavated the entire length of the canal, including that portion across the defendant's land. A core of earth was left on defendant's lands to be subsequently removed, but no further work was done on defendant's lands until 1916.

In October, 1916, no agreement had been reached, and when plaintiff entered upon defendant's land to continue the construction work of the canal the defendant protested against any work being done until an agreement had been reached. Several times defendant protested, and on November 29, 1916, advised the plaintiff that defendant's superintendent had been advised to "prevent any further construction work on our lands, and to resist any such effort to the fullest extent." Plaintiff, thereupon, brought an action to condemn the right of way across the defendant's land under a statute of 1911 which provided for the condemnation of land for the construction of canals and irrigation projects. Stats. 1911, p. 1407. Plaintiff did not rely alone upon the right to condemn, but at the same time instituted the present action to enjoin the interference by the defendant with the construction of a canal across defendant's lands. Defendant filed a cross-complaint to this action seeking to enjoin plaintiff from further proceeding with the construction of the canal.

Upon a trial of the condemnation suit, the judgment of the lower court was for the plaintiff, and the work on the canal progressed to completion. Upon appeal the judgment, however, was reversed upon the ground that the use for which the condemnation was sought was not a public use, and that therefore the statute authorizing a condemnation for such use was unconstitutional. *Gravelly Ford Co. v. Pope & Talbot Land Co.*, 36 Cal. App. 556, 178 Pac. 150. In the meantime this action had been tried in the lower court and judgment rendered and entered for the defendant upon its cross-complaint enjoining the plaintiff from proceeding with the construction of the canal across defendant's lands. An appeal from this judgment was taken to the Supreme Court by the plaintiff, which appeal was transferred to the District Court of Appeal. The District Court of Appeal reversed the judgment of the trial court enjoining the plaintiff from proceeding with its work of construction and

held that the defendant was limited to a right to recover damages. The basis of the appellate court's decision was that the testimony showed, without substantial conflict, that the plaintiff was entitled to construct said canal across the lands of the defendant by virtue of a parol license given to the plaintiff which defendant was estopped from revoking because of the fact that plaintiff in reliance upon it had made large and extensive improvements. *Gravelly Ford Co. v. Pope & Talbot Land Co.*, 36 Cal. App. 717, 178 Pac. 155. A rehearing was denied by the Supreme Court. The case having gone back to the lower court for a new trial, judgment upon the second trial went for the plaintiff. From this judgment defendant appeals.

It is plaintiff's contention that the defendant's rights in the premises are limited merely to a recovery of damages for the detriment caused by the construction of the canal and that the defendant is not entitled, under all the circumstances of the instant case, to injunctive relief prohibiting the use by the plaintiff of the canal in controversy. This contention is based primarily upon a claimed tacit consent given by the defendant to the construction of the canal by the plaintiff. This tacit consent, it is insisted, is evidenced by the fact of defendant's acquiescence without objection in the construction work of the canal, and upon this claimed consent plaintiff relied and now insists that it had a right to rely. It is insisted that the claimed acquiescence of the defendant was accentuated by reason of the friendly relationship existing between plaintiff and defendant during the entire period during which the negotiations concerning the construction of the canal were under way.

This contention is, of course, supported by the opinion of the District Court of Appeal, rendered in the first instance, the gist of which is, in effect, that because the defendant knew of the work of construction of the canal by the plaintiff on the defendant's land during the year 1912, and subsequent years until 1916, and by its friendly attitude induced plaintiff to proceed with its construction work, the defendant impliedly licensed the construction of the canal and that expenditures of money having been made by the plaintiff in reliance upon the license, the defendant was estopped to revoke it and was limited to its remedy at law for damages.

It is insisted by defendant that the statement of facts by the District Court of Appeal upon which the opinion of that court was predicated, and likewise the facts which the trial court in this action must necessarily have found to be true in order to have rendered judgment for the plaintiff, are neither warranted nor supported by the record now before us. It is insisted that the record shows facts to the contrary and that,

therefore, the judgment in the instant case should not and cannot be sustained.

[1, 2] Defendant insists that the record shows without conflict that the defendant had no knowledge of plaintiff's entry upon its lands, and could not, therefore, acquiesce in the entry. This is in a sense true. The record before us does show that the preliminary survey was made of the canal before the defendant was informed of the proposed construction of the canal, and also that the workmen under the direction of a Mr. Ogle, superintendent for Miller & Lux, Inc., in whose charge Mr. Nickel had placed the construction work of this canal, had entered upon the land of the defendant prior to the letter of May 13, 1912, wherein Mr. Nickel wrote Mr. Talbot that the men and teams were about to enter upon the land of defendant and that he was desirous of an early understanding. But the work continued during May and June, and there is the testimony of both Mr. Talbot and Mr. Harms, officers of the defendant company, that they were informed by Mr. Straube, their superintendent, of the work the latter part of May or the early part of June. There is also the testimony of Mr. Hopkins, workman for Miller & Lux, who testified that he started work on the land May 10, 1912; that Mr. Straube saw him at work and told him that he was upon defendant's lands. Furthermore, there is the testimony of both Mr. Talbot and Mr. Harms that "shortly after the receipt of the letter of May 13, 1923, they objected to Mr. Nickel about the men going on the land. This certainly indicated a knowledge on their part that the men had entered. And they also testified that, immediately upon the receipt of that letter, they sought legal advice as to whether plaintiff could secure the right of way by condemnation, and was informed by their counsel that plaintiff could not. It is also conceded that the defendant company had, early in the negotiations, been informed of the proposed route of the canal and had been supplied with a blueprint showing the proposed route over the defendant's lands. Therefore, while it may have been that the defendant was not aware of the entry by plaintiff on defendant's lands at its initial moment, there can be no doubt but that the defendant became cognizant of the fact very shortly thereafter and yet remained silent and made no objection to the progress of the work. With knowledge that plaintiff was proceeding with the construction, defendant entered into negotiations looking solely toward the compensation to be made by plaintiff for the privilege of constructing the canal across the defendant's lands. And although the defendant had been advised that the plaintiff could not secure a right of way by condemnation and was, therefore, aware of the fact that if, upon a failure of

the negotiations, the defendant should refuse to sell the right of way, the plaintiff would have expended large sums of money without compensation, the defendant remained silent and by its friendly attitude induced the plaintiff to continue its expenditures.

[3] We cannot agree with the defendant's contention that the entry upon the land of the defendant and the work done by the employees thereon was done without instructions from the plaintiff and without authority from plaintiff, and that this fact proves conclusively no reliance was placed upon the claimed tacit consent of the defendant. While it is true that on May 13, 1912 three days after the workmen had begun work on the defendant's lands, Mr. Nickel wrote to Mr. Talbot that the construction work "would soon be up to" his land, nevertheless, it is uncontradicted that Mr. Nickel had given a blueprint of the proposed route of the canal to Mr. Ogle, the superintendent of construction, with general instructions to excavate the canal its entire length from river to river. It was not necessary that specific instructions be given by Mr. Nickel to make entry upon the defendant's land. This was necessarily included in the general instructions.

[4, 5] Defendant insists that the permission to build was merely accessory to the negotiations and was dependent upon the consummation of a complete agreement, but conceded that if plaintiff had reason to believe the question of compensation was the only question between plaintiff and defendant, and that the belief was induced by defendant's acts or omission, defendant would be estopped to deny plaintiff's right to build and use the canal. This is just what the record before us does show. During the entire course of negotiations by correspondence, covering, as it did, a period of four years, only the question of compensation was discussed. In the first letter the defendant evinced a desire to share in the benefit of the water; but, when the plaintiff offered to permit the defendant to come in by sharing the expense, defendant did not accept, but did express a willingness to accept an exchange of acreage. While an exchange of acreage is not the exact equivalent of a money payment, the willingness to accept that method of payment conclusively shows that the defendant was not insisting upon water rights in exchange for the permission to build. Furthermore, defendant stated in a letter to plaintiff, which we think is on its face susceptible of the construction that money compensation was referred to, "We shall expect something in exchange for this right of way which shall be commensurate with the value of the privilege you are seeking." From these circumstances it is readily deducible that the only question between the plaintiff and the defendant was the question

of compensation. This being so, it is of no consequence that negotiations were pending, nor can it be said that plaintiff was required to be on its guard against the failing of the negotiations, for the only question being that of compensation and the plaintiff having been assured by the defendant that an amicable agreement would be reached had a right to rely upon such assurance and to continue the work. In other words, the mere fact that negotiations were pending is not necessarily conclusive that no license to build the canal was given by the defendant. If it was understood between the parties that the permission to build was dependent upon the consummation of an agreement, then, of course, the party building on the other's land would proceed at the risk of an agreement not being consummated. In the instant case, however, it is fairly deducible from the conduct of the parties that the permission to build was not one of the terms of the agreement, accessory and ancillary to the negotiations, and therefore dependent upon the consummation of a contract. On the contrary, it is evident that neither party doubted during the negotiations that the plaintiff's right was an existing right at that time and would be continuous.

Defendant earnestly insists that there was no silent acquiescence by defendant, as is claimed by the plaintiff, but that on the contrary the defendant through Mr. Talbot expressly warned the plaintiff not to proceed with its work, but to discontinue it until a settlement was reached. Upon the second trial, testimony, not present at the first trial, was introduced by the defendant upon this particular phase of the case. This was the testimony of Mr. Talbot stating that during the course of the negotiations he had told Mr. Nickel that the construction work on the defendant's land must cease until an agreement had been reached, and that Mr. Nickel had assented to this demand and had promised to withdraw his workmen. This testimony of Mr. Talbot is corroborated by Mr. Harms, treasurer of the defendant company. Mr. Nickel had testified in behalf of the plaintiff that no objections were made by the defendant until 1916, and upon cross-examination stated that he had no recollection of any such interview and no remembrance of ever having given such promise. There is, therefore, obviously a substantial conflict in the evidence. And although the

testimony of Mr. Nickel is not so emphatic as that of Mr. Talbot it was in our opinion sufficient to support plaintiff's contention that there was an acquiescence by defendant in the continuance of the building of the canal by the plaintiff.

The defendant further claims that practically no work was done on the defendant's land, but that all of it was done on plaintiff's own lands and that the expenditure of money, alleged by plaintiff to have been made, and found by the court to be sufficient to prevent a revocation of a parol license, was, in fact, expended upon the land of plaintiff itself, and not upon the land of the defendant. The defendant also alleges that the value of the work on plaintiff's land was not dependent upon the completion of the work on the defendant's land, but that the plaintiff had been able and would be able to irrigate a large tract of land south of defendant's land irrespective of whether it continued to have the use of the canal across the defendant's lands. This contention cannot be seriously maintained, for there is in the record ample testimony that work was done on the defendant's lands by plaintiff in 1912, and that two ditches approximately 30 inches in depth and 30 feet in width were excavated the entire length of the canal, and there is direct testimony to the effect that \$3,000 had been spent on this particular work in 1912. It is true that plaintiff is able to irrigate its land south of defendant's land irrespective of whether or not it has the use of the canal across defendant's lands, but the plaintiff's lands north of defendant's canal is dependent upon the use of the canal as a whole, and upon this land much money has been expended.

[6, 7] It will thus be seen that there is in the record evidence to support each of the separate facts upon which plaintiff relied to evidence an irrevocable parol license. We have, of course, in our discussion of the evidence, taken as true the testimony in favor of the plaintiff and resolved all doubts in its favor, but the rule that the evidence upon appeal is to be taken in the light most favorable to the prevailing party is so elementary and has been so often cited as to scarcely need reiteration here.

The judgment appealed from is affirmed.

We concur: SEAWELL, J.; MYERS, J.; WASTE, J.; KERRIGAN, J.; LAWLOR, J.

ARCHER v. MILLER. (S. F. 10638.)

(Supreme Court of California. Sept. 14, 1923.)

1. Appeal and error ⇨460(2)—Judgment ordering conveyance on payment of purchase price held one requiring undertaking to stay execution.

In action to quiet title, judgment decreeing that plaintiff execute conveyance to defendant on payment of \$40,000 was within Code Civ. Proc. § 945, providing that, if judgment directs sale or delivery of possession of real property, its execution cannot be stayed without written undertaking.

2. Appeal and error ⇨460(2)—Plaintiff entitled to supersedeas without giving stay bond, when defendant did not keep tender good.

Under judgment decreeing that plaintiff convey land to defendant on payment of \$40,000, where defendant made tender, but did not keep it good, plaintiff was entitled to supersedeas preventing delivery by clerk of deed executed by him without giving stay bond.

3. Tender ⇨18—Taking of appeal held to withdraw tender of payment under judgment.

Under judgment decreeing that plaintiff convey land to defendant on payment of \$40,000, where defendant tendered the price, but afterwards appealed, claiming that the \$40,000 was to be paid in installments, he thereby withdrew his tender.

In Bank.

Action by C. E. Archer against H. B. Miller. Judgment for defendant, and plaintiff appeals. On application for writ of supersedeas to stay enforcement of the judgment. Writ granted.

O'Melveny, Millikin, Tuller & Macneil, of Los Angeles, for petitioner.

Seward A. Simons and B. J. Bradner, both of Los Angeles (Scarborough & Bowen, of Los Angeles, of counsel), for respondent.

LENNON, J. This is an application for a writ of supersedeas to stay the enforcement of a judgment rendered by the superior court in and for the county of Los Angeles during the pendency of an appeal from the judgment. Suit was brought by appellant, plaintiff in the court below, to quiet plaintiff's title to a certain parcel of land consisting of 40 acres. The complaint is in the usual form of a complaint in an action to quiet title, alleging title and possession in the plaintiff. The defendant answered, and, while admitting plaintiff's possession, alleged that plaintiff's title was subject to an interest of defendant in the lands in suit resulting from a contract made and entered into between the plaintiff and the defendant.

The contract was in the form of a lease by the plaintiff to the defendant of the land for a term of 10 years for a total rental of \$40,000, payable in installments. The con-

tract, in addition, gave the defendant the option of purchasing the land at any time during the term by paying the unpaid balance of the \$40,000, together with the accrued interest. Certain conditions to be performed by defendant were also included in the contract. A dispute arose between the plaintiff and the defendant as to whether or not the admitted failure of the defendant to perform these conditions had been consented to by the plaintiff or were excused by reason of plaintiff's conduct. The plaintiff insisted that, the conditions not having been performed by the defendant, the contract was at an end.

The court below, upon a trial of the case, found that the contract was valid and subsisting, and that the defendant was entitled, by reason of the conduct of the plaintiff, to be relieved from any forfeiture of his rights under the contract. It also found that defendant was entitled to a decree directing specific performance by requiring plaintiff to convey the land to the defendant upon the payment to him by the defendant of the sum of \$40,000, plus certain taxes, within 60 days. The judgment decreed that "upon the payment to said plaintiff within sixty days from the date hereof of the sum of forty thousand dollars, and taxes, * * * plaintiff execute and deliver to the defendant, H. B. Miller, a good and sufficient deed of conveyance of said property, free and clear of all incumbrances," and further ordered, "if said plaintiff shall fail and refuse and neglect to make such conveyance, that the clerk of this court be and he is hereby appointed commissioner to execute such deed, and that such transfer, when made by such clerk as such commissioner, shall operate as a transfer to defendant of said premises," but, "in the event of failure of the defendant to pay to the plaintiff the sum of \$40,000 * * * within 60 days from the entry of the judgment herein, that the said agreement hereinbefore referred to be canceled and be of no effect. * * *

Thereafter the plaintiff perfected an appeal to this court, and in order to stay an execution of judgment duly executed and acknowledged a deed of grant of all of the real property described in the judgment and deposited the deed, together with written instructions to the clerk of the court, to await the judgment of the appellate court on such appeal. No stay bond was executed by plaintiff, for it is his contention that, in order to stay execution of the judgment pending the determination of the cause upon appeal, compliance with section 944 of the Code of Civil Procedure only is required. This section provides that:

"If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the in-

strument is executed and deposited with the clerk with whom the judgment or order is entered to abide the judgment of the appellate court."

The defendant made two attempted tenders of payments of the moneys to be paid plaintiff, which plaintiff refused to accept. The defendant thereupon demanded of the clerk of the court that he execute and deliver to defendant the deed conveying the said real property, upon the theory that by virtue of section 945 of the Code of Civil Procedure a stay bond was required to stay the execution of the judgment. Section 945, Code of Civil Procedure, provides that:

"If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant * * * to the effect that during the possession of such property by the appellant he will not commit, or suffer to be committed any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof. * * *"

The clerk of the court signified his intention to execute the deed unless plaintiff immediately comply with section 945, Code of Civil Procedure. The plaintiff thereupon made application to the court to fix a bond and the court made an order fixing the amount of the bond at \$55,000. No bond was given by plaintiff and application for supersedeas was made to this court to prevent the clerk from executing the deed.

[1] The language of the decree clearly directs the execution of the deed and the delivery of the possession of the property upon the payment of the money. Section 945, Code of Civil Procedure, would therefore, in our opinion, be applicable, and plaintiff would be required to file a stay bond provided for in that section in order to stay execution of the judgment pending the determination of the appeal, if the defendant had made payment of the purchase price or had made and kept good a sufficient tender. The defendant, in that event, would have become entitled to the property and to its use and occupation, and it would be an injustice to allow the plaintiff to retain possession of the property, and perhaps dissipate it with no provision to protect the defendant's interest against such a possibility.

[2, 3] A mere tender of the purchase price is not, however, sufficient to entitle the defendant to a conveyance of the property and to the delivery of immediate possession. By the

terms of the decree the execution and delivery of the deed is to be made upon payment of the purchase price. Payment may be made either to a creditor directly or by depositing the amount in a bank to his credit and giving notice thereof to the creditor. Section 1500, Civ. Code. It is fundamental that to be effective a tender must be kept good. Upon the refusal of the plaintiff to accept the purchase price, the defendant could have deposited the money in a bank to the credit of the plaintiff, and thus kept his tender good. Instead, the defendant, claiming that he had a right to spread the payment of the purchase price over a long term of years, elected to take an appeal for the purpose of securing a determination that the \$40,000 is not and should not be declared due. This is entirely inconsistent with a continuance of the tender, and by the taking of the appeal the defendant, in effect, elected to withdraw the tender.

It is clear that the defendant, pending the appeal, ought not to have the possession of the property and also the money, for the decree contemplates a simultaneous exchange of the possession of the money and the possession of the property. The result of a refusal to issue the writ of supersedeas would be that the defendant, in default of the filing of a stay bond by the plaintiff, would secure the possession of the property during the appeal without having paid therefor. If the decree is subsequently reversed, and it is held that the defendant has no right to the property, the defendant would have had the possession of the property during the appeal, without even hazarding the payment of the \$40,000, or furnishing security to the plaintiff for the rents, issues, and profits derived by him from the property pending the appeal. Inasmuch as the defendant still retains the purchase price of the property, he is not, under the decree, entitled to either a conveyance or a delivery of possession of the property. The plaintiff, as owner in fee, being entitled to its possession, cannot be required to put up a bond to cover its use and occupation or the commission of waste by him.

Plaintiff is therefore entitled to a supersedeas, staying execution and preventing the clerk of the court from executing and delivering to the defendant a deed to the property in controversy.

Let the writ issue as prayed for.

We concur: WILBUR, C. J.; WASTE, J.; SEAWELL, J.; KERRIGAN, J.; LAW-LOR, J.

192 Cal. 61

CITY OF PASADENA et al. v. RAILROAD COMMISSION OF CALIFORNIA.
(L. A. 7471.)

(Supreme Court of California. Sept. 14, 1923.)

1. Carriers ⇐12(2)—Different rates for interurban and local street car service for same distance held valid.

Where there are two distinct and different types of service, a local street car service and an interurban service, with rates established for each kind of service by different and reasonable methods, Const. art. 12, § 21, prohibiting the charging of a greater sum for a through rate than for the aggregate of the intermediate rates, is not contravened, even though the through rate exceeds the combined local street car service rates for the same distance.

2. Statutes ⇐219—Weight given to construction of executive department.

When doubt exists as to the construction of a statute, great weight should be given to a uniform construction placed on it by the department charged with its execution.

3. Carriers ⇐12(2)—Finding that difference existed between character of local street car service and interurban service supported by evidence.

Evidence that interurban cars were larger and more comfortable than local street cars, for a portion of the distance used tracks exclusively reserved for them, stopped only at designated places, and were operated at a high speed on published time-tables, held to sustain a finding that a substantial difference existed between the character of local street car service and interurban service.

In Bank.

Application for certiorari by the City of Pasadena and others to review an order of the Railroad Commission for the State of California. Order affirmed.

James H. Howard, City Atty., for Pasadena, Dudley Robinson, City Atty., for South Pasadena, T. C. Gould, City Atty., for Alhambra, and Hartley Shaw, City Atty., for Glendale, all of Los Angeles, for petitioners.

Hugh Gordon, of San Francisco, William W. Clary, of Los Angeles, and Carl I. Wheat, of San Francisco, for respondent.

Frank Karr, of Los Angeles, for Pacific Electric Ry. Co.

KERRIGAN, J. [1] This is a proceeding to review an order of the Railroad Commission fixing the rates and fares to be charged by the Pacific Electric Railway Company for passenger transportation in and near Los Angeles. Petitioners claim the Commission's rate-fixing order is in violation of section 21 of article 12 of the California Constitution, which contains an inhibition against the charging of a greater sum for a through rate than for the aggregate of the intermediate rates.

The Pacific Electric Railway Company operates an extensive interurban passenger railroad business in the counties of Los Angeles, Orange, Riverside, and San Bernardino, Cal., and, in addition thereto, operates extensive street railway passenger service or local service in the city of Los Angeles and the larger suburban cities of Southern California.

The decision of the Railroad Commission in question was rendered by the Commission in six consolidated proceedings, and after extensive investigation by the Commission on its own behalf, and after extended hearings conducted over a period of more than three and a half years, during which hearings and in which time all the activities of the carrier were investigated for the purpose of enabling the Commission to establish just "rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, or practices, or schedule or schedules" that were not unreasonable, discriminatory, or preferential.

The order of the Commission divides the service of the Pacific Electric Railway Company into two distinct and different classes of service, namely, the interurban passenger service and the street car passenger service, or local passenger service, and rates are established for each class of service in accordance with the prevailing method of establishing rates for such service in this state. For the purpose of establishing local passenger rates, Los Angeles proper was divided into two zones, and the following passenger rates were established: In inner Los Angeles zone, 6 cents; in outer Los Angeles zone, 6 cents; a through fare from inner zone to outer zone, or from outer zone to inner zone, 10 cents.

The reasonableness of this rate, or of the method by which it was determined, is not questioned. This rate is based upon the average distance all the passengers ride, the individual passenger paying the prescribed rate, regardless of whether he rides a short distance or a long distance.

The rates of fares on the interurban service were fixed and established upon a mileage basis, the mileage to and from Los Angeles being calculated from the Los Angeles terminal stations of the company—one located at Sixth street, at Main and Los Angeles street—and the other on Hill street, between Fourth and Fifth streets. The general one way fare for all interurban passenger service was fixed at 2.75 cents per mile, and the reasonableness of this rate is not questioned in this proceeding.

The service rendered by the Pacific Electric Railway Company includes transportation from Los Angeles to Pasadena, South Pasadena, Alhambra, and Glendale, respectively. The cars running from Los Angeles

to Pasadena pass an intermediate point known as Sierra Vista. The Alhambra cars and some of the South Pasadena cars also pass the same point. Sierra Vista, some 7.54 miles from Sixth and Main streets, Los Angeles, is the outer boundary of the outer local street car zone, that is, a passenger can reach Sierra Vista from any point in the "inner zone" on the local cars for 10 cents, and from any point in the "outer zone" for 6 cents.

The Commission, in the order here for review, established through interurban rates from Los Angeles to Pasadena, South Pasadena and Alhambra on a straight mileage basis of 2.75 cents per mile. Estimated on this basis, the fare from Los Angeles, using Sixth and Main streets as a terminus, to Pasadena, was fixed at 29 cents; to Alhambra, 26 cents; to South Pasadena, 24 cents.

The contention of the petitioners is that these through rates exceed the aggregate of the intermediate rates, and that they therefore violate the provisions of section 21 of article 12 of the Constitution. To sustain their contention the petitioners point out that a passenger can, by traveling on a "local street car" from any point in Los Angeles, reach Sierra Vista for a fare of 10 cents, and then by changing cars and paying another fare of 10 cents, reach Pasadena, having paid a total fare of 20 cents for the entire trip from Los Angeles to Pasadena, whereas the through fare, as pointed out above, would be 29 cents. Similarly, passengers going to South Pasadena and Alhambra, by using this combination service, may reach their destination for a fare less than the through interurban rate. Between Los Angeles and Glendale there is no combination local street car and interurban service, the aggregate fares for which are less than the regular through interurban fare between these points.

That part of section 21 of article 12 of the Constitution upon which petitioners rely is as follows:

"No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state. It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates; provided, however, that upon application to the Railroad Commission provided for in this Constitution such company may, in special cases, after investigation, be authorized by such commission to charge less for longer than for shorter distances for the transportation of persons or property and the Railroad Commission may from time to time

prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul.
* * *

We have not been able to find, nor has counsel called our attention to, any court decisions upon the precise issue here presented, but it has been pointed out that the language used in section 21 of article 12 of the Constitution is similar to that used in section 4 of the federal "Act to Regulate Commerce of 1887," as amended by Act June 18, 1910, c. 309, § 8 (24 Stat. at Large, 379, 380; 36 Stat. at Large, 539, 547; U. S. Comp. St. § 8566), which reads as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance. * * *

In its "Conference Ruling No. 304" the Interstate Commerce Commission, in construing this provision of the Interstate Commerce Act, declared:

"The fourth section applies to all rates and fares, but in determining whether its provisions are contravened rates and fares of the same kind should be compared with one another; that is, transshipment rates should be compared with transshipment rates; excursion fares with excursion fares; and commutation fares with commutation fares."

And again, in the case involving "Passenger Fares between New York, N. Y., and Points West of Newark, N. J." (decided by the Interstate Commerce Commission on November 23, 1922), it was said:

"It is well settled that in applying the provisions of the fourth section of the act, rates and fares of the same kind should be compared with one another."

[2] We believe that the construction thus placed upon the federal statute by the Interstate Commerce Commission is entitled to great respect under the well-known principle that, where any doubt exists, great weight should be given to a uniform construction placed upon a statute by the department charged with its execution. *United States v. Hammers*, 221 U. S. 220, 31 Sup. Ct. 593, 55 L. Ed. 710; *United States v. Cerecedo Hermanos y Co.*, 209 U. S. 337, 28 Sup. Ct. 532, 52 L. Ed. 821. As thus construed, the rate established in the instant case would not

violate the federal statute because only "rates of the same character" should be compared with one another, and a local street car rate is not of the same character as an interurban rate. We are convinced that section 21 of article 12 of the Constitution should be construed as this federal statute, containing similar language and having the same general purpose, has been construed, and that, therefore, the prohibition contained in this section applies only where the through fares and aggregate intermediate fares attempted to be charged relate to "the same classes of passengers." Such a construction will not, as petitioners argue, allow the Railroad Commission, by making an arbitrary classification of service, to set aside the very salutary rule of railroad regulation contained in section 21 of article 12 of the Constitution. We only hold, that if there are two distinct and different types of service, namely, a street car service and an interurban service, with rates established for each kind of service by different and reasonable methods, that the constitutional provision is not contravened if by combining these two rates the through rate exceeds the aggregate of the rates so combined.

We feel that the conclusion which we have reached is further strengthened by the opening words of section 21 of article 12, that:

"No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state." (Italics ours.)

This introductory sentence characterizes the whole purpose of this section. It was designed to prevent discrimination between the "same classes of freight or passengers." It is manifest that an interurban passenger, who pays a fare depending upon the exact distance that he rides, is not in the same "class of passengers" as the local passenger who may ride one block, or five miles, for the same fare.

[3] Petitioners contend that the finding of the Commission that a substantial difference exists between the character of service rendered on the local street cars and that rendered on the interurban cars is unsupported by the evidence.

We believe that there was sufficient evidence to support this finding, and consequently it must be sustained. There is evidence in the record before us that for a large portion of the distance between Sixth and Main streets and Sierra Vista the interurban cars use tracks exclusively reserved for them; that these cars are operated at a high speed, stop only at designated places, and are operated on published time-tables; that the cars used on the interurban lines are in general larger and heavier than those used on

the local lines, with more, and more comfortable, seats.

We are, therefore, constrained to hold that neither the order of the Railroad Commission nor the tariff schedule of rates filed pursuant to the provisions thereof violate the provisions of section 21 of article 12 of the Constitution of California.

The order of the Railroad Commission is affirmed.

We concur: WILBUR, C. J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; RICHARDS, Justice pro tem.; WASTE, J.

192 Cal. 16

WHITE v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(S. F. 10434.)

(Supreme Court of California. Sept. 12, 1923.)

Master and servant  405(2)—Evidence held to support finding painter was employed by petitioner seeking to annul award, and working at time of injury.

Evidence, though conflicting, held to justify finding of Industrial Accident Commission that at the time of the accident and injury to respondent painter he was in the employ of petitioner, seeking to annul award, and was at the time actually engaged in doing work for him.

In Bank.

Application by H. White against the State Industrial Accident Commission and another for writ of review to annul an order awarding compensation. Award affirmed.

G. C. Ringole, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

WASTE, J. This is a proceeding in review to annul an award of the Industrial Accident Commission. The petitioner, H. White, was engaged in the construction of a summer home at Middletown, in Lake county, during the summer of 1921. The work was done by day labor under the supervision of a foreman, Benjamin Althof, employed by the petitioner. During the entire period of construction, Hans Johnsen, the applicant before the industrial Accident Commission, and one of the respondents here, a former sailor and stevedore, was employed about the place as a laborer of a sort of "man of all work." He was so engaged during the latter part of September, at which time, Mr. White, becoming dissatisfied with the progress of the work, decided to suspend all building operations, and to wait until spring for its completion. He reconsidered this intention, however, and entered into a contract in writing

with Althof, by the terms of which the latter agreed to complete all the carpenter work and rough concrete work required in the erection of the building for the sum of \$850. Before making this contract, White had made arrangements with S. Sapero, a painter residing in Oakland, to do the painting on the job, at the rate of eight dollars per day, the owner to furnish the materials. Sapero did all the painting he could on the job, but, as the roof was not completed, he was laid off until it should be ready and was told to come back later on and complete that work.

There is a contradiction in the record as to when Althof began work under his contract. He testified he "took a few days off * * * but kept around looking after the work; that was outside the contract." Other testimony would tend to indicate that he was doing work called for by his agreement. It is not certain, therefore, that Althof was not acting for petitioner when, a few days later, he directed Johnsen to paint the roof, which had in the meantime been completed. Johnsen proceeded to do the work as directed. While working on the roof, he slipped and fell to the ground, breaking his leg. It was for this injury that he applied to the Industrial Accident Commission for compensation. White, the petitioner here, his wife, and Althof were made defendants. The Commission found that Johnsen was employed by White at the time of the injury, and was working under the direction of Althof, who, it determined, was merely an agent of White in the matter. It found that the injury occurred in the course of, and arose out of, Johnsen's employment, and made an award in his favor and against petitioner. Mrs. White and Althof were dismissed from the proceedings. It is this award which the petitioner seeks to have annulled by this proceeding.

The only question presented by the record, as we have reviewed it, is one of the weight and credit to be given to conflicting testimony in the case. It was admitted that until White entered into the contract with Althof, Johnsen was an employee of White, working under the direction of Althof, who was the foreman on the job. Johnsen testified that he did not know of the nature of the new arrangement between White and Althof, and continued to take his orders from the latter as he had been previously doing. Concerning what led up to the injury received by Johnsen, Althof testified that Mrs. White directed him to have the roof painted. She was constantly in touch with the work of construction, and regularly paid the men employed on the place. She apparently gave directions concerning the work when Mr. White was not present. Althof's version of what occurred is that he and Mrs. White talked over the completion of the building. They agreed that the roof ought to be painted before "the bad weather

set in." It was agreed between them that it would be a needless expense to have the painter go from Oakland to Lake county to paint the roof, because no other work was ready to be painted. Mrs. White thereupon told Althof to have the work done, and he directed Johnsen to do it. Mrs. White denied that she told Althof to have the roof painted and did not know how it came about that Johnsen was doing the work. There is evidence that Althof, both before and after his contract with White was made, insisted that it was important that the shingles on the roof should be painted immediately. Johnsen was at the place. His wages were \$4 a day. The painter was in Oakland; his wages were \$8 a day. Under all the circumstances, it does not seem improbable, as concluded by the Commission, that the parties did agree to have the roof painted as testified to by Althof. After carefully reviewing all the evidence relating to the painting of the roof, and considering that testimony in the light of the whole course of the transaction between White, Mrs. White, Althof, and Johnsen, we cannot say that there is no substantial evidence in the record which justifies the finding of the Commission that at the time of the accident and injury to Johnsen he was in the employ of petitioner, and was at the time actually engaged in doing work for him. The award must, therefore, be sustained. *Dearborn v. I. A. C.*, 187 Cal. 591, 594, 203 Pac. 112.

The award is affirmed.

We concur: WILBUR, C. J.; RICHARDS, Justice pro tem.; SEAWELL, J.; MYERS, J.; LENNON, J.; LAWLOR, J.

(192 Cal. 54)

RAILROAD COMMISSION OF CALIFORNIA v. RILEY, State Controller.
(S. F. 10785.)

(Supreme Court of California. Sept. 14, 1923.)

1. Statutes $\S$ 158—Repeal by implication not favored.

Repeals by implication are not favored, and are recognized only when there is an irreconcilable conflict between two or more existing legislative enactments.

2. States $\S$ 127—Appropriation by Public Utilities Act of fees to Railroad Commission fund not impliedly repealed by budget amendment of Constitution.

Public Utilities Act, $\S$ 85, appropriating to the Railroad Commission fund the fees directed to be collected by such commission, is not repealed by implication by Const. art. 4, $\S$ 34 (budget amendment), which, instead of indicating an intention to repeal appropriations provided for by existing laws, provides that the Governor shall submit to the Legislature a

budget of all proposed expenditures "provided by existing law" or recommended by him, and that the budget shall be accompanied by an appropriation bill, to be known as the Budget Bill, covering the proposed expenditures.

8. States — 127 — Appropriation by Public Utilities Act of fees to Railroad Commission fund not impliedly repealed by Budget Bill.

Public Utilities Act, § 85, appropriating to the Railroad Commission fund the fees directed to be collected by such commission, is not repealed by implication by Budget Bill, § 1, providing that, where statutory provisions or appropriations have been made for items included in this act, the amounts herein appropriated shall govern, and such other appropriations shall not be deemed in addition thereto; this merely requiring the appropriation by previous statute to be used first, and to be then supplemented from the general fund by enough to make the total appropriated for the particular item by the Budget Bill.

In Bank.

Application by the State Railroad Commission for writ of mandate to Ray L. Riley, State Controller. Writ granted.

Hugh Gordon and Carl Wheat, both of San Francisco, for petitioner.

H. C. Lucas, of San Francisco, for respondent.

Hill & Morgan, of Los Angeles, amici curiæ.

LENNON, J. This is an application for a writ of mandate directing the respondent, Ray L. Riley, as controller of the state of California, to examine and settle the account of the State Railroad Commission covering and controlling certain fees collected by said commission pursuant to the provisions of section 57 of the Public Utilities Act (Stats. 1915, c. 91, p. 115), and to certify the amount thereof to the treasurer of the state of California for deposit by him to the credit of the Railroad Commission fund.

Section 57 of the Public Utilities Act provides for the collection of fees by the Railroad Commission for the following purposes: (1) For certificates issued by the commission pursuant to section 52 of the Public Utilities Act, authorizing the issuance of bonds, notes, and other evidences of indebtedness by public utilities; (2) for certified copies of official documents and orders filed in the commission's office, and for annual reports, transcripts of evidence, and proceedings before the commission; and (3) for various reports and publications issued under the commission's authority. By the same section it is provided that all of the fees charged and collected thereunder "shall be paid, at least once each week, accompanied by a detailed statement thereof, into the treasury of the state to the credit of a fund to be known as the 'Railroad Commission fund.'" Section 85 of the same act provides that the fees so

charged and collected are specifically appropriated to be used by the Railroad Commission in carrying out the provisions of the Public Utilities Act.

Between July 1, 1923, and July 6, 1923, the Railroad Commission, acting under and in pursuance of the provisions of said section 57 of the Public Utilities Act, charged and collected certain fees aggregating in amount the sum of \$477.45. This money was thereafter transmitted by the Railroad Commission to the treasurer of the state of California, with a request that said treasurer deposit the same to the credit of the "Railroad Commission fund." At the same time the Railroad Commission transmitted a report of the fees so collected to the respondent, Ray L. Riley, controller of the state of California, requesting him to examine and settle the account of the Railroad Commission as set forth in said report, and to certify the amounts stated therein to the treasurer of the state of California for deposit by him to the credit of the "Railroad Commission fund." Respondent refused to credit said sum to the "Railroad Commission fund."

No claim has been made, and of course no claim could be made, that the provisions of the Public Utilities Act creating the fund known as the Railroad Commission fund and appropriating the same to the use of the Railroad Commission are expressly repealed by the enactment of either the constitutional provision known as the "budget amendment" (article 4, § 34, Constitution), or the "budget bill" (St. 1923, c. 121). Nowhere in either of these enactments is there any attempt made to repeal the statute directing the collection of the revenue and specifying the fund into which the revenue is to be paid, nor is there a specific provision requiring that the revenue so collected be transferred to the general fund. In the absence of such express provisions there can, of course, be no express repeal.

[1, 2] It is contended, however, in support of the respondent's refusal to credit the sum in controversy to the "Railroad Commission fund," that the constitutional provision for the budget bill, together with the budget bill itself, operated necessarily as an implied repeal of all appropriations made and existing pursuant to the provisions of statutes which preceded the preparation and presentation of the budget bill, and thereby, in effect, demitted and diverted all special funds into the general fund. If section 57 of the Public Utilities Act has not been impliedly repealed by subsequent legislation, then, of course, it is the plain duty of the state controller, in accordance with the provisions of section 433, subd. 11, and section 434 of the Political Code, to examine and settle the account transmitted by him by the Railroad

Commission and to certify the amount thereof to the treasurer, to be credited to the "Railroad Commission fund."

In support of the contention of the existence of a repeal by necessary implication it is urged that it was intended by the "budget amendment" to provide a scheme whereby each and every state expenditure, of whatsoever nature, during the biennial period following the enactment of the "budget bill," was to be provided for in the "budget bill," and that the "budget bill" was to become the single and exclusive source of all state appropriations, and that the result of the passage of the constitutional provisions providing for such a scheme was to repeal by implication all previous statutes providing for continuing or recurrent appropriations. Repeals by implication are not favored, and are recognized only when there is an irreconcilable conflict between two or more existing legislative enactments. *Malone v. Bosch*, 104 Cal. 680, 38 Pac. 516; *Rowe v. Hibernia, etc., Society*, 134 Cal. 403, 66 Pac. 569; *Estate of Brewer*, 156 Cal. 89, 103 Pac. 486. There is a difference in the language of the constitutional amendment of this state and that of the other states, and, whatever may have been the purpose and intent of the budget bills of other states, the language employed in the California constitutional provision clearly indicates that the "budget bill" was not intended to become the single and exclusive source of all state appropriations. This necessarily follows from the fact that it is provided in the constitutional amendment itself that other appropriation bills may be enacted. The only limitation which is placed upon other possible appropriation bills is that neither house shall place upon final passage any other appropriation bill until the budget bill has been finally enacted, and that no bill making an appropriation of money, except the budget bill, shall contain more than one item of appropriation, and that for one single and certain purpose to be therein expressed.

Furthermore, instead of there being any indication in the "budget amendment" of an intent to repeal appropriations validly made and provided for by existing law, there is, on the contrary, a clear intent shown to provide for a scheme of appropriation for a biennial period whereby all prior appropriations validly made and provided by existing law are to continue. It is expressly provided in the "budget amendment" that the "Governor shall, within the first thirty days of each regular session, * * * submit to the Legislature, * * * a budget containing a complete plan and itemized statement of all proposed expenditures of the state provided by existing law or recommended by him. * * *" It further provides that the budget shall be accompanied by an appro-

priation bill covering the proposed expenditures, to be known as the "budget bill." In other words, the "budget amendment" expressly provides that appropriations made by existing law shall be provided for by appropriations in the budget bill. This falls far short of showing an intent to repeal these appropriations. It is therefore quite apparent that the constitutional provision itself does not repeal by implication any prior appropriation bill validly enacted by a previous Legislature. On the contrary, the Constitution here provides for inclusion in the budget of expenditures of the state, those provided by existing law, and so long as these expenditures remain expenditures provided by existing laws, they become part and parcel of the budget regardless of whether or not they are expressly set forth therein.

[3] There still remains the question of whether or not the provisions creating the special fund for the Railroad Commission to be established by the receipt of certain fees and appropriating that fund to the use of the Railroad Commission has been repealed by the provisions of the budget bill to the effect that in all cases in which statutory provisions or appropriations have been made for items included in the budget bill, the amounts therein appropriated shall govern, and such other appropriations shall not be deemed in addition thereto.

The initial sentences of that section of the budget bill which it is claimed have this effect read as follows:

"The following sums of money are hereby appropriated out of any money in the state treasury not otherwise appropriated, and shall be used for the support of the state of California for the seventy-fifth and seventy-sixth fiscal years. In all cases in which statutory provisions or appropriations have been made for items of salary or of support included in this act the amounts herein appropriated shall govern, and such other appropriations shall not be deemed in addition hereto. Appropriations for purposes not otherwise provided for herein which have been heretofore made by any provision of the Constitution or of any existing statute shall not be affected by this act but shall continue to be governed by the constitutional or statutory provisions applicable thereto."

Clearly it cannot be said that these provisions operate as an implied repeal of all appropriations by all statutes preceding the budget bill and that they thereby in effect do away with all special funds and convert such funds into part of the general fund. Section 1 of the budget bill above quoted expressly recognizes that other statutes for appropriations and the setting apart of funds still exist. Indeed, it is expressly provided that in certain instances such appropriations shall continue. In the absence of some specific provision in the budget bill

requiring that the special funds be transferred to the general fund, it would seem that the legislative intention is clearly shown to be that such special funds shall remain intact as special funds.

The effect of the second sentence of section 1 of the budget bill providing that in cases in which statutory provisions or appropriations have been made for items of salary or support included in the budget bill, the amounts therein appropriated shall govern is that the amounts appropriated from the general funds in the treasury, as distinguished from the special fund, shall be used only after the special fund is exhausted; that is to say, that the special fund theretofore set apart for the payment of salaries and support is to be utilized first, and that thereafter there may be used, out of the money in the treasury not otherwise appropriated, the difference between the amount in the special fund and the amount set out in the budget bill, so that the total amount appropriated for the fiscal year shall not exceed for support and salaries the amount specified in the budget bill. The effect of this upon such a fund as the Railroad Commission fund, which is insufficient to furnish complete support and maintenance to the commission, is that the fund so set apart for that purpose shall be a continuing special appropriation recognized in the budget bill, which must be used in conjunction with sufficient amounts from the general fund to make the total amount appropriated.

It follows from what we have said that there is no irreconcilable conflict between the provisions of the "budget amendment" and the "budget bill" and the provisions of sections 57 and 85 of the Public Utilities Act, and that therefore the provisions of the latter act, creating the "Railroad Commission fund" and appropriating the same to the use of that commission, have not been repealed, and are now valid and existing provisions in full force and effect.

Let the writ issue as prayed for.

We concur: WILBUR, C. J.; RICHARDS, Justice pro tem.; WASTE, J.; SEAWELL, J.; LAWLOR, J.; KERRIGAN, J.

191 Cal. 716

RICHARDSON v. RAILROAD COMMISSION OF CALIFORNIA. (L. A. 7534.)

(Supreme Court of California. Sept. 6, 1923.)

1. Public service commissions ⇨19(1), 35—Order declaring that a public utility, which is not so, void, and assailable by writ of review.

Any decision of the Railroad Commission declaring an individual or corporation a public

utility, when it appears that it is not a public utility, is void as beyond the jurisdiction of the Commission and may be assailed by writ of review.

2. Public service commissions ⇨35—Decision of Railroad Commission conclusive if based upon substantial evidence.

If there is any substantial evidence before the Railroad Commission in a proceeding to declare an individual or corporation a public utility which would justify its finding that it is a public utility, its order must stand.

3. Public service commissions ⇨6—When a public service is a "public utility."

To constitute a true "public utility," the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the legal right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

4. Public service commissions ⇨15—Presumptions as to dedication to public use.

A dedication of property to a public use in the sense of operating a public utility is never presumed without evidence of unequivocal intention.

5. Waters and water courses ⇨249—Supply to neighbors of owner held not to constitute a public use.

A landowner, who besides irrigating his own farm from his well, supplied certain neighbors regularly and still others occasionally with such surplus water as he could spare, for which he charged a certain hourly rate, held not to have dedicated his work to a public use so as to entitle the public generally to demand water service as a matter of legal right.

In Bank.

Original application by G. H. Richardson for a writ of review to annul a decision of the Railroad Commission of the state of California, declaring petitioner a public utility engaged in supplying water. Decision and order annulled.

G. H. Richardson and Allen & Lyon, of Fullerton, and Head, Rutan & Scovel, of Santa Ana, for petitioner.

Hugh Gordon, William W. Clay, and Carl I. Wheat, all of San Francisco, for respondent.

RICHARDS, Judge pro tem. This is an application for a writ of review, wherein the petitioner seeks to have set aside and annulled a certain decision and order of the Railroad Commission made and entered on October 11, 1922, declaring the petitioner herein to be a public utility engaged in supplying water to complainants before the Commission in the proceeding in which said decision was made, and ordering the petitioner,

as such public utility, to continue his water service to said complainants and to such other customers as he had theretofore served, for irrigation or domestic purposes, and further ordering the petitioner to file forthwith a schedule of the rates formerly in effect for such water service, the same to constitute the present schedule for such service. The entire record in such proceeding is brief and is before us and shows the following substantially undisputed facts to have been presented before the Commission and to have formed the basis for such decision and order.

Prior to and during the year 1913 the petitioner herein was the owner of 45.8 acres of land in Orange county, California, which was partly set out to young fruit trees. He had upon his said land a well, operated by a small motor or windmill, which at the time furnished a supply of water which was more than adequate for his present needs. He had two neighbors, Flint and Bell, the former having about ten acres of land and the latter about fifteen, neither of whom had a well upon his own land. They each asked the petitioner to sell water to them, and as a neighborly accommodation he agreed to do so, and from time to time thereafter, as required, supplied them with such surplus water as he could spare. In that year, however, the water level in his small well went down below his pump, so that he could get no water at all, either for his own or neighbors' uses. He accordingly put down a larger well, and was fortunate enough to strike an increased flow of water. He installed a pumping plant for this well, operated electrically, and with water pipes and conduits extending over his own land; and he thereafter continued to supply his two neighbors with surplus water, as asked for by them, at the price, at first, of 75 cents per hour, and later at an increased price of \$1 per hour. In about 1918 other neighbors began applying to him for water, and, having a considerable surplus over his own needs, he responded to their requests when made, stating in each case that he could only supply them out of his own surplus and when the water was not being used elsewhere. These neighbors laid their own pipes or ditches to his line, and on each occasion when they needed water asked him for it, and also in each instance paid him at the rate per hour of service when the use of the water on each occasion ceased. The petitioner increased his rates in 1919 to \$1 an hour, giving as a reason therefor that the price of "juice" to run his engine had gone up. In the fall of the same year he increased the rate to \$1.25 for the same reason. Between 1918 and 1921 he came to serve regularly six neighbors, having in all an acreage of about 45 acres. He also served occasionally two, or at most three, other neighbors having lands planted intermittently to annual crops. There were also

two of his neighbors receiving water for irrigation from his larger well to whom he furnished water for domestic uses from his smaller well and tank operated by a windmill, and for which he received a small amount monthly. He kept no regular accounts and sent no bills. His net income from these sources for some of the years from 1913 to 1922 was less, and for other of these years was slightly more, than his outlay in operating expenses, without taking into account the depreciation of his plant by use.

In 1922, evidently for the first time apprehending that some of his neighbors thus being served with water might predicate a claim of right for such service, he went to some of those who were more or less regularly receiving water from him and presented a writing which he asked them to sign, stating that he would not continue to furnish them with any more water unless they did so. The main features of this document consisted in the statement that the petitioner was the owner of certain surplus water from a well located on his property, which he agreed to sell, to those who signed the writing, for irrigation purposes, at the rate of \$1.25 per hour, it being understood that the furnishing of such surplus water should not confer on those receiving it any right to demand or receive water from the petitioner, but that the signers would waive all right to demand or receive water from him under or by virtue of any law of the state of California. The petitioner reserved the right to cancel said agreement at any time by giving 30 days' written notice of the same. The persons to whom the petitioner presented this writing for signing refused to sign the same, whereupon the petitioner declined to further supply them with water. Four of the petitioner's former customers then instituted the proceeding before the Railroad Commission to have the petitioner therein declared to be a public utility and to have his schedule of water rates fixed and regulated by law.

[1, 2] It is conceded by both the petitioner and the respondent herein that if, upon the undisputed facts as presented before the Railroad Commission, it appears that the individual or corporation complained of is not a public utility, any decision or order of the Commission declaring him or it to be a public utility is void as beyond the jurisdiction of the Commission and may be assailed and vacated by means of a writ of review. The rule, however, is that if there is any substantial evidence before the Commission in the proceeding thus sought to be annulled, which would justify its findings to the above effect, its order must stand. It was so stated by this court in the case of *Van Hoosear v. Railroad Commission*, 184 Cal. 553, 555, 194 Pac. 1003. In applying this principle to the proceeding before us, it is well to have in mind the definition of what constitutes a

public utility, as adopted and clearly set forth by this court in the case of *Allen v. Railroad Commission*, 179 Cal. 68, 88, 175 Pac. 466, 474 (3 A. L. R. 249) wherein this court says:

[3] "What is a public utility, over which the state may exercise its regulatory control without regard to the private interests which may be affected thereby? In its broadest sense everything upon which man bestows labor for purposes other than those for the benefit of his immediate family, is impressed with a public use. No occupation escapes it, no merchant can avoid it, no professional man can deny it. As an illustrative type one may instance the butcher. He deals with the public, he invites and is urgent that the public should deal with him. The character of his business is such that under the police power of the state it may well be subject to regulation, and in many places and instances is so regulated. The preservation of cleanliness, the inspection of meats to see that they are wholesome, all such matters are within the due and reasonable regulatory powers of the state or nation. But these regulatory powers are not called into exercise because the butcher has devoted his property to public service so as to make it a public utility. He still has the unquestioned right to fix his prices; he still has the unquestioned right to say that he will or will not contract with any member of the public. What differentiates all such activities from a true public utility is this, and this only: That the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Public use, then, means the use by the public and by every individual member of it, as a legal right. Such is not only the accepted significance of the phrase by the great weight of authority as expounded by Mr. Lewis (*Eminent Domain*, § 164 et seq.) but is the definition repeatedly announced by this court. * * *

[4] The court also and in the quite recent case of *Van Hoosear v. Railroad Commission*, supra, quoted with approval the further statement in the *Allen* Case that "To hold that property has been dedicated to a public use is no trivial thing," * * * and such dedication is never presumed "without evidence of unequivocal intention."

[5] Applying the foregoing definition as to what constitutes a public utility to the evidence before us in the instant proceeding, and also applying the forgoing measure by which the evidence of the dedication of the property in question to a public use is to be weighed, we utterly fail to find any substantial evidence that this petitioner ever made, or intended to make, such a dedication of the surplus water from the wells upon his tract of land to public uses so as to entitle either the little circle of his immediate neighbors using the same, or the public generally to de-

mand, as a matter of legal right, that his said supply and service of surplus water should be conducted and continued as a public utility, subject to regulation as to its service and rates by the Railroad Commission. There is no case to which our attention has been called which goes so far as to hold that the mere fact that a private individual or corporation furnishes the surplus portion of a limited water supply to a small circle of consumers, each especially requesting and individually receiving the use and benefit of the same, and each paying an agreed sum for each particular period of such use, has been held to be a public utility by reason of these facts alone and in the absence of any other facts showing an express or implied dedication of the property to a public use. Each of the cases cited and relied upon by respondent herein, contained other essential facts which warranted this court in finding a dedication of the property involved in each of said cases to public users. In *Francioni v. Soledad Land & Water Co.*, 170 Cal. 221, 149 Pac. 161, the dedication to public use was implied from the application of the owner of the property to the board of supervisors for a public fixation of water rates. In the case of *Palermo L. & W. Co. v. Railroad Commission*, 173 Cal. 380, 160 Pac. 228, the dedication to a public use was implied from provisions in the contracts of the water company stipulating that water was to be furnished "at such rates as may be fixed by law." In the case of *Producers' Transportation Co. v. Railroad Commission*, 176 Cal. 499, 169 Pac. 59, the dedication of the property, an oil pipe line, to a public use, was implied from the exercise by the corporation installing it of the right of eminent domain. In the case of *Traber v. Railroad Commission*, 183 Cal. 304, 191 Pac. 366, the dedication to a public use was implied from the fact that the corporation had been organized under acts of the Legislature providing for the organization of corporations for supplying water for public use. In the case of *Brewer v. Railroad Commission* (Cal. Sup.) 210 Pac. 511, the dedication to public use was implied from the fact that the water company had voluntarily submitted itself to the jurisdiction of the Railroad Commission and to orders made by it fixing the rates to be charged consumers for its water service.

The most instructive case coming recently before this court for adjudication, and the case most nearly approaching the instant case as to its main facts, is the case of *Van Hoosear v. Railroad Commission*, supra, upon which the respondent herein strongly relies as sustaining its position. In that case, as in this case, the petitioner for the writ was an individual, having a small water plant upon his farm, originally installed to supply water for his own use thereon, but from which he began to supply his surplus water to some of

his neighbors as a matter of accommodation, continuing for some years so to do, but finally discontinuing such service when he sold his farm. In commenting upon the facts of that case as thus far stated, this court aptly said:

"The petitioner's plant is an exceedingly small one; it was originally built to supply water for his own use on his farm; he testifies, and his testimony is corroborated, that he began to supply water to some of his neighbors as a matter of accommodation and merely continued so doing; and he finally discontinued his service because he had sold his farm. It is a case to which the obligations and responsibilities of a public utility are wholly inappropriate, and where the petitioner, by dedicating his system to public use, would impose a perpetual servitude upon his farm from which there could be no escape except by the grace of the Commission. It is a good illustration of the truth of the statement in *Allen v. Railroad Commission*, supra, that 'to hold that property is dedicated to a public use is no trivial thing,' and of the justice of the statement which immediately follows that 'such declaration is never presumed without evidence of unequivocal intention.'"

The fatal error which Van Hoosear made, and which compelled this court to hold that his water service had been dedicated to a public use, consisted in the fact that he had voluntarily gone before the Railroad Commission with a petition for leave to discontinue his service, and upon being refused such leave, had continued his service for some time in acquiescence with the order of the Commission and in the capacity of an operator of a public utility. It was upon this ground alone that this court felt constrained to deny relief to petitioner in that case. No such situation is presented in the instant case, and hence the language of this court in dealing with those of the facts of that case which are practically identical with those of the case at bar must be given particular significance and force as decisive of the question before us.

There are two alleged facts upon which the respondent herein chiefly relies as furnishing the basis for its findings and conclusion that the petitioner's water plant was a public utility. One of these is to be found in its assertion that there was no other water supply available to the customers of the petitioner. The record does not bear out this assertion, since it appears that there was another pumping plant within a short distance from the lands of certain of the petitioner's customers, the waste water of which at times ran into this very neighborhood, and there is nothing in the record to show that its supply would not be available if this petitioner's service were to cease. Neither is there anything in the record to show that the neighbors and customers of the petitioner herein could not sink wells on their own lands as

successfully as he had done. The other fact relied upon by the respondent is that Mr. Henry West, when he bought his land in 1919, went to see the petitioner, and, to use his own language, "told Richardson I would like to set the place out to trees and didn't know when I could put down a well. He said, All right, he had water to sell, he would furnish water, to go ahead and set out the trees, so I went and bought trees and set them out." The mere recital of this interview should suffice to show its insufficiency as any basis for a finding that the petitioner was thereby intending to declare that his water plant was a public utility, or to dedicate it to the general public use as such.

The decision and order of the Railroad Commission is annulled.

We concur: WILBUR, C. J.; MYERS, J.; SEAWELL, J.; WASTE, J.; LENNON, J.; LAWLOR, J.

191 Cal. 740

IN RE ROMARIS' ESTATE.

HYNES v. STATE.

(S. F. 10265.)

(Supreme Court of California. Sept. 7, 1923.)

1. Aliens $\Leftrightarrow$ 13, 14—State statute imposing restriction upon right of nonresident aliens to inherit held in conflict with treaty granting equality of inheritance.

Civ. Code, §§ 672, 1404, providing that nonresident foreigners could not take property by succession unless claimed within five years after the death of decedent, are, regarding nonresident aliens who are citizens and residents of France, in conflict with article 7 of the Treaty of 1853 between France and the United States, providing that "Frenchmen shall enjoy the same right of possessing personal and real property by the same title and in the same manner as the citizens of the United States," when the statute makes no such restriction regarding time of claiming to citizens of the United States.

2. Aliens $\Leftrightarrow$ 13, 14—Enactment makes operative a treaty granting French nonresidents equality of inheritance with United States citizens.

A constitutional provision of 1849 and Civ. Code, § 671, giving resident aliens the right to hold and inherit property, together with the Treaty of 1853 between France and the United States, giving Frenchmen the same right regarding possession of property as citizens of the United States, confers upon nonresident Frenchmen equality of inheritance with citizens of the United States.

3. Treaties $\Leftrightarrow$ 11—Treaty supreme over state law.

A treaty is supreme over a state law in conflict with it.

4. Treaties —2—Regulation of inheritance of property not reserved to the states, but may become subject of treaty.

The regulation of inheritance of property by aliens is not a power reserved to the states by the federal Constitution, but may become the subject of the treaty-making power of the federal government.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Petition by W. J. Hynes for distributing the estate of Francois Romaris. From a decree distributing the estate, the State of California appeals. Affirmed.

U. S. Webb, Atty. Gen., and Frank L. Guereña, Deputy Atty. Gen., for the State.

P. A. Bergerot, A. P. Dessouslavy, and Cullinan & Hickey, all of San Francisco, for respondent.

MYERS, J. The state of California appeals herein from a decree of distribution rendered in the above-entitled estate. The decedent died intestate June 1, 1906, in San Francisco, being a resident thereof, and leaving an estate therein consisting of personal property. The decree distributes the estate to his heirs at law, who are nonresident aliens, being citizens and residents of the republic of France, and who did not appear to claim the succession within five years after his death. The appellant contends that they are barred by reason thereof from succeeding to the estate, under the provisions of sections 672 and 1404 of the Civil Code, which provide:

"§ 672. *Aliens Inheriting Must Claim Within Five Years.* If a nonresident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in title eight, part three, Code of Civil Procedure.

"§ 1404. *Aliens May Inherit; When and How.* Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no nonresident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

Respondent replies that the provisions of the foregoing sections, invoked by appellant, are suspended and controlled by the Treaty of 1853 between France and the United States, article 7 of which reads as follows (10 Stat. 996):

"In all the states of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing

personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter or to taxes which shall not be equally imposed."

"As to the states of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

"In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property, and to inheritance, as are enjoyed there by its own citizens."

[1-3] Appellant argues that the state law and the treaty provision do not conflict for the following reasons: (a) Because the treaty does not grant equality in the matter of inheritance. The argument in support of this is that the treaty provides for equality only with respect to the right of possessing property, and that one possesses property by holding it, but only after it has come to him by inheritance, purchase, gift, or otherwise, and that the treaty therefore does not apply to the situation here obtaining. This precise question was decided adversely to appellant's contention in *Geofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642, and *Bahuaud v. Bize* (C. C.) 105 Fed. 485. (b) Because there was no law of this state in 1853 which permitted equality in the matter of inheritance. The answer to this is that the state Constitution of 1849 provided that aliens who then were or who thereafter should become bona fide residents of this state were given "the same rights in respect to possession, enjoyment, and inheritance of property, as native-born citizens." Article 1, § 17. The two cases above cited also decide this question, and hold that such a provision in the law of a state is sufficient to make applicable the provisions of the treaty. So, also, is the existing provision of section 671, Civil Code, providing that "any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state." (c) Because the treaty does not assume supremacy over state law. This contention also has been ruled adversely to the appellant by the two cases above cited and, inferentially, by the cases of *In re Stixrud*, 58 Wash. 339, 109 Pac. 345, 33 L. R. A. (N. S.) 632, Ann. Cas. 1912A, 850; *Succession of Dufour*, 10 La. Ann. 391; *Succession of Amat*, 18 La. Ann. 403. See, also, cases cited in note to 32 L. R. A. at page 177. (d) Because

sections 672 and 1404 of the Civil Code create no conflict with the provisions of the treaty, this for the reason that the Code sections do not deny the right of such aliens to inherit, but merely undertake to regulate the time and manner by which they may avail themselves of that right. The treaty provides that:

"Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States."

Under our laws the property of a person who dies intestate vests in the heirs immediately upon the death of the ancestor. If the heirs are citizens of the United States, they become vested at once with the full property and estate of the ancestor therein, by a title which is indefeasible except by the right of the administrator to possess the same for the purposes of administration and to sell the same for the payment of the debts and expenses of administration, and for the purposes and in the manner provided by law, in the course of the administration. *Brenham v. Story*, 39 Cal. 179; *Bates v. Howard*, 105 Cal. 173, 183, 38 Pac. 715; *Estate of Hills*, 176 Cal. 232, 234, 168 Pac. 20; *Estate of Benvenuto*, 183 Cal. 382, 387, 191 Pac. 678. But under our laws, considering them as unaffected by the treaty provisions, if such heirs are nonresident aliens, the estate which vests in them upon the death of the ancestor is not an absolute or unconditional estate, as in the case of citizen heirs, subject only to be divested in the process of administration, but it is a conditional estate, upon the condition subsequent that if they fail to appear and claim the same within five years their right ceases and the property then vests in the state. *Estate of Pendergast*, 143 Cal. 135, 140, 76 Pac. 962; *State v. Miller*, 149 Cal. 208, 210, 85 Pac. 609. It cannot be said under these circumstances that under the state law as unaffected by the treaty the nonresident alien enjoys the right of possessing property "by the same title and in the same manner as the citizens of the United States." This distinction was pointed out in the *Estate of Aufret*, 187 Cal. 34, 36, 200 Pac. 946, 947, where it was said:

"If they [the heirs] were such residents or citizens at the time of the death of the decedent, they would immediately succeed to the title, free from the condition expressed in section 1404, and no claim on their part would be

necessary to enable them to take by the succession."

[4] Finally, the Attorney General urges that the regulation of inheritance of property by aliens is a subject not within the scope of the powers conferred by the Constitution of the United States upon the treaty-making power of the federal government, but is among the powers the reservation of which to the several states was recognized by the Tenth Amendment to the federal Constitution. He concedes the existence of "a long line of adverse decisions," but urges that they are not well-reasoned decisions, and appeals to this court "to examine and consider and determine this proposition for itself, as though the question were for the first time presented to a judicial tribunal." This undertaking would be interesting, but the interest would be purely academic so far as this court is concerned. Upon this question as to the interpretation of the federal Constitution, the Supreme Court of the United States is the ultimate authority. There is an unbroken line of decisions by that court upon this question, all to the same effect, covering a period of more than a hundred years, from *Ware v. Hylton*, 3 Dall. 199, 235, 255, 281, 282, 1 L. Ed. 568, decided in 1796, to *Missouri v. Holland*, 252 U. S. 416, 432, 40 Sup. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984, decided in 1920. The authority and controlling effect of those decisions have been recognized by this court in *People v. Gerke*, 5 Cal. 381, *Forbes v. Scannell*, 13 Cal. 243, 282, *Blythe v. Hinckley*, 127 Cal. 431, 435, 59 Pac. 787, and *In re Terui*, 187 Cal. 20, 24, 200 Pac. 954, 17 A. L. R. 630. It is true that the particular arguments here presented do not appear to have been made or considered in the earlier cases here referred to, but the point to which those arguments are directed was involved in those decisions. Substantially the same arguments here presented were made to the United States Supreme Court in *Missouri v. Holland*, supra, and to this court in *In re Terui*, supra, and by both courts rejected. The question cannot be regarded as open to reconsideration by this court.

The decree is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; SEAWELL, J.; WASTE, J.; LENNON, J.

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UNION TOOL CO. v. FARMERS' & MERCHANTS' NAT. BANK OF LOS ANGELES (HELLMAN COMMERCIAL TRUST & SAVINGS BANK, Intervener). (L. A. 7099.)

(Supreme Court of California. Sept. 13, 1923.)

1. Banks and banking ☞148(1)—Bank liable for payment of forged check irrespective of care exercised.

A bank is only warranted in paying out depositor's money on his genuine order and in accordance therewith, and, in absence of circumstances creating equitable estoppel or prior contributory negligence of depositor, no degree of care will excuse bank from liability for payment of forged check.

2. Banks and banking ☞148(3)—Duty of depositor to compare indorsements with names of payees.

Under the general law and under receipts given by depositor for returned checks by which he agreed to examine them and report all differences and missing vouchers, it was his duty to compare indorsements with names of payees as they appeared on his check register.

3. Banks and banking ☞148(3)—Negligence of depositor in examining returned checks does not relieve bank if it is negligent.

Though depositor was negligent in not making more thorough examination of returned checks, bank was not relieved of liability for amounts paid on forged checks, unless it was itself free from negligence.

4. Banks and banking ☞148(2)—Duty of bank to determine genuineness of indorsements of checks drawn on it.

It was the duty of the bank on which checks were drawn to determine the genuineness of the indorsements.

5. Banks and banking ☞148(2)—Bank with which checks deposited on forged indorsements held negligent and bound to refund money.

Where irresponsible employee of drawer of checks payable to M., the agent of a railway company, erased the descriptive words and indorsed M.'s name thereon with no attempt to imitate his handwriting, and then indorsed them in his own name and deposited them in a bank which, without exercising any care to ascertain whether M. had indorsed them, guaranteed all indorsements and forwarded them for collection, it was negligent and liable to refund the amount paid it on the checks.

6. Banks and banking ☞154(2)—Action for balance of deposit held subject to limitation of actions for payment of forged checks.

Though, in depositor's action to recover alleged balance of deposit, neither complaint nor answer indicated that forged check was involved, where defendant's cross-complaint and intervening complaint of another bank which had cashed the forged checks raised issue as to their payment, and the only dispute related to such checks, the action was within Code Civ.

Proc. § 340, subd. 3, limiting time for action by depositor for payment of forged check.

7. Limitation of actions ☞16—Governed by nature of right sued on.

It is not so much the form of an action as the nature of the right sued upon which determines applicability of statute of limitations.

8. Banks and banking ☞154(2)—Alteration of check held "forgery."

Where checks drawn payable to M., the agent of a railway company, were altered by erasing the descriptive words and M.'s name was then fraudulently indorsed thereon, such acts amounted to forgery within Code Civ. Proc. § 340, subd. 3, limiting time for action by depositor for payment of forged check.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Forgery.]

9. Banks and banking ☞154(2)—"Forgery" within statute as to actions by depositor defined.

Any material alteration of a writing, with intent to defraud, so as to make the writing appear to be different from what it was originally intended to be, is a "forgery," within Code Civ. Proc. § 340, subd. 3, limiting time for action by depositor for payment of forged check.

10. Banks and banking ☞154(2)—Special statute as to action for payment of forged check prevails over general statute.

Code Civ. Proc. § 340, subd. 3, as amended in 1905, providing that action by depositor against bank for payment of forged check must be brought within one year, in the special class of actions within its terms, controls the general rule expressed in section 348, providing that there is no limitation for actions to recover money deposited with bank.

11. Limitation of actions ☞67—Cause of action for payment of forged check accrues upon return of checks and statement.

When canceled checks and statement of depositor's account are regularly furnished him by bank, limitation against action for payment of forged check runs from time of return of such check with statement of account showing that it is charged against depositor, as this amounts to notice to him of its denial of liability for the amount so paid.

12. Banks and banking ☞119, 138—Deposit creates debt payable on demand.

Relation between bank and depositor arising out of general deposit is that of debtor and creditor, and the debt is payable on demand.

13. Limitation of actions ☞66(9)—Does not run against depositor until demand.

As a general rule there is no default on part of bank and no accrual of cause of action against it for balance of general deposit until payment is demanded, or there is some act on part of the bank dispensing with such demand, but denial of liability, either in terms or in effect, is such an act dispensing with demand as sets statute of limitations in motion.

14. Banks and banking ⇨ 148(4)—**Duty of depositor to examine statement and vouchers.**

Where bank regularly furnishes depositor with statement of his account and returns canceled checks, it is his duty to examine them and report at once any error therein and any forgeries or alterations, and if he does not do this within reasonable time the account as rendered becomes an account stated.

In Bank.

Appeals from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by the Union Tool Company against the Farmers' & Merchants' National Bank of Los Angeles, in which the Hellman Commercial Trust & Savings Bank intervened. From the judgment, defendant and the intervenor appeal. Modified and affirmed.

Lawler & Degnan, of Los Angeles, for defendant appellant.

Page & Hurt, and Eugene D. Williams, all of Los Angeles, for intervenor appellant.

Andrews, Toland, Gregg & Andrews, A. V. Andrews, and H. W. Reynolds, all of Los Angeles, for respondent.

KERRIGAN, J. By the judgment in this case the plaintiff recovered from the defendant the sum of \$18,576.98 and costs. The defendant recovered a like amount and costs from the intervenor. Both the defendant and the intervenor appeal. The facts appear to be as follows: For many years prior to September, 1918, the plaintiff had been a depositor of the Farmers' & Merchants' National Bank, the defendant. At the time the account was opened the treasurer of the plaintiff corporation received a passbook which contained what purported to be an "agreement with depositor," and which provided, in substance, that, within 10 days after the receipt of returned canceled checks or vouchers drawn by the depositor, the latter would make an examination of such returned checks and vouchers, and satisfy itself of their correctness, genuineness, and regularity, both as to the face and indorsements, and that a failure of the depositor to report in writing anything to the contrary to the bank within 10 days after such delivery would be deemed positive and conclusive evidence that the examination had been made and the account and checks and vouchers had been found correct. This so-called agreement was not read by the officer of the plaintiff corporation opening the deposit, nor did the company or any officer sign the purported agreement, nor was it called to their attention or known by them. At the same time that the account was opened, arrangements were made to the effect that statements would be returned to the plaintiff three times a month, and statements were so returned. Each time such a statement was returned it

was accompanied by the checks or vouchers, and a receipt was given therefor in the following words:

"Received from the Farmers' & Merchants' National Bank of Los Angeles, Cal., statement of account and all canceled vouchers for the months indicated. I agree to examine same carefully and report all differences or missing vouchers, if any, within ten days. Otherwise the account may be considered correct."

Each statement so received contained at the top the following words:

"Please examine at once and report any differences. If not reported on within ten days the account will be considered correct."

In the latter part of August, 1918, the plaintiff employed as traffic manager a man by the name of Davis. Among his duties was that of checking the freight bills and preparing a distribution to the particular accounts of the charges therein contained, and thereupon submitting to the treasurer of the company the freight bills, properly approved by himself and approved as to distribution by another employee, together with a vouchered check made out in payment of such freight bills and complete except as to the signatures of the president and secretary. Thereupon the secretary examined the freight bills to see that they corresponded in amount with the check, and that they appeared to be regular, and attached the signature of the president by rubber stamp to the check and then completed the same by signing as secretary. Such officer made no other examination of the other vouchers, nor any other check of the vouchers than the distribution check. After the check had been signed it was entered by the bookkeeper upon the check register, showing the date, name of payee, the amount of the check, its number, and the account to which it was charged; but the date, name of payee, the amount of the check, the account to which it was charged, and its number were entered in the check register in numerical order according to the number of the check.

Soon after entering the employ of the plaintiff, Davis conceived the scheme of forging freight bills at intervals, and presenting such spurious freight bills so that they appeared to be valid bills duly approved. On the 4th day of September, 1918, or about a week after Davis was employed, he caused a check for the sum of \$2,405.75 to be drawn against the Union Tool Company's account in the Farmers' & Merchants' National Bank in favor of "C. H. Mueller, agent, Pacific Electric Railway Co., Torrance, Cal." This check accompanied a voucher and a freight bill, which freight bill had been prepared by Davis himself and which did not actually represent a claim made by the Pa-

cific Electric Railway Company against the Union Tool Company. The name of the payee was the customary name used by the Union Tool Company in making payments to the Pacific Electric Railway Company. This check, having been duly signed by the proper officers of the company, was entered in the check register. In the place provided in the check register for the name of the payee the words "Pacific Electric Ry." were written. Davis, upon receiving the check, erased the words "Agent, Pacific Electric Railway Co., Torrance, Cal.," thereby making the check payable to C. H. Mueller. Davis then indorsed the name of C. H. Mueller on the back of the check, and wrote underneath thereof his own name, G. C. Davis. This check was deposited by Davis in the banking house of the intervener, Hellman Commercial Trust & Savings Bank, and was indorsed by it with its clearing house stamp, and the check in due course was cleared through the Los Angeles Clearing House, and on September 5, 1918, was paid by the Farmers' & Merchants' National Bank, upon which the check was drawn. The indorsement by the Hellman Commercial Trust & Savings Bank was made by it without taking any steps to verify the genuineness of C. H. Mueller's indorsement. Thereafter other checks were similarly fraudulently prepared, indorsed, and cashed, amounting with the first check, together with interest, to the aggregate sum of \$18,576.98. Each of the checks in question separately passed under the examination of the Hellman Commercial Trust & Savings Bank and then, as to the face thereof, under the examination of the Farmers' & Merchants' National Bank. Whatever an expert inspection of the face of the checks in question would disclose concerning any erasure after the name of the payee "C. H. Mueller" was within the power of the respective banks to discover by such inspection. These checks were paid from time to time, beginning September 4, 1918, until the Farmers' & Merchants' National Bank discovered the forged indorsements on January 12, 1920. In the meantime no effort was made by the Farmers' & Merchants' National Bank at any time to verify the genuineness of the indorsement of C. H. Mueller.

When the packages of canceled checks with the statement of the Farmers' & Merchants' National Bank were returned to the Union Tool Company, the bookkeeper of the Union Tool Company arranged the checks in numerical order and then checked them by number and amount against the corresponding numbers and amounts shown in the check register, and at the same time observed the signatures of the officers of the Union Tool Company. No comparison was made of the face of the check with the check register either as to date, or name of payee, nor was any examination of the back of the check

made by any person in the employ of the plaintiff company.

The plaintiff sued the Farmers' & Merchants' National Bank of Los Angeles for the balance upon the checking account. The defendant admitted all the allegations of the complaint, except as to the amount paid out by the defendant on orders of plaintiff. There were also certain affirmative defenses pleaded, including estoppel of plaintiff by reason of the so-called agreements to which reference has been made, and because of its not having claimed irregularities within 10 days after the paid checks were returned to plaintiff; also, for the same reason, that the plaintiff as a matter of law was guilty of negligence; and that the statute of limitations applied as to the first four of the forged checks. By stipulation the judge of the trial court was permitted to decide that it would be inequitable for either the defendant or the intervener to plead the statute of limitations as to the fourth check, of date January 27, 1919, and no complaint is made by either of the appellants as to the court's ruling as to that particular check. The court gave judgment: (1) In favor of plaintiff and against the Farmers' & Merchants' National Bank of Los Angeles for the sum of \$18,576.98; and (2) in favor of the Farmers' & Merchants' National Bank of Los Angeles and against the intervener Hellman Commercial Trust & Savings Bank for the same amount.

[1] It is a well-settled general rule that as between a bank and its depositor the bank is only warranted in paying out the money of the depositor on his genuine order and in accordance therewith. If payments be made on a forged check, with no attendant circumstances sufficient to create an equitable estoppel as against the depositor, or there has been no prior negligence by the depositor contributory to the payment of the check, no degree of care on the part of the bank will excuse it from liability. *Janin v. London & San Francisco Bank*, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82; *Otis Elevator Co. v. First National Bank of San Francisco*, 163 Cal. 31, 124 Pac. 704, 41 L. R. A. (N. S.) 529; *Los Angeles Investment Co. v. Home Savings Bank*, 180 Cal. 601, 182 Pac. 293, 5 A. L. R. 1193.

[2] One of the defenses here is that the plaintiff was negligent in its duty in not making a proper examination of the accounts and the vouchers which were respectively rendered and returned to the plaintiff by the Farmers' & Merchants' Bank, and that because of such negligence and the failure of the plaintiff to discover the forgery and thereupon to report same to the Farmers' & Merchants' Bank, the plaintiff should be estopped because thereby the Farmers' & Merchants' Bank was induced to pay and did pay all subsequent checks in consequence of the silence of the plaintiff when it was its

duty to speak—in other words, that the Farmers' & Merchants' Bank was misled to its injury by reason of the fault of the plaintiff. A comparison was made by the plaintiff as to the number and the amount of the several checks returned, with the stub of the check register, and of the genuineness of the signatures of the officers of the plaintiff company, and the correctness of the account as between the plaintiff and the Farmers' & Merchants' National Bank was duly ascertained.

An examination of the returned checks should have included a comparison of the names of the payees of the checks. The check register showed, as of course it should, the names of the payees of the checks, and an examination of returned canceled checks which did not cover a comparison of the names of the payees, would, it appears to us, be, as a matter of prudence, incomplete. In this case, if that had been done, it would have led to the discovery of the first forged check, and the losses subsequent to the payment thereof would not have occurred. It was the duty of the plaintiff, under an obligation imposed by general law and under the terms of its receipts for the canceled checks, to make such an examination and comparison.

In 7 C. J. at page 687, the rule is thus stated:

"Although there are a number of authorities to the contrary, the weight of authority, and perhaps of reason, supports the view that, when a depositor's passbook has been written up and returned to him with the canceled checks which have been charged to his account, it is his duty to examine such checks within a reasonable time and to report any forgeries or alterations which he has discovered, failing in which he cannot, if his failure has resulted in detriment to the bank, dispute the correctness of the payments shown."

See, also, 3 R. C. L. 533.

[3, 4] Assuming that the plaintiff was negligent in not making a more thorough examination of the returned checks, although the trial court found he was not negligent, still the depositing bank may not escape liability for the payment of amounts paid on forged checks unless it has itself been free from negligence. Here the finding of the trial court that the bank was negligent is clearly sustained by the evidence. It was the duty of the bank to determine the genuineness of the indorsements. This was a duty which devolved solely upon the bank. In the case of Los Angeles Investment Co. v. Home Savings Bank, *supra*, the court, after having stated the law with reference to the duty of a depositor in circumstances similar to those in this case, quoted with approval from the case of Shipman v. Bank of the State of New York, 126 N. Y. 318, 27 N. E.

371, 12 L. R. A. 791, 22 Am. St. Rep. 821, the following:

"The defendant's contract was to pay the checks only upon a genuine indorsement. The drawer is not presumed to know, and in fact seldom does know, the signature of the payee. The bank must, at its own peril, determine that question. It has the opportunity, by requiring identification when the check is presented, or a responsible guaranty from the party presenting it, of ascertaining whether the indorsement is genuine or not. When it returns the check to the depositor, as evidence of a payment made by his direction, the latter has the right to assume that the bank has ascertained the fact to be that the indorsement is genuine" —citing many cases.

The bank being primarily negligent in regard to the indorsement, as well as to the alteration of the check or checks, it follows that even if the plaintiff had been negligent in failing to make a proper examination of the canceled checks the defense of estoppel must fail. Before a defendant bank will become entitled to escape its liability for payment of a forged check it must be shown that the bank itself was free from negligence. In *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, it is said that—

"Of course, if the defendant's officers, * * * could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, *even if the depositor omitted all examination of his account.*" (Italics ours.)

In another case (*Morgan v. U. S. Mortgage & Trust Co.*, 208 N. Y. 218, 101 N. E. 871, L. R. A. 1915D, 741, Ann. Cas. 1914D, 462), it is said:

"It is, however, permitted to a bank to escape liability for repayment of amounts paid out on forged checks by establishing that the depositor has been guilty of negligence which contributed to such payments *and that it has been free from any negligence.*" (Italics ours.)

The general proposition is aptly put in the case of *National Dredging Co. v. President, etc., of Farmers' Bank*, 6 Pennewill (Del.) 580, 591, 69 Atl. 607, 611 (16 L. R. A. [N. S.] 593, 599, 130 Am. St. Rep. 158), as follows:

"In every case where suit is brought by a depositor to recover from a bank money deposited by him, which the bank has paid out otherwise than in conformity with his orders, and the bank sets up the defense that it is nevertheless entitled to charge the depositor with such payments, because of conduct of the depositor subsequent to such payment, the preliminary question to be determined is whether the bank was or was not guilty of negligence in making the payments. If it were negligent, if its officers be found to have failed to exercise due and reasonable care in detecting the forgery or fraud, then the subsequent negligence of the depositor, his failure to perform his duty in examining his pass book and vouchers

with reasonable care and report to the bank in a reasonable time any errors or mistakes, would constitute no defense. It is needless to cite cases in which this doctrine is explicitly stated, because they are all in accord upon this point, and the doctrine is assumed in every case where it is not stated."

[5] The intervener, Hellman Commercial Trust and Savings Bank, can be in no better position with respect to the defenses pleaded than can the Farmers' & Merchants' Bank; they both rest upon the same facts and the same law with reference thereto. In a case involving a similar principle, it was said:

"The defendant bank is in no better attitude to defend against the government's demand than would have been the banks which advanced the money to McCoy upon his forged indorsements. Those banks had the opportunity to discover the facts, and it was their duty to do so. Had they investigated, they would have discovered that the holder of those checks had no legal title to them, and was not an authorized payee." *United States v. Nat. Bank of Commerce of Seattle, Wash.*, 205 Fed. 433, 437, 123 C. C. A. 501.

See, also, *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, 116 N. W. 617, 17 L. R. A. (N. S.) 514, 126 Am. St. Rep. 467.

The evidence shows that the intervener, Hellman Commercial Trust & Savings Bank, failed to exercise proper care to ascertain whether or not C. H. Mueller had indorsed any of the checks here involved. It, in effect, took the word of the forger, paid him the money, guaranteed all indorsements on the checks, and forwarded them through the clearing house for the collection from the Farmers' & Merchants' Bank. Referring again to the case of *United States v. National Bank of Commerce of Seattle, Wash.*, supra, it is there held that where a forged check was cashed by a bank other than that on which it was drawn, such bank was negligent in failing to discover the forgery and in not requiring identification of the payee, and could not urge, in defense of its liability to refund the money, that the drawer of the check was negligent in failing promptly to discover the fraud. To quote from the opinion in that case, it was said:

"It was their duty to ascertain whether there was such a person as the payee named in the checks, and to know that the person who presented the checks was entitled to receive the payment thereof. They made no investigation, required no identification, and took no precaution. They paid the money negligently, and at their own risk, and the defendant bank in choosing to rely upon the identification of the payee by the banks which cashed the checks did so at its own risk."

And in this respect the Farmers' & Merchants' Bank was also guilty of negligence, for, although thoroughly equipped to do so, it took no pains to learn if the indorsements

on the checks were genuine, depending, according to the custom of banks, where checks have passed through clearing houses, upon the responsibility of the preceding indorsements. The cashier of the bank testified:

"When a check came to it through a clearing house, as a matter of fact we determine that the clearing house stamp was on there and we are not interested in the genuineness or sufficiency of it; * * * in other words, we depend entirely upon the responsibility of the preceding indorser."

When it is remembered, as disclosed by the record, that no attempt was made by the forger to imitate in any way the handwriting of Mr. Mueller; that the forger was financially irresponsible; that all the persons connected with the matter were easily accessible; that a careful inspection of the face of the checks would have disclosed the alteration—these matters, taken in connection with the lack of diligence on the part of the depository bank to determine the genuineness of the checks, clearly show that the depository bank was guilty of actual negligence.

[6.7] It is contended by appellants that, because the first three checks in question were paid by the Farmers' & Merchants' Bank more than one year prior to the date of the filing of the complaint herein, the action as to them is barred under a part of the provision of subdivision 3 of section 340 of the Code of Civil Procedure, which fixes at one year the time for commencement of "an action by a depositor against a bank for the payment of a forged or raised check."

Respondent's position is that its action is not for the payment of a forged check or checks, but that it is for the collection of a deposit based upon a demand for payment and a refusal of the demand, which would bring the case under an entirely different section of the Code relating to the time for the commencement of civil actions. Moreover, respondent claims that there was no forgery of the check itself, but that the offense consists in the forgery of the indorsement, and consequently that in no event could the action be one against the bank for the payment of a forged or raised check. While there is nothing in either the complaint or the answer herein which would indicate that a forged check was in any manner connected with the action, the complaint in intervention by the Hellman Commercial Trust & Savings Bank and the cross-complaint by the Farmers' & Merchants' Bank do raise an issue as to the alteration and payment of the checks in question. The case as presented on the trial hinged, not so much upon the direct allegations of the complaint, as it did upon the case as stated in the cross-complaint, and the complaint in intervention. It is not so much the form of the action as it is the nature of the right sued upon which determines the applicability of the statute of limitations. Bell

v. Bank of California, 153 Cal. 234, 243, 94 Pac. 889. The case of Otis Elevator Co. v. First Nat. Bank, supra, 163 Cal. at page 37, 124 Pac. at page 706 (41 L. R. A. [N. S.] 529), contains a statement of law which is applicable here. It is as follows:

"It must be remembered, however, that the purpose of the action was to determine whether or not plaintiff had a certain balance in defendant's bank. The payment of the two checks being pleaded by way of defense issue was completely joined. The forgery of the checks and plaintiff's conduct with reference to their preparation and custody were matters arising in connection with the offered proof of the principal allegation in the answer and plaintiff's attempted refutation of it. It was not necessary that any issue upon the alteration of the checks should be made by the pleadings."

Neither the question of how much money was actually deposited by the plaintiff with the Farmers' & Merchants' Bank nor how much money was actually withdrawn therefrom, outside of the checks here in question, was ever in dispute. The gravamen of this action was concerning the effect of the alteration of these checks, the forgery of the name of the payee as altered, and the subsequent conduct of the plaintiff with relation to the canceled checks after they came into its possession. It involved in reality a question of forgery and the effect thereof—nothing more and nothing less.

[8, 9] The statute to which reference has been made must be taken, if possible, in its natural and usual sense; it should not receive a strained construction. The checks as originally drawn were first altered by changing the name of the intended payee and afterward by fraudulently indorsing the payee's name thereon. Those acts certainly amounted to forgery within the definition of that term as found in any of the citations dealing with such an offense to which attention has been called by counsel. Any material alteration of a writing with intent to defraud any one, so as to make the writing appear to be different from what it was originally intended to be, is a forgery.

This action was commenced more than one year after the return to plaintiff of the first three of the forged canceled checks, aggregating \$4,221.37.

[10] Subdivision 3 of section 340 of the Code of Civil Procedure was amended in 1905 to provide that all actions "by a depositor against a bank for the payment of a forged or raised check" must be brought "within one year." This, as a later enactment and as one dealing with a special case, must, as respects the special class of actions within its terms, be held to control the general rule expressed in section 348 of the Code of Civil Procedure, that "to actions brought to recover money * * * deposited with any bank * * * there is no limitation." In other words, where the action is one to

recover money deposited with a bank and not paid out by it on a check claimed to have been forged or raised, the provisions of section 348 applies. To the special case where the action arises because of payment on a check which the plaintiff asserts was forged or raised, the special provision of subdivision 3 of section 340 applies. The case at bar is plainly of the latter class.

[11] This, however, presents the question when the statute begins to run against an action by a depositor against a bank for the payment of a forged or raised check. The plaintiff contends that it begins to run only from the date when the depositor demands payment to him of the amount paid out by the bank on the check he claims was "forged." It is our view that where, as here, the canceled checks and a statement of his account with the bank are regularly furnished to the depositor, the statute begins to run from the time the alleged "forged or raised" check was delivered to the depositor as a voucher supporting the payment made by the bank.

[12, 13] It is, of course, the settled rule that the relation between a bank and its depositor arising out of a general deposit is that of debtor and creditor. The deposit creates a debt of the bank payable as and when demand for payment is made. Accordingly, it is the general rule that there is no default on the part of the bank, and hence no accrual of a cause of action against it to recover the balance of a general deposit until its payment is demanded or there is some act on the part of the bank dispensing with such demand. *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110; 7 Cor. Jur. 663, § 366, and cases cited; 3 R. C. L. 569, and cases cited; note 2 L. R. A. (N. S.) 571, and cases cited. But the basis of the rule and indeed the statement of it shows the proper limitations. A demand is ordinarily necessary, because until it is made and refused there is no denial by the bank of its liability to pay, and no default out of which a cause of action could arise. Where, however, the bank, either in terms or in effect, has denied liability to the depositor for the amount in question, this is an "act on the part of the bank dispensing with such demand," the cause of action accrues, and the statute of limitations, where one is applicable, is set in motion.

[14] The whole purpose of submitting monthly or regular statements to depositors, together with canceled checks as vouchers in support of them, is to direct the attention of the depositor to the state of his account, to the credits in his favor, the charges against it, and to the vouchers supporting these charges. It is his duty to examine the statement and the vouchers, and to report at once any error in the one and any forgeries or alterations of the other. If he does not do this within a reasonable time, the account as rendered becomes an account stated between the bank and him. *Los Angeles Investment*

Co. v. Home Sav. Bank, *supra*; 3 R. C. L. 532, 533, 534, 537. The submission of a check as a voucher and of a statement in which its amount is charged to the depositor's account is notice to him that the bank treats that check as the basis of a valid charge to his account; that it has charged it to that account; and, of course, that it no longer holds itself liable to him for the amount so charged. It is a denial of liability for the amount paid out on the check, and we cannot doubt that it sets in motion the period of limitations prescribed by subdivision 3 of section 340. See *Glassell Development Co. v. Citizens' Nat. Bank of Los Angeles* (Cal. Sup.) 216 Pac. 1012.

The judgment of the lower court should be modified by reducing the amount thereof to be recovered by the plaintiff from the defendant, and by the defendant from the intervenor, by the sum of \$4,221.37, with interest thereon from the 4th day of March, 1920, at the rate of 7 per cent. per annum; otherwise the judgment should be affirmed; and it is so ordered.

We concur: WILBUR, C. J.; LENNON, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.; RICHARDS, Justice pro tem.

192 Cal. 780

UNION TOOL CO. v. FARMERS' & MERCHANTS' NAT. BANK OF LOS ANGELES (HELLMAN COMMERCIAL TRUST & SAVINGS BANK, Intervener). (L. A. 7098.)

(Supreme Court of California. Sept. 13, 1923.)

In Bank.

Appeals from Superior Court, Los Angeles County; Russ Avery, Judge.

Action by the Union Tool Company against the Farmers' & Merchants' National Bank of Los Angeles, in which the Hellman Commercial Trust & Savings Bank intervened. From the judgment, defendant and intervenor appeal. Modified and affirmed.

Lawler & Degnan, of Los Angeles, for defendant appellant.

Page & Hurt and Eugene D. Williams, all of Los Angeles, for intervenor appellant.

Andrews, Toland, Gregg & Andrews, A. V. Andrews, and H. W. Reynolds, all of Los Angeles, for respondent.

PER CURIAM. The issues involved in this cause are identical with those considered in *Union Tool Co. v. Farmers' & Merchants' National Bank of Los Angeles et al.* (No. 7099) 218 Pac. 424, this day decided. Upon the authority of that case the judgment is modified by reducing the amount thereof, to be recovered by the plaintiff from the defendant and by the defendant from the intervenor, by the sum of \$4,221.37, with interest thereon from the 4th day of March, 1920, at the rate of 7 per cent. per annum; otherwise the judgment is affirmed.

(192 Cal. 1)

FRANKS v. CESENA et al. (S. F. 10608.)

(Supreme Court of California. Sept. 12, 1923.)

Appeal and error ⇨170(1)—**Dismissal and nonsuit** ⇨7(2)—**Dismissal of case ordered submitted for decision on briefs, though improper, held not reversible.**

Where, at the close of the evidence, the court ordered that the "cause be and the same is hereby submitted to the court for consideration and decision on briefs," the case was finally submitted, and was improperly dismissed on plaintiff's filing a notice of abandonment, and moving for dismissal under Code Civ. Proc. § 501, subd. 4, authorizing the court to dismiss a cause, where on the trial and before final submission the plaintiff abandons it, but in view of the fact that in this case the dismissal was in effect no more than a mere nonsuit by consent, and that the court had power to vacate the order of submission and to dismiss the case, it was a mere error of procedure not going to the merits and not reversible under Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Fred C. Franks against Cipriano Cesena and others. From an order dismissing the action, defendants appeal. Affirmed.

Oscar Hudson, of San Francisco, and Lawrence Sledge, of Oakland, for appellants.

John T. Carey, of San Francisco, for respondent.

WILBUR, C. J. This is an appeal from a judgment of dismissal entered upon plaintiff's application in a suit brought by him to quiet title. The case is within the appellate jurisdiction of this court, but was inadvertently taken to the district court of appeal, which rendered an opinion and judgment in the matter, without observing that the case was within the appellate jurisdiction of the Supreme Court. For that reason an application to this court for transfer and hearing was granted.

The dismissal in this case was made by the court upon motion of the plaintiff's attorney, after a declaration by the plaintiff that he abandoned the case, and the authority of the court to dismiss the case under

the circumstances is predicated upon subdivision 4 of section 581 of the Code of Civil Procedure, which reads as follows:

"By the court, when, upon the trial and before the final submission of the case, the plaintiff abandons it."

The case came on for trial on November 22, 1921. The minutes of the court recite that the case came on regularly for hearing on that day; that an amended complaint was filed; that witnesses were examined, and the minutes state the order of the court as follows:

"And the evidence being closed, it was ordered that said cause be and the same is hereby submitted to the court for consideration and decision on briefs of 10, 15 and 5 days."

On the 30th day of November, 1921, the plaintiff filed with the clerk the following document:

"Now comes plaintiff in the above-entitled cause, and while upon the trial and before the final submission of the case hereby abandons said cause."

On that date notice was served by the plaintiff upon the attorneys for the defendants of the filing of said abandonment and stating that:

"The plaintiff hereby abandons the above-entitled matter, and will on Monday the 12th of December, 1921, at 10:00 o'clock a. m. of said day move for an order dismissing the cause as provided in section 581, subd. 4 of the Code of Civil Procedure."

The grounds of said motion stated in said notice, and the affidavits filed in connection therewith, show that plaintiff's purposed abandonment of the case resulted from his conclusion that the defendants' case was so wholly without merit that a proceeding to quiet title against the defendants was futile and unnecessary. On December 15th the court made the following order:

"Motion to dismiss action submitted December 15, 1921, and it appearing to the court that the above case was only submitted for argument the motion to dismiss is granted."

The question is whether or not the dismissal was entered "before the final submission of the case" and this question turns upon the form of the order made at the time the taking of testimony was concluded. We are unable to distinguish this case from the case of *Casey v. Jordan*, 68 Cal. 246, 247, 9 Pac. 92, where it is said:

"The first action was tried in the court below, and submitted to the court for decision upon the briefs to be filed by the respective parties; and in that condition of the case, the court, on motion of the plaintiffs, caused to be entered in the minutes an order dismissing the action

without prejudice to another. Two days afterwards the order of dismissal was vacated by the court on motion of the defendants in the action. In the meantime the second action was commenced.

"The order of dismissal was invalid, for after the cause had been regularly tried and submitted for decision, it could not be dismissed on plaintiffs' motion. *Heinlin v. Castro*, 22 Cal. 102. The order of dismissal was therefore rightly vacated and the suit carried to judgment."

The question of whether or not the case is submitted at the conclusion of the testimony depends upon the terms of the order made at that time. There is no doubt that the court could reserve the order of submission until after the filing of briefs, or could provide in the order of submission that the case should stand submitted upon the filing of the closing brief, but where the order reads as in this case, "It was ordered that said cause be and the same is hereby submitted to the court for consideration and decision on briefs of 10, 15 and 5 days," the submission of the case is not deferred until the filing of the final brief, and it was expressly so held in *Casey v. Jordan*, *supra*.

It is clear that the plaintiff in his so-called abandonment of his action did not intend to admit the title of the defendants, or to submit to a judgment in their favor. On the contrary, the plaintiff asserted his intention to abandon the case, because he was so well satisfied with his title that he deemed a confirmation of that title by order of court entirely unnecessary. It would, therefore, be unfair to the plaintiff to con-

strue the judgment of dismissal in this case as anything more than a mere nonsuit by consent. The case had proceeded too far for such a nonsuit upon motion of plaintiff, having been submitted for decision. The court, however, still had power to vacate the order of submission and upon vacating such order to grant the plaintiff's motion to dismiss the case. If this judgment of dismissal is reversed, it would simply mean that the court could then vacate its order of submission and thereupon dismiss the case, and the result would show that we had reversed the case for a mere error of procedure not going to the merits of the case and in violation of article 6, § 4½ of the Constitution. The order actually made by the trial court was as follows:

"Motion to dismiss action submitted December 15, 1921, and it appearing to the court that the above case was only submitted for argument the motion to dismiss is granted."

We are inclined to hold upon the appeal that the trial court, having treated its order of submission as a mere continuance of the case for further argument, would be justified in vacating the order of submission, and thereafter dismissing the case upon the plaintiff's application. This being true, nothing would be accomplished by the reversal of the case.

Judgment affirmed.

We concur: LENNON, J.; SEAWELL, J.; LAWLOR, J.; KERRIGAN, J.; WASTE, J.

63 Cal. App. 49

MENOTTI v. MARCHESI.
(Civ. 4054; L. A. 7173.)

(District Court of Appeal, Second District, Division 2, California. July 16, 1923. Hearing Denied by Supreme Court Sept. 13, 1923.)

4. Trial ☞377(2)—Court may permit either party to introduce further evidence before judgment or dismissal.

The court has power to control its own proceedings and may, before judgment or dismissal, permit either party to introduce further evidence.

2. Dismissal and nonsuit ☞5—Plaintiff may dismiss action without application to court before final submission.

Under Code Civ. Proc. § 581, subd. 1, plaintiff may dismiss the action without application to the court any time before final submission.

3. Dismissal and nonsuit ☞65—Dismissal held proper under court's general authority to dismiss action when plaintiff fails to make case.

Where the court, after hearing the evidence over plaintiff's objection, heard evidence on defendant's application for further hearing, which was denied because of the insufficiency of the evidence to upset the settlement theretofore agreed on, an order dismissing the case, prepared by plaintiff in obedience to the directions of the court, was properly granted under the court's general authority to dismiss on its own motion, when plaintiff fails to establish his case.

4. Appeal and error ☞1010(1)—Decision of trial court on issues of fact supported by evidence not reviewed on appeal.

A decision of the trial court on issues of fact supported by evidence will not be reviewed on appeal.

5. Dismissal and nonsuit ☞81(2)—Court owes no duty to relieve from dismissal.

Though the court has power to relieve from dismissal, it is not the duty of the court to do so.

6. Appeal and error ☞931(1)—Presumed that evidence supporting decision of trial court true.

An appellate court will presume that evidence in support of a decision of a lower court is true, and will construe every conflict as favorably as possible in support thereof.

On Hearing in Supreme Court.

7. Dismissal and nonsuit ☞7(2)—Dismissal held proper under statute permitting court to dismiss before final submission on plaintiff's abandonment.

Where the court, after hearing the evidence over plaintiff's objection, heard evidence on defendant's application for further hearing, which was denied because of insufficiency of evidence to upset a settlement theretofore agreed on, an order dismissing the case prepared by plaintiff, who had previously made two unsuccessful attempts to dismiss the action, in obedience to directions of the court, was properly granted, under Code Civ. Proc. §

581, subd. 4, authorizing the court to dismiss a case, when on the trial and before final submission plaintiff abandons it.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Louisa Cesarini Menotti against Gus Marchesi. From an order dismissing the action for dissolution of partnership, defendant appeals. Affirmed. Petition for hearing in Supreme Court denied.

L. G. Susemihl, of Santa Monica, for appellant.

O. H. Myrick, of Los Angeles, for respondent.

CRAIG, J. The action from which this appeal arises was filed on the 6th day of June, 1921, the complaint alleging that on June 1, 1920, the parties entered into an oral agreement of copartnership in a business known as "Menotti's Buffet," in the city of Venice; that the defendant agreed to and did act as manager of the business, for which he was to receive \$125 per month; that the plaintiff was the owner of the premises upon which the enterprise was situated, which she leased to the copartnership at rentals varying from \$150 to \$350 per month, in the winter and summer seasons, respectively, and that each should share equally in the profits. It is further alleged that there was no agreement as to the duration of such partnership, but that on March 29, 1921, plaintiff formally notified defendant of its termination, and offered to purchase his share at cost, and to assume the rent for the month of April; and that again on June 1, 1921, the plaintiff notified defendant that the latter having claimed that the partnership had been created for a period of one year, said partnership had terminated on March 29th, or was terminated on June 1, 1921, and, in either case, demanding its termination, and offering to purchase defendant's share at cost. The reasons for such notice were alleged to have been the assumption by defendant of control of the business and the assets and books thereof, to the exclusion of the plaintiff, and mismanagement, and refusal to account. The plaintiff prayed for the appointment of a receiver, dissolution of the partnership from the 6th day of June, 1921, sale of the assets, payment of the obligations, and distribution of remaining assets.

The defendant answered, admitting the material facts as to the partnership agreement, but denying the existence of any stipulated date for its termination, and denying the alleged derelictions on his part. He also denied all of the asserted grounds for appointment of a receiver, and averred that such action would endanger the property and good will of the business, and entail financial loss to the parties.

Issues having been joined, further minutiae of which it is unnecessary here to detail, a trial was had before the court, without a jury, and evidence was introduced on July 18, 19, and 22, 1921, but no judgment was rendered. As a result of the hearing an accountant was employed, who rendered his report on August 2, 1921. On the following day the plaintiff filed an order for the dismissal of the action, and on October 4th she filed another such order, neither of which was signed by the court or acted upon further.

On the last-mentioned date the defendant filed affidavits, wherein he claimed that the total merchandise of the copartnership, as shown by the auditor's report, appeared to be of the value of \$1,534.47, and the cash on hand \$1,707.76; but that he had discovered an apparent transfer of \$2,010.83 from the partnership bank account to plaintiff's private account, without agreement, which had not been included in the auditor's report, and which remained unsettled in the final adjustment based thereon. Fraud was not alleged in this connection. He asked for further hearing, adjustment as to this additional amount and judgment. On November 10, 1921, the court, over plaintiff's objections, heard the evidence of defendant, upon the conclusion of which his motion was denied, upon the ground that his evidence was insufficient to "upset the settlement" theretofore agreed upon. Plaintiff thereupon, in obedience to a direction from the court, executed and prepared a third order for dismissal of the action, which was then signed by the judge and filed.

Appellant maintains that this is not an appeal from the order decreeing a dissolution of the partnership as of August 1, 1921, but from the order of dismissal of the action following appellant's evidence in respect to a certain item. This the respondent controverts, and contends further that appellant had no right to present his motion of November 10th, because (1) the action had been tried, and (2) that the parties had stipulated as to their rights and interests, and that the court was required to enter a decree in strict conformity therewith; that if a stipulation presented to the court did not fully express the intention of the parties, it was a matter for correction by appropriate action, but that the court was without authority to "open up the case."

Appellant, in turn, maintains that he established the disputed item *prima facie* to be money belonging to the partnership "without dispute," and assumes that it was the duty of the court to require plaintiff, if possible, to produce evidence tending to show that it was not a partnership item, but grew out of some transaction between the parties, wholly foreign to their partnership relations.

Referring to the evidence received upon No-

vember 10, 1921, the court, when ordering the dismissal, said:

"It is insufficient to keep the court from consenting to his dismissal. I have allowed it to come in over his objection, because I thought you might prove enough to justify the court in not joining in, as the court would have to do, in his dismissal. He attempted to dismiss it twice. Neither time did he come to the court and get the necessary consent, so it was not actually dismissed. * * * My ruling is merely for granting a dismissal on the ground of insufficient showing."

The defendant appealed, as appears from his notice—

"from the order or judgment made and entered by said superior court in the above-entitled action on November 10, 1921, by which order or judgment said court granted the motion of the plaintiff to dismiss the above-entitled action, and did pursuant thereto make and enter an order or judgment of dismissal in said cause."

[1] From the foregoing it is difficult to perceive how any doubt can exist as to this appeal being one from the order dismissing the action. No judgment or dismissal having theretofore intervened, the court had power to control its own proceedings, and to permit either party to introduce further evidence in anticipation of a judgment to be based upon facts which the parties between hearings had sought to obtain and agree upon.

[2, 3] Under section 581 (subd. 1) of the Code of Civil Procedure, it was the right of the plaintiff to dismiss the action without application to the court at any time before final submission, but because of the manner in which this dismissal was entered, it having been prepared under direction of the court and presented, signed and filed, it must be regarded as having been made under its general authority to dismiss upon its own motion when upon trial plaintiff has failed to establish a case.

[4] The court having in its rightful discretion received evidence upon the issues presented, questions of fact arose for its determination, which this court will not review where, as here, there is evidence to support the conclusion reached.

[5] Although, as appellant contends, it is within the power of the court to relieve from dismissal, yet it cannot be held to be a duty. Appellant relies upon *Truett v. Onderdonk*, 120 Cal. 581, 53 Pac. 26, but it is there said that the court may exercise such power "*if the circumstances justify it.*" (Italics ours.)

[6] In the instant case the court heard evidence, and this court will presume that the evidence in support of the decision of the lower court was true, and construe it and resolve every substantial conflict as favorably as possible in support thereof. *Woody v. Bennett*, 88 Cal. 241, 26 Pac. 117; *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140,

134 Pac. 1157. As to whether or not the item of \$2,010.83 was the property of the defendant, or of the partnership, or of the plaintiff, defendant testified that he was not sure, "that it was some way or another"; that he had collected rents, and had sold personal property for the plaintiff, and had deposited the proceeds to her personal account. The trial court concluded from all the evidence before it that there was not sufficient showing to support the relief asked by defendant, and its finding upon this point cannot here be disturbed. Code Civ. Proc. § 1981; *Wilson v. Cal. Cent. R. Co.*, 94 Cal. 166, 26 Pac. 861, 17 L. R. A. 685; *Bell v. Pleasant*, 145 Cal. 410, 78 Pac. 957, 104 Am. St. Rep. 61.

The order dismissing the action is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [7] In denying the petition for a transfer to this court we desire to say that the dismissal of the action was justified under section 581, subd. 4 of the Code of Civil Procedure, having been made upon motion of the plaintiff who evidently abandoned the action. Section 581, subd. 4, C. C. P., and *Franks v. Cesena* (Cal. Sup. S. F. No. 10608) 218 Pac. 437, decided September 12, 1923.

The petition for a hearing is denied.

(63 Cal. App. 175)

In re COX et al. (Civ. 4176.)

(District Court of Appeal, Second District, Division 1, California. July 24, 1923. Hearing Denied by Supreme Court Sept. 20, 1923.)

Records 69(4)—Tax title from state registered without actual and adverse possession for five years.

Under Land Title Law, § 8, providing that the prerequisite of "actual, exclusive, and adverse possession" of land acquired by tax sale for five successive years shall not apply to the registration of any title to property which the state has acquired through sale, and "which has been sold by the state for taxes, and held by the state for the period provided by law," title which applicant's grantor acquired by tax deed from the state after the state had held it for 13 years, having acquired it by tax sale, held eligible to registration, even though applicant, or those under whom he claimed, had not been in such adverse possession for five years.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Application by James Wilson Cox and others for registration of title to lands. From an order refusing to register the lands, applicants appeal. Reversed.

Jas. W. Bell and Ronald H. Loenholm, both of Los Angeles, for appellants.

HOUSER, J. On February 28, 1921, James Wilson Cox and others, including Elias Munz and Gertrude Leah Munz, his wife, filed a petition with the clerk of the superior court of Los Angeles county for registration of the title to their lands under the provisions of the so-called Land Title Law of November 3, 1914, St. 1915, p. 1932. After a reference and hearing thereon, the court made certain findings, including the following: That Elias Munz and Gertrude Leah Munz claim to own the property involved as their community property; that said land is not subject to homestead, nor to any other incumbrances, but is improved and was assessed for the purposes of county taxation at the sum of \$60; that no other person, firm or corporation has any claim in or to any part of said land; that by virtue of a sale to the state of California in 1897 for the delinquent taxes due to the county of Los Angeles for the year 1896, the said state held a lien on said land; that there was no redemption, and in 1910 the said state of California made a tax deed of said land to O. F. Goodrich; that if the said tax deed carried title in fee, it then passed by mesne successive conveyance to Elias Munz by deed bearing date May 1, 1920; that the record owner at the time of said sale for delinquent taxes, and at the time when the above-mentioned tax deed on behalf of the state was made, was Mrs. F. E. Robgent, who was also known as Fanny Robgent, who was named as a defendant in this proceeding, and who was served by mail according to law, but who did not appear in this proceeding.

The conclusions of law filed by the court contain the statement that:

"For the reason that the law above quoted (section 8 of the Land Title Law) requires as a prerequisite in such a case 'actual, exclusive and adverse possession,' in the conjunctive, I am precluded from registering said land."

As shown by the record, the petitioners owned a fee-simple estate in the land, and the only question raised regarding its eligibility to registration lay in the failure of the owners, or those through whom they claimed, to have been in the "actual, exclusive and adverse possession" thereof for at least five years.

Section 8 of the Land Title Law reads as follows:

"No title derived through sale for any tax or assessment shall be entitled to be first registered, unless it shall appear to the satisfaction of the court upon the hearing of the application that the applicant or those through whom he claims title have been in the actual, exclusive and adverse possession of the land under such title at least five successive years, and have paid all taxes and assessments legally levied thereon during said period. *But the foregoing shall not apply to any title derived through sale by the state of California of any property which*

has been sold by the state for taxes and held by the state for the period provided by law."

It will be noted that the last sentence of the amended provision provides for just such a case as is before the court. The title in petitioners Munz was derived through sale by the state of California; the property was sold by the state for taxes; and it was held by the state for "the period provided by law."

No brief has been filed herein other than that in behalf of appellant, and this court is unaware of any statutory or other authority which would indicate a reason for a refusal to register the property in question. All the objections mentioned in section 8 of the Land Title Law against registering a title through a sale of property for taxes are entirely removed and overcome by the facts of this case, as applied to the exception to such provision as therein set forth.

The judgment is reversed.

We concur: CONREY, P. J.; CURTIS, J.

(63 Cal. App. 193)

PEOPLE v. REESE. (Cr. 1079.)

(District Court of Appeal, First District, Division 2, California. July 25, 1923.)

Criminal law — 1162—Conviction will not be reversed for technical grounds not affecting verdict, where innocence and miscarriage of justice not claimed.

Where, on appeal from a conviction of robbery, no contention was made that there had been a miscarriage of justice, nor that if the alleged errors had not been committed, the verdict might have been different, but the conviction was attacked upon numerous technical grounds only, none of which had any merit, the judgment will be affirmed.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Charles R. Reese was convicted of robbery, and he appeals. Affirmed.

Walter F. Lynch, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for respondent.

LANGDON, P. J. The defendant was charged by indictment with the crime of robbery. He was convicted, and the appeal is from the judgment and the order denying his motion for a new trial.

It is not contended upon appeal that appellant is innocent of the crime charged, nor that there has been a miscarriage of justice, nor that if the alleged errors had not been committed the verdict might have been dif-

ferent, but the judgment is attacked upon numerous technical grounds only, none of which have any merit whatsoever. Under the circumstances, since the judgment must be affirmed, a discussion of the points raised would serve no useful purpose.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

(63 Cal. App. 204.)

LOUDON v. LOUDON et al. (Civ. 4041.)

(District Court of Appeal, Second District, Division 2, California. July 25, 1923.)

Appeal and error — 1226—Undertaking on appeal by one having no right to appeal held without consideration.

Where in a separate maintenance action an order was made increasing the wife's allowance, and on appeal by the purchaser of the husband's realty the Supreme Court ruled that such purchaser had no right to intervene nor to appeal, plaintiff could not maintain an action upon an undertaking to stay execution pending appeal, furnished by the purchaser, since there was no consideration for such undertaking, and the proceeding being one to obtain on motion in an original suit a judgment against sureties, under Code Civ. Proc. § 942, which is permissible only on statutory undertakings.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action upon an undertaking by Sarah Hancock Loudon against James Arlington Loudon and the National Surety Company, a corporation. Judgment for plaintiff, and defendant last named appeals. Reversed.

Lawler & Degnan and Goudge, Robinson & Hughes, all of Los Angeles, for appellant.

Collier & Labarere, of Los Angeles, for respondent.

CRAIG, J. A judgment for separate maintenance was rendered in favor of Sarah Hancock Loudon against James Arlington Loudon. It directed him to pay her the sum of \$150 per month, and enjoined him from transferring any of his property in California. Later Sarah Hancock Loudon moved the court to increase her allowance so as to direct the payment to her of \$250 per month.

Subsequent to the entry of the original judgment James A. Loudon had deeded his real property in California, subject to the restraining provision of the judgment, to Lewis S. Loudon. The latter petitioned to intervene, to contest the motion for increased allowance made by Sarah Hancock Loudon, which petition the superior court refused. It then granted the motion for an increase of the monthly sum required to be paid by

James A. Loudon from \$150 to \$250 per month.

From the order denying him leave to intervene, and from the judgment modifying the original judgment for separate maintenance, Lewis S. Loudon filed a notice of appeal, and also an undertaking, pursuant to section 942 of the Code of Civil Procedure, to stay execution upon such second judgment; Sarah Hancock Loudon moved the appellate court to dismiss the two appeals so taken. Both motions were granted, and both appeals dismissed. After the expiration of 30 days from the coming down of the remittitur dismissing the appeal of Lewis S. Loudon from the order modifying the judgment for separate maintenance, Sarah H. Loudon applied to the superior court for judgment upon the undertaking, pursuant to section 942 of the Code of Civil Procedure, which judgment was rendered for the amount of the increased allowance which had accrued and interest thereon, in all the sum of \$816.33. The National Surety Company was the surety on this undertaking, and execution was issued and levied at once against said company. From this last-named judgment this appeal is taken.

The undertaking in question reads as follows:

"Whereas, Lewis S. Loudon has appealed in the above-entitled action to the Supreme Court of said state of California from the order of said superior court entered in said action on December 6, 1920, denying said Lewis S. Loudon leave to intervene in said action on and in respect to the application and motion of said plaintiff, Sarah Hancock Loudon, for an order modifying the judgment theretofore entered and become final in said action, by increasing the amount required by said judgment to be paid by defendant James Arlington Loudon, to said plaintiff from \$150 to \$250 per month; and

"Whereas, said Lewis S. Loudon has appealed to said Supreme Court from the order of said superior court entered on the motion and application of plaintiff in said action on December 15, 1920, modifying the judgment theretofore entered and become final in said action, by increasing the amount required by said judgment to be paid to said plaintiff by said defendant, James Arlington Loudon, from \$150 to \$250 per month, on the 15th day of each and every month thereafter, commencing December 15, 1920, and continuing until the further order of the court; and

"Whereas, said Lewis S. Loudon desires to stay execution on said order and on the said judgment as modified by said order to the extent that said order increases the amount required to be paid monthly by said defendant to said plaintiff, to wit, to the extent of \$100 per month to be paid on the 15th day of each and every month commencing December 15, 1920, and continuing until the further order of the court, during the time that said Lewis S. Loudon may stay execution thereon.

"Now, therefore, in consideration of the premises and to secure such stay of execution, the undersigned surety company undertakes and

promises on the part of said Lewis S. Loudon, appellant, and is bound to the respondent Sarah Hancock Loudon in the sum of \$3,600, being double the monthly increase payment made by said order to said judgment for eighteen months, of \$100 each month, commencing January 15, 1920, making the total of \$1,800 and being for a stay of execution for said monthly payments of \$100 each month during the next 18 calendar months commencing January 15, 1921, that if the order and judgment appealed from, or any part thereof be affirmed or the appeal dismissed, the appellant, Lewis S. Loudon, will pay the respondent, Sarah Hancock Loudon, the amount directed to be paid by the said judgment and order, or the part of such amount as to which the judgment and/or order is affirmed if affirmed only in part, and all damages and costs which may be awarded against the appellant Lewis S. Loudon upon the appeal, and that if the appellant does not make such payment within 30 days after the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered, on motion of the respondent, Sarah Hancock Loudon, in her favor against the undersigned surety for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant Lewis S. Loudon upon the appeal."

The appellant contends that the judgment appealed from is erroneous because the undertaking was without consideration. Without doubt an undertaking wholly devoid of consideration is so completely invalid as not to render the sureties liable thereon. The Supreme Court in the separate maintenance action ruled that Lewis S. Loudon had no right to intervene, and no right to appeal. These matters are *res judicata* in the present appeal. This is not an action upon a bond, but a proceeding to obtain, on motion, in an original suit, a judgment against sureties, under section 942, Code of Civil Procedure. Such proceeding and remedy are permitted only on statutory undertakings. *Powers v. Chabot*, 93 Cal. 266, 267, 28 Pac. 1070; *McCallion v. Hibernia, etc., Society*, 98 Cal. 442, 444, 33 Pac. 329; *Weldon v. Rogers*, 154 Cal. 632, 636, 98 Pac. 1070; *Reay v. Butler*, 118 Cal. 113, 50 Pac. 375. This is not a statutory undertaking, and numerous California authorities absolutely preclude an examination of the question here involved as one of first impression, and require a reversal of the judgment.

Respondent argues that, since the judgment rendered is for the payment of money, it is one within the purview of section 942, Code of Civil Procedure. In this we think he is in error. In designating the cases to which they respectively apply, in proceedings for the execution of bonds on appeal, etc., the phraseology of sections 942, 943, 944, and 945, Code of Civil Procedure, are similar. In none of these code provisions do we find a definite specification that the

judgment appealed from must have been one against the appellant. For example, section 943 begins:

"If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal," etc.

The same form of statutory enactment is found in the other sections mentioned. Nevertheless, it has been decided in *Halsted v. First Savings Bank*, 173 Cal. 605, 160 Pac. 1075, that these sections apply only—

"where the appellant has money or other property in his possession or under his control which has been adjudged by the lower court to belong to the respondent, or where the appellant has been directed to do some act for the benefit of the respondent."

Other cases ruling to the same effect are: *Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696; *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617; *Born v. Horstmann*, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577; *Rohrbacker v. Superior Court*, 144 Cal. 633, 78 Pac. 22. In the instant case, although the judgment was one for the payment of money, it was not one for the payment of money by appellant, hence there is no provision for the stay bond which was executed, and it was therefore without consideration. *McCallion v. Hibernia, etc., Society*, 98 Cal. 442, 33 Pac. 329; *Halsted v. First Savings Bank*, supra.

Respondent insists that expense and delay incident to procuring the dismissal of a void appeal constitute a definite detriment to the person in whose favor a judgment has been rendered, and that this detriment is a sufficient consideration to support the undertaking of the surety company, and cites in support of this argument the *Estate of Kennedy*, 129 Cal. 384, 62 Pac. 64. As applied to this appeal we think this is a faulty construction of the opinion in that case, for it goes on to say that this reasoning can have no application, however, to an undertaking required merely to secure a stay of proceedings during an appeal which has already been taken. If in the latter case the appeal should be invalid, the undertaking is without consideration, and no recovery can be had thereon against the sureties. This decision also holds that there can be no estoppel, as suggested by respondent, which precludes the sureties from raising the defense of want of consideration, whatever the terms of the instrument may be. See, also, *Reay v. Butler*, 118 Cal. 113, 50 Pac. 375.

The judgment is reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

63 Cal. App. 278

KAHN v. ROYAL INDEMNITY CO. (No. 4524.)

(District Court of Appeal, First District, Division 1, California. July 27, 1923.)

1. Appeal and error $\Rightarrow$ 173(14)—Points not raised below cannot be first urged on appeal.

On appeal, after a second trial, from a judgment in an action on an accident insurance policy, it was too late for plaintiff to urge that insurer was barred from raising the defense of breach of warranties, without first tendering back the premiums paid, such point not having been raised below.

2. Appeal and error $\Rightarrow$ 907(3), 1099(3)—Decision on first appeal binding on second appeal as law of case.

Where, in an action on an accident policy, a decision on appeal as to materiality of statements as warranties was followed on a second trial below as the law of the case, on a subsequent appeal on the judgment roll appellant cannot urge that the evidence on the second trial was different from that on the first, and the court is bound by the decision on the first appeal.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Flossie Kahn against the Royal Indemnity Company upon an accident insurance policy. From a judgment for defendant, plaintiff appeals. Affirmed.

Goldman & Altman, of San Francisco, for appellant.

Miller, Thornton & Miller, of San Francisco, for respondent.

ST. SURE, J. This is the second appeal in this case. On the first trial the jury rendered a verdict in favor of plaintiff. The defendant appealed, assigning as error the refusal of the trial court to direct a verdict in its favor. This court reversed the judgment (39 Cal. App. 180, 178 Pac. 331), and on the second trial before the court judgment went for defendant. Plaintiff appeals from this judgment on the judgment roll alone.

The action is one by appellant as beneficiary under a policy of accident insurance issued by defendant to Frank G. Kahn, appellant's husband, September 1, 1912. The particular clause under which recovery is claimed binds defendant to pay the whole amount of the policy if bodily injury, caused solely and directly by violent, external and accidental means, causes the death of the insured.

The pertinent portions of the policy, and answers and statements contained in the application, necessary to a consideration of the case, are as follows:

Clause 11 of the policy:

"11. This policy, with a copy of the application therefor signed by the insured, and such other papers as may be attached to or indorsed hereon, shall constitute the entire contract between the company and the insured. * * *

Certain questions, with the answers, in the application:

"(9) I have no accident, health or benefit insurance current, nor any application for such pending, except as follows: \$5,000 Pacific Mutual expiring in September, 1912, for which this policy takes its place."

"(15) I have not obtained medical or surgical advice regarding any illness or injury during the past 7 years, except as follows: Received medical attention for sprained back."

Statement at close of application:

"I hereby warrant that the above statements are in every respect complete and true, and I apply for a maximum disability insurance policy which shall be based upon such statements, and which policy I agree to accept, subject to all its terms and conditions. * * *

The policy was applied for on behalf of the insured, and with a copy of the application attached thereto, unsigned by the insured, received and kept for him by an insurance broker. The court found: That the insured did not sign the application nor did he read the policy; that the answers to the two questions set out herein were false; that as a matter of fact the insured had current an accident policy in the Standard Accident Insurance Company of Detroit, Mich., at the time of making the answer to question 9, in the sum of \$5,000, and that with respect to question 15, the fact was that the insured had received medical and surgical advice, and that during the year 1908 he had suffered from, received medical and surgical advice for, and been operated on for, a mastoid abscess; that two premiums of \$60 each had been paid on the policy at the time of the death of the insured on October 8, 1914, and credit had been extended for the unpaid premium for the period between the regular payment date, September 1st, and that time; that defendant did not know at the time of the issuance of the policy that any of the statements in the application were not true; that the premium was not the only consideration for the policy; that demand had been made within the proper time for payment of the policy, and that such demand had been refused. Conclusions of law were made, in effect, as follows: That the statements made in the application were warranties, and that a part of the consideration for the issuance of said policy was that said warranties should be true; that the warranties in findings 9 and 10 (answers to questions 9 and 15) were not waived by defendant; that because of the falsity of said warranties the policy of insurance became, and was, null and void, and no liability existed thereon against the de-

fendant above named at the time of the death of the said Frank G. Kahn; that the warranties were binding on the insured, notwithstanding they were not signed by him; that insured was not relieved from said warranties because the policy was delivered to a broker instead of to him; that he was not relieved from the warranties by reason of the fact that he did not read said policy; that the policy was not in full or any force at the time of the death of the insured, and that defendant is entitled to judgment.

Death of the insured resulted from ptomaine poisoning, which the jury found on the first trial to be "violent, external and accidental means" under the terms of the policy. On this point, on the first appeal, this court reserved opinion as unnecessary to a decision of the case. On the second trial the trial court found to the same effect on this point as had the jury on the first trial, and this finding, being favorable to plaintiff, is not before us on this appeal.

The decision of this court on the first appeal reads in part as follows:

"It is defendant's claim that ptomaine poisoning is not a bodily injury * * * but a disease. * * * Interesting as is this subject, we do not consider a discussion of it necessary, for the reason that we are of the opinion that the second point relied on for reversal, namely, that the court erred in refusing to instruct the jury to find a verdict for the defendant, presents a legal barrier against any recovery on the policy, irrespective of the cause of death. The question presented upon this motion involves the breaches of certain warranties contained in the policy. * * * Where, as here, there is a distinct agreement that an application for insurance is a part of the contract, and the statements in the application are expressly declared to be warranties, they are to be treated as such, and not merely as representations, and must be strictly true, or the policy will not take effect."

The decision on the first appeal being chiefly grounded on this statement, it is the sole contention of appellant on this appeal, that, even conceding the statements to be warranties, and the breach thereof unquestioned, the policy was not void by reason thereof, but merely voidable at the option of the company, and the company having failed to cancel the policy, the same is to be considered as having been in full force and effect at the time of the death of the insured. She also asserts that defendant is barred from defending on the ground of breaches of warranty without having first tendered back the premiums paid. The cases cited, and the argument advanced by appellant that the policy was in force at the death of the insured, are evidently on the basis that the company had knowledge of the breaches of warranty for which it resisted payment of the policy, and failed to take action thereon. The court found in this con-

nction "that it is not true that the defendant had any knowledge or notice at the time of the issuance of said policy of insurance that any of the statements in the application aforesaid were untrue," and there is no record presented to show that they had knowledge on this subject at any other time.

[1] The point not having been raised in two trials below, it is too late now for appellant to urge that defendant was barred from raising the defense of breach of warranties without first tendering back the premiums paid. The plaintiff, however, is not without redress as to the money so expended. It is possible that an action for money had and received may lie if the policy be declared void, such cause of action accruing on the final determination that the policy is void.

[2] Whatever our views on the subject of the materiality of the statements herein declared to be warranties, we are bound by the decision on the first appeal, as set out above, which the court below followed on the second trial, as the law of the case. This appeal being on the judgment roll, it does not lie with appellant to urge at this juncture that the evidence on the second trial was different from that on the first. As was said in *Burns v. Jackson*, 53 Cal. App. 345, 200 Pac. 80:

"Where the appellate court has in its opinion stated a rule or principle of law necessary to a decision, that rule or principle must be followed and observed throughout the subsequent progress of the case, both in the lower court and upon subsequent appeals, although it may be believed upon further consideration that the former decision in that particular is erroneous. *Westerfeld v. New York Life Insurance Company*, 157 Cal. 339. By the former decision herein it was held that the evidence against respondent was sufficient to be submitted to the jury. If substantially the same evidence appears in the record, said decision, of course, is controlling. It would make no difference if additional evidence was received that might be favorable to respondent. The test is, Was substantially the same evidence favorable to appellant received at the second as at the first trial? As to this, it may be said that respondent has not pointed out any difference, and we would be justified in concluding from his omission that no difference exists."

And again, in *Brett v. S. H. Frank Co.*, 162 Cal. 735, 739, 124 Pac. 437, 439:

"It has sometimes been said that the doctrine of the law of the case is invoked only when the former decision as to the law is erroneous; that its application presupposes a previous error by which the court is bound. It does, indeed, go that far, if it becomes nec-

essary to do so. But the last decision would be the same in a case where the first decision was not erroneous. The doctrine means simply this, that the court, having once decided the law, and the cause having gone back to the lower court for further proceedings in accordance with the law as thus established, and the parties and the lower court having acted in reliance upon that law, this court will not, upon a second appeal, again enter into a consideration of the question, but if the facts and circumstances are substantially the same, will treat it as settled law, regardless of its accuracy. See *Allen v. Bryant*, 155 Cal. 258, 100 Pac. 704." This language is quoted with approval in *McEwen v. New York Life Insurance Co.*, 187 Cal. 144, 201 Pac. 577.

Aside from the "law of the case" point, we are further constrained by the opinion of this court in the case of *Wolverine Brass Works v. Pacific Coast Casualty Co.*, 26 Cal. App. 183, 146 Pac. 184, where the following language is used:

"The above-mentioned warranties being false, the policy issued in reliance upon them was in our opinion void ab initio. When a warranty is broken in its inception the policy never attaches to the risk which it purports to cover. Civil Code, § 2612; *Wenzel v. Commercial Insurance Company*, 67 Cal. 438. 'As a warranty is in the nature of a condition precedent to the validity of the policy, and must be literally true, if the fact warranted is not true there is a breach of warranty. It follows as a matter of course that a breach of warranty will avoid the policy.' *Cooley's Briefs on Insurance*, vol. 3, p. 1950."

The decision on the first appeal disposed specifically of the objections that the insured did not sign the application, that he did not read the policy, and that he was not relieved of the warranties because of delivery of the policy to a broker instead of to him personally. The one ground, therefore, on which the decision on the first appeal was based, and which was followed by the lower court in awarding judgment to defendant, is that which appellant seeks to overturn on this appeal, on the theory that the policy was not void, but merely voidable. The language of this court on the first appeal, which we have quoted, was, we think, such that the conclusions of the trial court on the second trial (that the policy was null and void because of the falsity of the warranties, and was not in full or any force at the time of the death of the insured) followed inevitably thereon.

Such being the case, we can do nothing but affirm the judgment as it now stands.

It is so ordered.

We concur: TYLER, P. J.; RICHARDS, J.

63 Cal. App. 185

KLEIN v. SOUTHERN PAC. CO.
(Civ. 4520.)

(District Court of Appeal, First District, Division 1, California. July 25, 1923. Hearing Denied by Supreme Court Sept. 20, 1923.)

1. Carriers §391—Not liable for articles of merchandise not for passenger's personal use as "baggage."

Generally, articles of merchandise, which are not for passenger's personal use on his journey, but are carried for sale or trade, are not "baggage," and carrier is not obliged to carry them, except on payment of additional compensation, and, in absence of knowledge thereof, is not liable for them as baggage, though taken in trunk such as is usually used for holding personal effects, or mingled with other articles which are properly baggage.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Baggage.]

2. Carriers §391—Commerce §8(12)—Permitted to carry as baggage only goods designated as such by Interstate Commerce Commission.

An interstate carrier, operating under authority of the Interstate Commerce Commission, is governed by its rules touching the subject of baggage, and may carry as baggage only such goods as are designated as baggage therein.

3. Carriers §391—Articles intended for sale not baggage though reorders customary.

Where articles of jewelry carried by passenger in his trunk were intended for sale, they were not within rule of Interstate Commerce Commission permitting transportation as baggage of samples used by commercial travelers in making sales, though the pieces sold were being constantly reordered.

4. Carriers §398—Not liable for delay in delivery of trunk containing articles not properly baggage.

Where trunk contained articles of merchandise intended for sale, not baggage under regulations of Interstate Commerce Commission, the passenger was not entitled to special damage for delay in transit.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Philip Klein against the Southern Pacific Company. From a judgment for defendant, plaintiff appeals. Affirmed.

B. M. Jackson, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

RICHARDS, J. This appeal is from a judgment in favor of defendant in an action for damages for the failure to promptly deliver a trunk shipped as baggage on one of defendant's trains.

The plaintiff herein is a manufacturing jeweler, with his place of business in San Francisco. During certain periods of the year it was his custom to manufacture certain lines of jewelry, and at other seasons to take the manufactured product and sell the same to the trade in various cities. At the time in question plaintiff purchased a ticket to Chicago and presented his trunk for shipment as baggage to the defendant at San Francisco, paying \$7.21 for 60 pounds overweight. The trunk was a combination wardrobe and sample trunk and contained articles of jewelry manufactured for sale in Chicago and other Eastern cities. It does not appear that the baggageman knew the contents of said trunk. The trunk went forward on the right train, but the baggage agent had placed the wrong tag upon the trunk, and it went to the destination of another passenger at New London, Conn., while the baggage of the other passenger went to plaintiff's destination, Chicago. Plaintiff stayed about four days in Chicago, endeavoring to locate the trunk, and then left for New York, being advised while on the train of the whereabouts of his missing property, and the same was delivered to him in New York. Plaintiff returned to Chicago later on, but was unable to make any sales of his jewelry on account of the buyers' strike.

The facts set forth above were not disputed, and upon this showing the court found that the plaintiff did not declare the character of the contents of the trunk, and that the same was accepted under the belief that it was baggage; that said trunk, with its contents unimpaired, was delivered to plaintiff in New York; that the failure to deliver the trunk in Chicago was due to carelessness upon the part of employees of the defendant, but that plaintiff was not entitled to check the contents of the trunk as baggage under the rules and regulations of the defendant and of the Interstate Commerce Commission. As conclusions of law from these facts the court determined that plaintiff take nothing by his action, and that defendant was entitled to judgment against plaintiff for its costs of suit. Judgment was rendered accordingly.

[1, 2] The first contention of the appellant is that the evidence is insufficient to justify the decision under the theory upon which the case was tried; that is, the action was not instituted nor tried upon the theory that the trunk was either lost or damaged, but upon the theory that the defendant, due to the gross negligence of its servants, failed to deliver said trunk at Chicago, which resulted in a loss of profits from prospective sales of merchandise and reorders as well, as also expenditures for taxicab hire, telegrams, hotel bills for himself, and his salesman, and other expenditures. In support of this theory ap-

pellant relies upon the following statement of the law:

"For delay in the delivery of baggage, due to the negligence of a carrier, the passenger is entitled to recover the value of the use of the property during the time of such delay and such individual expenses and damages as were in contemplation of the parties when the contract was made, including in some cases expenses incurred and reasonable efforts made to trace the baggage, living expenses of the owner while waiting for the baggage, * * * and where a carrier accepts baggage with notice that the passenger requires it at a certain place at a certain time for a special purpose, the measure of damages is injury to the special business attributed to the delay, including the expense and loss of time incurred in the search for the delayed baggage." 10 C. J. p. 1227.

This language, however, presupposes that the shipment was, in fact, baggage, and in addition the language would seem to imply that in order to recover for "injury to the special business attributed to the delay" the carrier must accept the baggage "with notice that the passenger requires it at a certain place at a certain time for a special purpose." The court found that the plaintiff did not declare the character of the contents of said trunk, and that the trunk was in fact accepted by the defendant under the belief that it was baggage. The general rule regarding baggage is that articles of merchandise which are not for the personal use of the traveler on his journey, but which are carried for the purpose of sale or trade, cannot be included in the term "baggage." The carrier is not obliged to carry them, except on payment of additional compensation, and in the absence of knowledge thereof cannot be held liable for them as baggage, even though taken in a trunk such as is usually used for holding personal effects, or mingled with other articles which are properly baggage. 10 Cor. Jur. 1193. Rule 9 of the tariff under which the defendant company was operating, under the rules of the Interstate Commerce Commission, Western Classification, provides that merchandise will not be checked nor transported in regular baggage service, with the exception of emergency shipment, where no freight nor express service is available. This being so, the railroad company, as an interstate carrier, operating as it does under the authority of the Interstate Commerce Commission, was governed by the rules of that Commission touching the subject of baggage, and was permitted under said rules, as set forth in the tariffs, only to carry the goods which were designated as baggage therein.

[3] Appellant makes the claim that any piece of jewelry manufactured by any manufacturer is being constantly reordered from him or imitated by others, and thus attempts to bring his case within the tariff rules respecting merchandise used as samples, and permit the checking as baggage of wares or merchandise of a commercial traveler for use by him in making sales or other disposition of the goods, wares, or merchandise represented thereby. While upon the witness stand plaintiff testified as follows:

"Q. Now, the merchandise that you manufacture, Mr. Klein, it is absolutely incumbent upon you to take that and exhibit that, is it not? A. Yes, sir. Q. How is the jewelry generally sold—by sample, or are you able to— A. (interrupting) Genuine things—no buyer will buy a genuine article by sample. He must see the article and buy it. All dealers that sell genuine things sell them right then and there, not by sample, as it cannot be bought by a sample."

It would seem clear, therefore, that the goods in question were not samples but were intended for sale. The case of *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587, is practically the same as the case at bar. In that case a traveling salesman bought a passenger ticket for passage on a railroad and presented a trunk to be checked to his destination, without informing the agent that the trunk contained jewelry, which it did, and without inquiry being made by the agent. He paid a charge for overweight as personal baggage and the trunk was checked. The court held that it was not necessary for the agent to inquire as to the contents of the trunk so presented as personal baggage and was therefore not liable for the loss of jewelry. In the case of *Wunsch v. Northern Pacific R. Co.* (C. C.) 62 Fed. 878, it was held that as the original delivery to the company was a deception upon it, the trunk and its contents did not become baggage thereby, the only duty imposed on the company with respect to it being to keep the same safely as a bailee and deliver upon demand and identification to the owner.

[4] Under the facts of this case, we are of the opinion that as the shipment was not in fact baggage, within the meaning of that term as contained in the regulations of the Interstate Commerce Commission, and as the goods were afterward delivered unimpaired, the plaintiff is not entitled to any claim for special damage for the delay in transit.

The judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

(63 Cal. App. 178)

PEOPLE v. JOHNSON. (Cr. 687.)

(District Court of Appeal, Third District, California. July 24, 1923.)

1. Indictment and Information $\S$ 110(31)—Information for maintaining common nuisance held sufficient.

An information substantially in the words of Volstead Act, $\S$ 21, declaring a place in which intoxicating liquor is kept to be a common nuisance, held sufficient.

2. Criminal law $\S$ 421(1)—Evidence of general reputation of defendant's saloon held inadmissible.

In a prosecution under Volstead Act, $\S$ 21, evidence that defendant's saloon had the general reputation of being a place in which intoxicating liquors were habitually sold held inadmissible, being pure hearsay.

3. Criminal law $\S$ 1169(1), 1186(4)—Admission of evidence of general reputation of defendant's saloon held reversible error.

In view of a sharp conflict in the evidence in a prosecution under Volstead Act, $\S$ 21, the admission of evidence that defendant's saloon had a general reputation of being a place in which intoxicating liquors were habitually sold held reversible error, notwithstanding Const. art. 6, $\S$ 4 $\frac{1}{2}$, prohibiting a reversal for an error not resulting in a miscarriage of justice.

4. Intoxicating liquors $\S$ 233(1)—Evidence of sales in saloon prior to defendant's purchase thereof held irrelevant and prejudicial.

Testimony of sales made in defendant's saloon prior to the time defendant purchased it and took responsible control held irrelevant and prejudicial.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Henry Johnson was convicted of maintaining a common nuisance in violation of the Wright Act, and he appeals. Reversed, and cause remanded.

Metzler & Mitchell and Henry L. Ford, both of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was informed against in the superior court of Humboldt county by the district attorney of said county for the crime of maintaining a common nuisance, as said crime is defined by the so-called "Wright Act" (Stats. 1921, p. 79), the purpose of which is to enforce the provisions of the Eighteenth Amendment to the Constitution of the United States. As is commonly known, the Legislature of 1921, by and through the act just named, adopted all the provisions of an act of Congress, known as the "Volstead Act" (Ann. Fed. Stats. Supp. 1919, 212, 41 Stat. 305), the design of which was and is the enforcement, within

the limits of the federal jurisdiction, of the said amendment to the federal Constitution.

The defendant was, upon being tried for the offense so charged, convicted. He made a motion for a new trial, and the same was denied. He prosecutes this appeal from the judgment of conviction and the order denying him a new trial.

So much of section 21 of the act last mentioned as affects the present consideration reads as follows:

"Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1000.00 or be imprisoned for not more than one year, or both."

The information charges that the defendant, "on or about the 15th day of January, 1923, at and in the county of Humboldt, state of California, did then and there willfully and unlawfully maintain a common nuisance in and on the premises known as 507 Second street, in the city of Eureka," said county and state, etc.

[1] The defendant, in support of these appeals, presents a variety of assignments of alleged error; but, as we have concluded that the judgment and order must be reversed because of errors in admitting certain evidence, it will not be necessary to consider the other alleged errors, except that involved in the claim that the information does not state a public offense, or fails properly to state the offense sought to be charged, as to which, in view of a possible retrial of the case, it should be said that the charge as laid is substantially in the language of the statute, which itself fully and clearly describes the offense, and that it is therefore in all respects sufficient to inform and to have informed the accused of the specific crime with which he was charged so as to enable him to prepare and interpose thereto any defense available to him. This is all that is required of any criminal pleading.

It appears that the place (507 Second street) in and upon which the alleged offense was committed was, prior to the 2d day of January, 1923, owned and conducted by one Ed. Storm as a soft-drink saloon, and that the defendant, for about 16 months prior to the said 2d day of January, was employed by said Storm as a barkeeper therein. It further appears that, about the middle of December, 1922, Storm was arrested for, charged with, and convicted of the crime of driving an automobile over and through certain streets or thoroughfares of Humboldt county while in a state of intoxication, and

was given a jail sentence therefor; that, while incarcerated in jail for said offense, he applied for probation or parole; and that the authorities agreed to grant his petition upon the condition that he would dispose of the soft-drink establishment at 507 Second street in question, complaint having previously been frequently made that, in addition to dispensing "soft drinks" at said place, he was also engaged in "bootlegging" there; that Storm agreed to the condition and thereupon entered into negotiations with the defendant for the sale of the place to the latter; that an agreement between Storm and the defendant was reached; and that on the 30th day of December, 1922, the defendant made application in due form to the city clerk and ex officio tax collector of the city of Eureka for a license to conduct a "soft-drink emporium and poolroom" at said 507 Second street, the same being issued to him on said day. Both Storm and the defendant testified that the agreement for the sale of the saloon to the defendant was reached about a week before New Year's Day of 1923, but that the sale was not fully consummated until the 2d day of January, 1923, when the defendant paid to Storm the purchase price, and that, on the said 2d day of January, the defendant became the proprietor and took full control of the place.

The people introduced three witnesses, who were connected with the district attorney's office as detectives, and who testified that, in the month of January, 1923, and prior to the arrest of the defendant on the charge alleged in the information, they had visited the saloon at 507 Second street, and called for and were served with intoxicating liquor. Some of these witnesses, according to their testimony, were visitors of the place on two different occasions in the month of January, 1923, and on each occasion purchased and drank intoxicating liquor there. The people were also permitted to show, against objections by the defendant, that intoxicating liquor had been sold and served in said saloon in the month of April, 1922, or several months prior to the time at which the defendant purchased and became the owner of the saloon, and that they also purchased such liquor in the month of December, 1922, and before the defendant became the owner of the place. And here it may be stated that the witnesses above referred to testified that, although they saw the defendant in or about the saloon at the times they were served with intoxicating liquor therein, he (defendant) did not wait on them or himself serve the liquor.

[2] In addition to the foregoing, which involves a statement in substance of all the direct testimony presented in support of the charge, the people introduced seven witnesses, one of whom was a member of the city council of Eureka, another chief of

police of said city, and the others either police officers or members of the so-called "dry squad" of Eureka and Humboldt county, employed as such to run down and prosecute violators of the prohibition laws, and who, over strenuous objections by the defendant, were allowed to testify that the general reputation of the saloon owned and conducted by the defendant was, as one witness characterized it, "bad," and as others expressed it, "a place where booze or liquor can be bought." In other words, the witnesses last referred to were permitted to give testimony, not of what they actually knew to be the fact, but of what the general public had said about the place, to wit, that intoxicating liquors were habitually sold and served therein. And it is the action of the court in allowing this character of testimony to be received into the record and go before the jury that the defendant particularly complains of, and which he contends, and we think justly so, involved error and prejudiced his rights in the trial of the case.

It cannot be doubted that the testimony as to the general reputation of the saloon was pure hearsay and, therefore, incompetent and inadmissible. Neither the Wright Act nor any other law of this state authorizes the proof of the crime of which the defendant was accused and convicted by any such means, and in the absence of express legislative authority for proving a crime by evidence of common repute, the allowance of such testimony as in proof of such crime involves a palpable contravention of one of the very first rules of evidence, to wit, that hearsay testimony is wholly incompetent for any purpose, unless it is expressly allowed by the Legislature. Wharton, Criminal Evidence, § 255; Cook v. State, 81 Miss. 146, 32 South. 312; State v. Fleming, 86 Iowa, 294, 53 N. W. 234; Commonwealth v. Eagan, 151 Mass. 45, 23 N. E. 494; Hockman v. State, 59 Tex. Cr. App. 183, 127 S. W. 825; Gorman v. State, 52 Tex. Cr. App. 327, 106 S. W. 384; Trayhan v. State (Tex. Civ. App.) 180 S. W. 646. These cases, with the exception of the last-named, involved precisely the same character of crime as is involved herein and the identical question at present before us. In each of said cases the conviction of the accused was set aside because the trial court permitted the people, over objection by the defendant, to prove the alleged crime by testimony that the general reputation of the latter's place of business was that it was a place where intoxicating liquors were habitually sold or served to the public.

[3] The remaining question is whether the action of the court in admitting testimony of the general reputation of the saloon as against the defendant was prejudicial to his rights, or whether, upon a consideration of the entire testimony, a miscarriage of jus-

tice would follow the upholding of the verdict.

It is inconceivable that any fair-minded person, after an examination of this record, could reach the conclusion, with the slightest ground for hope that such conclusion would be regarded as just, that the testimony that the general reputation of the saloon of the defendant was that it was a place where intoxicating liquors were sold and served did not have the effect of seriously prejudicing his rights.

There is a direct conflict between the testimony of those witnesses who testified to having bought intoxicating liquor in the saloon in question on the several occasions in the month of January, 1923, mentioned by them, and the testimony of the witness Lax, a bartender in said saloon at the times designated, and that of the defendant. Lax was the party who, the state's witnesses declared, sold them the liquor on the occasions referred to; but he positively testified that he did not sell or serve any of said witnesses with whisky or other intoxicating liquor on the days or at the times mentioned. The defendant, testifying in his own behalf, asseverated that, after he became the owner and took charge of the saloon, on the 2d day of January, 1923, no intoxicating liquor was kept in the place, and with equal emphasis declared that none was sold or served therein to any person. With the conflict in the testimony so pronounced, it may readily be understood how the testimony as to the general reputation of the saloon as a place where contraband liquors were dispensed could have injuriously affected the rights of the accused. The testimony of the witnesses of the respective sides as to the sale or serving of intoxicating liquors in the saloon being of equal positiveness, the incompetent testimony referred to might have had, and probably did have, the effect, in the matter of weighing the proofs, of turning the scale against the defendant. Indeed, when the character of the witnesses giving the hearsay testimony is considered, it would seem most probable that the jurors would attach more than ordinary importance to their testimony. As seen, a majority of said witnesses occupied important and responsible public offices in the city of Eureka, and from this we are authorized to assume, in the absence of the impeachment of their characters or testimony, that they hold a high place in the estimation of the citizens of that city and of Humboldt county, and likewise may it well be assumed that they were personally well and favorably known to the jurors, or a majority of them, sitting as arbiters of

the defendant's fate, so far as his trial on the charge against him was concerned.

While, ordinarily, the determination of a sharp conflict in the evidence addressed to the proof and disproof of a disputed issue of fact is a matter entirely within the province of the jury, or the court, if the questions of fact are submitted to its decision, still the very fact that there is here such a positive evidentiary conflict compels the conclusion that the allowance of so large an amount of hearsay testimony as in proof of the defendant's guilt had the effect of denying to him that fair and impartial trial to which every person on trial for his life or his liberty in our country is entitled as a matter of absolute right. Nor, even upon its face, is the competent evidence of guilt in this case so overwhelming in probative weight or force as to warrant the conclusion that a miscarriage of justice would not result from the verdict, if it is permitted to stand. It may be conceded that section 4½ of article 6 of the Constitution is a mantle within the dark recesses of whose ample folds a multitude of errors occurring in the trial of a case may rest secure against judicial inspection, but we cannot persuade ourselves that it was ever intended as authority supporting or sanctioning the denial to a defendant in a criminal or a litigant in a civil case a fair and impartial trial according to the law of the land.

[4] Not alone upon the foregoing considerations do we conclude that the defendant was not accorded the character of trial which the laws guarantee to him, but our view also is that the allowance by the trial court of testimony of sales made in said saloon prior to the time at which the defendant purchased the place and himself took responsible control and management of the establishment was wholly irrelevant to the issue in his case, and that its effect was to prejudice him in the minds of the jury. Such testimony might be pertinent to and admissible in a civil action to abate the nuisance, but certainly it is wholly foreign to this case, which, it must be kept in mind, involves a charge of criminal conduct on the part of the accused. He was charged with committing an offense against the people of the state. Obviously, the act or acts of another having no connection with the defendant or with the act or acts constituting the basis of the criminal charge against him would not be relevant or material to his case.

The judgment and the order are reversed, and the cause is remanded.

We concur: FINCH, P. J.; BURNETT, J.

63 Cal. App. 189

KAHN et al. v. MARYLAND CASUALTY CO. (Civ. 4529.)

(District Court of Appeal, First District, Division 1, California. July 25, 1923. Hearing Denied by Supreme Court Sept. 24, 1923.)

1. Evidence ⇨148—Telephone conversation held sufficiently connected to be admissible.

In action on indemnity bond for loss of liberty bonds taken surreptitiously by buyer, who left forged check, testimony of plaintiffs' clerk as to telephone conversation with ostensible payee *held* sufficiently connected by the payee's testimony to be admissible for purpose of showing that plaintiffs did not rely on the check.

2. Witnesses ⇨287(1)—Testimony held admissible on redirect examination to rebut inference from matter brought out on cross-examination.

In action on indemnity bond for value of Liberty bonds taken surreptitiously by one who left forged check, testimony of plaintiffs' clerk that he had no conversation with any one in plaintiffs' office as to validity of the check, and that it was withdrawn from bank in which deposited before telephone conversation with ostensible payee, *held* admissible on redirect examination to rebut inference from fact, brought out on cross-examination, that the check was deposited.

3. Insurance ⇨425—Bonds held lost by theft, and not by forgery.

Where one ordering bonds through broker, on calling for them, ordered other securities, and while clerk was writing the order surreptitiously took the bonds and left, leaving forged check for amount in excess of price of the bonds, and the other securities, and, though check was deposited after banking hours, it was promptly withdrawn the following morning, the bonds *held* stolen, and not lost by forgery, within meaning of indemnity bond.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Ira Kahn and others, individually and as copartners doing business as J. Barth & Co., against the Maryland Casualty Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

John Ralph Wilson and Charles B. Morris, both of San Francisco, for appellant.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for respondents.

ST. SURE, J. Action by plaintiffs on an indemnity bond of defendant for the market value of certain Liberty bonds owned by and lost to them. Judgment went for plaintiffs. Defendant appeals.

Under the terms of the indemnity bond sued on defendant agreed to protect plaintiffs against any loss, not exceeding \$50,000, of bonds, debentures, scrip, certificates, or

other similar securities in which plaintiffs may have a pecuniary interest or for which they are legally liable, sustained by the insured during the life of the agreement, through robbery, burglary, theft, or holdup, whether effected with or without violence, or with or without negligence on the part of any of the employees of plaintiffs. Another provision of the agreement reads as follows:

"This bond does not cover any loss directly or indirectly effected by means of forgery, unless the forgery be committed by, or with the collusion of, one or more of the employees * * *" of the insured.

Provision is made in the bond for the giving of notice of loss and for furnishing the indemnity company with an itemized statement thereof within a certain period after the loss suffered. These provisions were complied with, and the claim in both instances rejected by defendant, whereupon this suit was brought.

The sole question presented by this appeal is whether the circumstances set forth show that the bonds for which indemnity is claimed were stolen, or whether their loss was due, directly or indirectly, to forgery, without collusion of any employee of the plaintiffs. The former is plaintiffs' contention; the latter, defendant's. Plaintiffs are copartners, engaged in the stock and bond brokerage business in San Francisco as J. Barth & Co. They buy and sell securities for clients and charge a commission for so doing.

On November 15, 1920, a stranger entered the office of plaintiffs and asked to be sold Liberty bonds for cash. A clerk explained the method of buying the bonds for him through an exchange, and the stranger signed an order, filled in by the clerk, for Liberty bonds whose face value amounted to \$3,500, using the name E. Kennard. Later he telephoned, asking if the bonds were ready. Without waiting for investigation, he said he would be in later in the day. About 4 o'clock in the afternoon he returned and the same clerk attended him, who went to the cashier's cage to get the bonds and bill for the customer. The cashier being out, he stepped into the cage himself, and found the package of bonds for this particular customer with the bill and delivery tag attached. The customer had crossed the room, so that he stood before the wicket of the cage. On being handed the bill, the customer remarked that he had more money, asked the price of Standard Oil stock, and asked the clerk to take his order for two shares. With the Liberty bonds on the counter inside the grill of the cage, between the customer and himself, the clerk began writing an order for the Standard Oil stock. When he looked up again the bonds and the customer were nowhere to be seen, and on the counter before him was a "slip

of paper," a check of the Standard Oil Company to the order of Kennard & Bierce, indorsed, "Kennard & Bierce, per E. K." This check had not been tendered to the clerk in payment, and the statement of the customer had been concerning a transaction "for cash."

The cashier's cage of plaintiff's office faces north. A counter separating the employees from the public part of the office runs at right angles to the cashier's cage east and west, directly opposite doors opening on the north side of California street. A gate through this counter is the exit for those behind it and back of the cashier's cage as well. Aside from going from the cashier's cage around to a place behind this counter, whence he could see straight out through the open doors onto California street, the clerk did nothing to apprehend the customer. He then spoke to the office manager and handed him the check which had been left and which was for an amount some \$700 in excess of the bill for Liberty bonds, or some \$70 in excess of the combined bill for the Liberty bonds and the amount for which the Standard Oil stock was expected to be secured. The manager in turn handed the check to the cashier, who deposited it in the bank. No member of the firm was in the office at the time. On the following morning, at 9 o'clock or earlier, a member of the firm ordered the check withdrawn from the bank, and it was returned to plaintiffs unpaid.

[1] During the morning, subsequent to the withdrawal of the check, telephone communication was had by plaintiffs' office with that of Kennard & Bierce in Los Angeles, and it was ascertained that Mr. Kennard had not been in San Francisco the previous day. Prior to the trial Mr. Kennard testified that some one telephoned him from San Francisco about this date, between 10 and 11 o'clock in the morning; that he did not know who it was, but was under the impression that it was from the office of the Standard Oil Company. He also testified that the questions asked were as to his age, appearance, and his presence in San Francisco the day previous. On this state of affairs, evidently on the theory that the communication testified to by Kennard was not sufficiently connected up, defendant asks us to hold as error the action of the trial court in allowing the clerk's testimony on this point. We think the telephone communication was sufficiently identified by the clerk to establish it as that testified to by Mr. Kennard himself, and, having been thus established, we see no error in admitting the former's testimony. That it was later in time than the action taken by plaintiffs in withdrawing the check from the bank supports their contention, we think, that no reliance was placed on the check.

[2] Appellant also urges as error the admission in evidence of testimony of the clerk

that no conversation with any one in the office of plaintiff was had by him as to the validity of the check. Though this testimony on direct examination would have been objectionable as tending to establish an implied negative statement, we think that the trial court was entitled to receive it on the redirect examination of plaintiffs to rebut the inference following on the one circumstance of the deposit of the check in the ordinary course of business, brought out by defendant on cross-examination, that plaintiffs were acting on what they considered a valid check.

The third error assigned by appellant is the admission in evidence of testimony that the withdrawal of the check was made prior to the telephone communication between the office of J. Barth & Co. and Kennard & Bierce in Los Angeles. The same may be said with respect to this evidence as to that respecting testimony of conversations regarding the validity of the check.

[3] The entire contention of appellant, without citation of any cases in point, is that the bonds were obtained through forgery, and that it therefore is not liable to plaintiffs under its indemnity bond. We agree with the lower court that the bonds were stolen by a person calling himself E. Kennard, regardless of what his name may have been, and that the fact that he left behind him a check some \$700 in excess of the value of the bonds he carried away only strengthens our belief, in addition to the evidence in the record, that forgery played no part—as to plaintiffs—in his securing and making away with them. Appellant calls attention to the fact that the addition of the value of the two shares of Standard Oil Stock which he assumed to order to the bill for the bonds would reduce the excess to some \$70, but we cannot see that this fact adds any force to their argument. Men do not so generously dispense with what is theirs, nor pay in advance as a usual thing for what is not yet forthcoming.

The fact that the check was deposited in the bank does not appeal to us with the same force that it seems to have for appellant. There was no member of the firm present when the action was taken; there is no evidence to show why it was done. The occurrence took place late in the day, after regular banking hours. At or before 9 o'clock the following morning, before banking hours, and at the first opportunity offered, a member of the firm acted in repudiation of the check by ordering its withdrawal.

Appellant has cited us to no cases that are in point, and we believe that the lower court was correct in its rulings and holding.

The judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

63 Cal. App. 254

JONES et al. v. SIERRA VERDUGO WATER CO. et al. (Civ. 4039.)

(District Court of Appeal, Second District, Division 2, California. July 26, 1923.)

1. Waters and water courses ⇨232—Organization of new company by water company's stockholders held not to prejudice bondholders' right to foreclose.

Organization of new company by stockholders of water company, for purpose of acquiring its property on sale under trust deed securing bonds, or failure of stockholders and directors to supply necessary funds to prevent default on the bonds, could not alone prejudice bondholders' right to cause sale under provision in trust deed for foreclosure on request of bondholders.

2. Waters and water courses ⇨232—Complaint of bondholders in action to set aside sale held insufficient.

In bondholders' action to set aside sale of water company's property under trust deed, on ground that stockholders and directors combined to wreck the company, complaint alleging that more than 50 per cent. of bondholders requested trustee to sell, but that majority of those requesting the sale were stockholders, did not show that those joining in the request, who were not parties to the combination, did not hold 50 per cent. in amount of the bonds, so as to be entitled to request a sale.

3. Waters and water courses ⇨232—Bondholders, suing to set aside sale, have burden of showing facts rendering it invalid.

In bondholders' suit to set aside sale of water company's property under trust deed, on ground that directors and stockholders had combined to permit default, the burden was on plaintiffs to plead and prove all facts necessary to show the sale invalid, including the fact that holders of sufficient amount of bonds outside of those who, as stockholders, were parties to the combination, did not join in requesting the sale.

4. Waters and water courses ⇨232—Immaterial for what reason bondholders exercised right to request sale.

Under trust deed of water company's property, providing for sale by trustee on request of holders of 50 per cent. of the bonds, it was immaterial how or for what reason the bondholders were induced to exercise this right.

5. Judicial sales ⇨39—Inadequacy of price must be caused by fraud or unfairness.

Mere inadequacy of price, however gross, is not itself sufficient ground for setting aside judicial sale; but there must be fraud, unfairness, or oppression, which must account for and bring about inadequacy of price.

6. Waters and water courses ⇨232—Conduct of directors and stockholders held not ground for setting aside sale.

That directors and stockholders of water company combined to permit sale of its property under trust deed, and that for that pur-

pose stockholders failed to pay, and directors failed to enforce, assessments and stock subscriptions, is not ground, in connection with inadequacy of price, for setting aside trustee's sale to new company organized by them, where it did nothing to prevent competition or bring about inadequate price.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by A. Halden Jones, and another against the Sierra Verdugo Water Company and others. From a judgment for defendants on demurrer, plaintiffs appeal. Affirmed.

John B. Haas, of Los Angeles, for appellants.

A. I. McCormick, of Los Angeles, for respondent Crescenta Mutual Water Co.

Page & Hurt, of Los Angeles, for respondent Hellman Commercial Trust & Savings Bank.

FINLAYSON, P. J. Plaintiffs, who hold bonds issued by the defendant Sierra Verdugo Water Company, brought this action to set aside a trustee's sale, had under the deed of trust which had been given to secure payment of the bonds. The defendants Crescenta Mutual Water Company and Hellman Commercial Trust & Savings Bank filed, each of them, a general demurrer to the complaint. The demurrers were sustained. Plaintiffs, refusing to amend, appeal from the judgment which was entered in favor of the defendants after the order sustaining the demurrers.

The facts, as set forth in the complaint, are substantially as follows:

On March 10, 1915, the Sierra Verdugo Water Company, a mutual water company incorporated under the laws of this state (hereinafter for brevity referred to as the Verdugo Company), desiring to incur a bonded indebtedness of \$150,000, authorized its secretary and president to issue 1,500 of its bonds, of the denomination of \$1,000 each, 100 of the bonds to be payable on December 31, 1918, and an additional 100 on the 31st day of December of each year thereafter, the bonds to bear interest at 7 per cent. per annum, payable semiannually. To secure the payment of these bonds the Verdugo Company, on May 28, 1915, executed to the Hellman Commercial Trust & Savings Bank (hereafter for brevity referred to as the trustee) a trust deed, conveying all of its property, real and personal. Of the bonds issued by the Verdugo Company the plaintiff Jones owns and holds 32 and the plaintiff Martens 30. It is provided in the deed of trust that, if the Verdugo Company should default for six months or more in the payment of any installment of the interest provided for in the bonds, the trustee, upon the written request of the holders of 50 per cent. or more in

amount of the bonds outstanding, shall declare all of the bonds due and payable, and thereupon shall proceed to sell the property described in the trust deed.

The Verdugo Company having defaulted in the payment of interest, and certain of the bondholders having demanded that the property be sold, the trustee, on June 18, 1921, offered the property for sale under the trust deed. The defendant Crescenta Mutual Water Company (hereafter for brevity referred to as the Crescenta Company)—the sole bidder at the trustee's sale—made an offer of \$10,595 for all of the property. The trustee accepted this bid, and was about to execute a deed to the Crescenta Company and accept payment of the \$10,595, when plaintiffs brought this action to have the sale set aside and the trustees enjoined from executing a deed to the purchaser.

The Crescenta Company was organized July 26, 1920. Like the Verdugo Company, it also is a mutual water company incorporated under the laws of this state. Prior to the organization of the Crescenta Company, the stockholders and directors of the Verdugo Company, who were the owners of the acreage served with water by that corporation, agreed among themselves to organize a mutual water company to serve with water the same territory which then was being served by the Verdugo Company. They further agreed among themselves not to pay any of the principal or interest on the bonds that had been issued by the Verdugo Company, but to allow the property of that corporation to be sold under the trust deed. Pursuant to such agreement, the stockholders and directors of the Verdugo Company organized the Crescenta Company, for the purpose of taking over the property of the Verdugo Company when the same should be sold under the trust deed. For that purpose they raised sufficient money to organize the Crescenta Company, and to drill wells and develop water on the property of the Verdugo Company. The money so raised by them was sufficient to have rehabilitated the Verdugo Company, and to have provided sufficient funds wherewith to have paid the principal and interest of the bonds as the same fell due. The stockholders of the Verdugo Company neglected to pay an assessment levied by that company on August 1, 1918, and also neglected to pay the subscription prices on their shares of the Verdugo Company's capital stock, although they were financially able to pay such assessment and such unpaid subscriptions, had the proper steps been taken by the board of directors of the Verdugo Company to compel payment. The assessment and unpaid stock subscriptions were not paid, because the directors and stockholders of the Verdugo Company had agreed among themselves not to compel payment of such assessment or of such unpaid subscriptions, in order that there might be

no money on hand wherewith to pay the principal or interest due on the bonds which had been issued by the Verdugo Company, thereby allowing the property of that company to be sold at trustee's sale.

Prior to the trustee's sale to the Crescenta Company, the board of directors of the Verdugo Company had induced more than 50 per cent. of the stockholders to request the trustee to sell the property under the trust deed. Pursuant to such request the trustee sold the property, as we already have stated. The majority of the bondholders requesting such sale were and are stockholders of the Crescenta Company. The latter company employed counsel to attend the sale and to attend to the negotiations whereby the trustee was requested to sell the property.

It further is alleged, on information and belief, that the properties which the trustee sold to the Crescenta Company for \$10,595 had a total value of \$294,734.16, that the sum bid is grossly inadequate, and that if the sale be permitted to stand plaintiffs will receive only a fraction of the value of the bonds which they hold. Wherefore plaintiffs pray that "the said sale so conducted and held on the 18th day of June, 1921, be declared void and of no effect, and set aside."

In considering whether the complaint states a cause of action two questions present themselves: (1) Do the facts alleged show that the trustee should not have undertaken to sell the property to any one whomsoever? (2) Do the facts show that this particular sale should not have been made? In determining the first of these questions the facts principally to be considered are: (1) The organization of the Crescenta Company for the purpose, among others, of acquiring the properties of the Verdugo Company when the same should be offered for sale by the trustee; (2) the failure of the stockholders and directors of the Verdugo Company to supply, by assessment or "call," the necessary funds wherewith to meet the payments on the bonds as they fell due, thereby "allowing" the property to be sold; and (3) the inducing of more than 50 per cent. of the bondholders to request the trustee to sell the property under the trust deed.

[1-3] The mere organization of the Crescenta Company by the stockholders of the Verdugo Company, for the purpose of acquiring the property of the latter company in the event that it should be sold at trustee's sale, standing alone and considered as an isolated fact, could not prejudice the right of the bondholders to cause the property to be sold to satisfy the bonds held by them, if and when the Verdugo Company should default in the payment of its bonds.

"It is of common occurrence that an insolvent corporation is compelled to go into liquidation. The individuals who compose it seek to save what they can from the wreck by organizing themselves in a new corporation, and

buying such of the properties of the former corporation as they can profitably use in the new. No principle of law is violated by their forming the new organization, *and no right of the creditors of the old organization is injured*, provided its assets are lawfully acquired by the new one." *Armour v. E. Bement's Sons*, 123 Fed. 59, 62 C. C. A. 145. (Italics ours.)

The fact that the stockholders of the Verdugo Company contemplated a reorganization might possibly furnish them with a motive for disregarding plaintiffs' rights; but, unless plaintiffs show that their rights have actually been invaded, the law will not concern itself with a possible motive for their invasion. If it did, new complications would be introduced into suits, which might seriously obscure their real merits. If those bondholders who requested the trustee to sell the property—more than 50 per cent. of all the bondholders—had the legal right to demand that a sale be made by the trustee, and if the sale was conducted according to the conditions provided by the trust deed, with due regard to the rights of all the parties, and was made to the highest bidder, the fact that the stockholders of the Verdugo Company, in organizing the Crescenta Company, had in mind the possible purchase of the properties by the new company, could afford no ground for setting aside the sale.

The failure of the stockholders and directors of the Verdugo Company to supply the necessary funds by assessment or "call" in order to prevent their company from defaulting on its bonds furnishes no reason why the property should not be offered for sale by the trustee on a proper request therefor by the holders of 50 per cent. in amount of the bonds outstanding. The complaint alleges that "bondholders constituting more than 50 per cent. of the bondholders" requested the trustee to sell the property. It is not alleged that all the bondholders other than plaintiffs were stockholders of either water company. The allegation is that:

"The majority of the bondholders requesting said foreclosure [i. e., the trustee's sale under the trust deed] were at the time of said organization [of the Crescenta Company] and ever since have been stockholders of said Sierra Verdugo Water Company."

This may be true, and yet the owners of 50 per cent. in amount of the bonds outstanding may not have been stockholders in either company, but may, nevertheless, have joined in the request for the trustee's sale. The fact that "the majority of the bondholders requesting said foreclosure" were stockholders of the Verdugo Company is entirely consistent with the hypothesis that one or more of the bondholders who joined in the request for a sale by the trustee owned 50 per cent. or more in amount of the bonds outstanding, but did not constitute any part of that "majority of the bondholders" who were stockholders of the Verdugo Company.

Plaintiffs themselves owned less than 5 per cent. in amount of the bonds outstanding. For aught that appears to the contrary, the "majority of the bondholders requesting said foreclosure," and who were "stockholders of said Sierra Verdugo Water Company," may have constituted no more than 48 per cent. of all the bondholders, leaving at least 47 per cent., besides these plaintiffs, who were not stockholders in either the Verdugo or Crescenta companies; and of such 47 per cent. one or more persons may have owned at least 50 per cent. in amount of all the outstanding bonds. Such person or persons, however few in number, owning 50 per cent. in amount of the outstanding bonds, and not being a stockholder in either of the water companies, unquestionably would have the right to demand that the trustee sell the property.

The complaint does not say that a trustee's sale shall be had on the request of 50 per cent. of the bondholders. The allegation is that the trustee, under the mandate of the trust deed, shall, on default in the payment of interest for six months or more, sell the property "upon the written request of the holders of 50 per cent. in amount of the bonds." Therefore, even if we were to assume that those bondholders who, as stockholders, had neglected to supply the Verdugo Company with funds sufficient to meet its bonds, could not rightfully demand a sale by the trustee, still there is nothing to show that the demand for the sale was not made by bondholders owning 50 per cent. in amount of the bonds outstanding and who were not stockholders in either the old or the new company. However censurable the stockholders may have been for their neglect to raise the money wherewith to pay the bonds, without compelling resort to a sale under the trust deed, it is certain that such of the bondholders as were not stockholders had the indubitable right to demand a sale by the trustee. The burden is upon plaintiffs to plead and prove all the facts necessary to show an invalid sale. If they would claim that the sale is void because the holders of 50 per cent. in amount of the outstanding bonds were of those stockholders who made it impossible for the Verdugo Company to raise the necessary funds wherewith to pay the maturing interest on its bonds as it fell due, the burden was upon them to show that fact by appropriate averments in their complaint. This they have not done; for, as we have shown by an analysis of the complaint, the averments of that pleading are entirely consistent with the fact that 50 per cent. or more of the outstanding bonds may have been held by one or more persons who held no stock in either water company, and, clearly, if 50 per cent. of the bonds were held by persons who were not parties to the machinations of the alleged scheming stockholders, the holder or holders of such 50 per cent. of

the outstanding bonds had the right to demand of the trustee that it proceed to sell under the trust deed.

For these reasons we are satisfied that a sale of the properties by the trustee was the right of at least certain of the bondholders; or, rather, the complaint fails to show that certain of the bondholders had not the right to demand a sale by the trustee. To sell the property was, therefore, a duty imposed upon the trustee under the terms of the trust which it had accepted. What was said by the United States Circuit Court of Appeals in *Land, etc., Co. v. Asphalt Co.* is apposite here:

"It was the right and duty of the trustee under the so-called mortgage or pledge to foreclose the same, when default had taken place, whether the company be solvent or insolvent, and it is not material to the trustee what remedies the company may have to collect money with which to pay the mortgage debt. No conduct of stockholders, however reprehensible, could impair the remedy of the holders of certificates and of their trustee to enforce their security." 127 Fed. 14, 62 C. C. A. 36.

[4] The fact that the bondholders who requested the trustee to sell the property were induced to do so by the directors of the Verdugo Company cannot invalidate the sale. As we have pointed out, there is nothing to show that the holders of at least 50 per cent. in amount of the outstanding bonds did not have the absolute right to demand that the property be sold after default in the payment of the interest. Having such right, it is of no moment how or for what reason those bondholders were induced to exercise their right.

For the foregoing reasons we conclude that the complaint fails to show that it was not the trustee's duty to offer the property for sale and to sell it to any person or corporation who would make the highest and best bid. Indeed, we do not understand appellants to claim that the trustee should not have attempted to make any sale whatever. Even though the willful neglect of the stockholders of the Verdugo Company to pay the balances due on their stock subscriptions may have been the cause of that company's insolvency, still appellants would not for that reason be apt to claim that the bondholders, themselves included, have suffered an impairment of their right to cause the property to be sold under the trust deed. The security afforded by that instrument, and the right to have the property sold as therein provided, should not be deemed to have been crippled merely because another right of the bondholders—their right to compel their immediate debtor, the Verdugo Company, voluntarily to pay the principal and interest accruing on its bonds—may have been impaired or rendered less valuable by the neglect of the stockholders to pay

their subscriptions, or by the failure of the directors to levy and collect assessments. What appellants do claim, and this brings us to what we conceive to be the real contention on this appeal, is that this particular sale should be set aside because the property was sold for an inadequate price, and that such inadequacy was accompanied by fraud, in that the stockholders and directors of the Verdugo Company fraudulently combined to wreck that company by refusing to levy and pay assessments, and by organizing the Crescenta Company to buy the property at an inadequate price.

[5, 6] The established rule in this state is that:

"Mere inadequacy of price, however gross, is not itself a sufficient ground for setting aside a sale legally made. There must, in addition, be proof of some element of fraud, unfairness, or oppression, before a court will be justified in depriving the purchaser of his legal advantage." *Rauer v. Hertweck*, 175 Cal. 280, 281, 165 Pac. 948. See, also, *Bock v. Losekamp*, 179 Cal. 676, 677, 179 Pac. 516.

Appellants claim that they are entitled to have the sale set aside under this statement of the rule. They claim that the facts alleged by them in their complaint do show that, in addition to inadequacy of price, there was fraud and unfairness. But the accompanying fraud, unfairness, or oppression which will suffice to make inadequacy of price a ground for setting aside a sale must be such as accounts for and brings about the inadequacy of price. The rule is stated in *Ruling Case Law* as follows:

"What causes, in addition to inadequacy of price, are sufficient to lead the court to withhold confirmation from a sale at a sacrifice, cannot well be reduced to any general rule; but they must be such as were calculated to prevent the property from bringing its value, or something reasonably near what it should bring at a public sale, and which on the particular occasion have actually produced that effect." 16 R. C. L. p. 98.

In *Burton v. Kipp*, 30 Mont. 275, 76 Pac. 563, it is said:

"It is not alleged that the sale in question was attended by any irregularity on the part of the sheriff or the plaintiff in the writ, or that any mistake, surprise, accident, misconduct, or fraud intervened, *by which the inadequacy of price was brought about.* * * * Mere inadequacy of price, not attended by circumstances of fraud, misconduct, accident, mistake, or surprise *tending to influence the result*, is not sufficient to invalidate such a sale. Otherwise the mere lack of competitive bids, or the intervening of any like circumstance whereby the price realized should be deemed inadequate, would be sufficient to render questionable the title obtained by sale under execution." (Italics ours.)

There is nothing alleged in plaintiffs' complaint from which even a remote inference

can be drawn that the conduct which appellants stigmatize as fraudulent tended in any wise to bring about the inadequacy of the price bid for the property. There is nothing to show that the sale was not properly conducted in the utmost good faith on the part of the trustee, or that appellants did not have due and timely notice of the sale, or that the stockholders or directors of the Verdugo and Crescenta Companies did aught to prevent competition in the bidding. So far as the allegations show to the contrary, the small price realized may have been the result of lack of bidders, or incumbrances upon the property, or a variety of other causes over which neither the trustee nor the stockholders or directors of either of the water companies had any control. Under the terms of the trust deed, the bondholders had the right to have their claims satisfied by a sale of the property. The Crescenta Company, the sole bidder, was under no obligation to bid more than it deemed proper. It was at liberty to bid what it wished, leaving it to others to make higher bids if they chose. Since the inadequacy of price was not attended by circumstances of fraud, misconduct, accident, mistake, or surprise, which tended to influence the result by preventing the property from bringing its value, it follows that those bondholders who requested the trustee to sell—bondholders who are not complaining and who had the right to collect their claims in this manner—cannot be deprived of the fruits of this sale merely because the bid was not higher.

The judgment is affirmed.

I concur: WORKS, J.

CRAIG, J. (concurring). I concur in the conclusion of the foregoing opinion. However, I think the transaction, the completion of which appellant has sought to enjoin, cannot properly be termed a sale; it had amounted only to a contract to sell. While the distinction might not be material in the instant action, the inaccurate use of a legal word or expression often leads to confusion in subsequent cases. Opinions may be found where the word "sold" has been loosely applied to transactions which had progressed no further than those in the present case; but they do not fit the definitions of the word as found in text-books, our Civil Code, or such cases as deal with it with care and accurateness. A "sale" is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property. Civ. Code, § 1721. Here the transfer had not been made, and the injunction was asked to prevent it. "An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing." Civ. Code, § 1727. This is precisely what the contracting parties did.

A contract relative to land, binding the vendor to make a deed, is a mere agreement to convey. *Ellis v. Jeans*, 7 Cal. 409; *Roberts v. Abbott*, 48 Cal. App. 779, 786, 192 Pac. 345. The same opinions hold the transactions therein respectively involved to constitute executory agreements. This, it seems to me, was clearly the legal status of the transaction in this case. The Crescenta Company made a bid of \$10,595 at the trustee's sale, and until the trustee should have executed its deed, and the transaction thus have become an executed contract by a transfer and by payment of at least part of the purchase price by the vendee, only a contract to sell existed.

63 Cal. App. 101

DICKERMAN v. OHASHI IMPORTING CO.
(Civ. 4522.)

(District Court of Appeal, First District, Division 1, California. July 21, 1923. Hearing Denied by Supreme Court Sept. 17, 1923.)

1. Sales ⚡195—**Failure to present draft within time specified in letter of credit, though discharging bank, held not to release buyer.**

Where letter of credit was furnished by buyer on demand of seller for guaranty of payment, it constituted additional guaranty, and did not restrict obligation of buyer, and though failure to present draft within time specified therein discharged bank issuing the letter of credit, it did not release the buyer, where transaction was carried through so far as it was concerned, especially when delay was attributable to its agent.

2. Sales ⚡195—**Resale by buyer held not to affect contractual relations when not in contemplation of parties.**

That buyer of nails had resold them to foreign firm, and was protected by letter of credit, did not alter contractual relations between seller and buyer, where no such element appeared in details of the transaction, or was in contemplation of the parties.

3. Sales ⚡195—**Seller not responsible for failure of buyer's agent to get bill of lading in time to present to bank issuing letter of credit.**

Where failure to attach bill of lading to draft for price of goods presented to bank issuing letter of credit was due to failure of buyer's agent, a forwarding company, to get import bill of lading in exchange for railroad bill of lading in time for such presentation, the seller was not responsible therefor.

4. Frauds, statute of ⚡112—**Failure to specify price did not invalidate contract when agreement was to pay reasonable value.**

That telegrams constituting contract of sale did not specify the price, did not render it void under statute of frauds, where it was found on sufficient evidence that buyer agreed to pay reasonable value, in view of Civ. Code, § 1611.

5. Sales $\S$ 87(3)—Telegrams held to support finding of agreement to pay reasonable value and make delivery within reasonable time.

Telegrams between seller and buyer held to support findings that buyer agreed to pay reasonable value, and that delivery was to be made within reasonable time.

6. Sales $\S$ 162—Sufficient delivery and acceptance when bill of lading turned over to forwarding company designated by buyer.

Where forwarding company to which seller turned over bill of lading was designated by buyer to receive and handle the shipment, and buyer had resold the goods to firm in Japan, there was a sufficient delivery and acceptance.

7. Sales $\S$ 78—Implied that reasonable price was intended when goods delivered and accepted.

When there was delivery and acceptance under contract of sale, silent as to price, it is implied that reasonable price was intended.

8. Sales $\S$ 176(3)—Buyer waived deficiency in quantity by electing to proceed.

Where buyer knew of deficiency in quantity of nails shipped by seller, at time a forwarding company was instructed by it to handle the shipment or shortly thereafter, it affirmed the contract, and waived such deficiency by electing to proceed, under Code Civ. Proc. $\S$ 2076, requiring objections to tender property to be specified.

9. Sales $\S$ 172—Seller not responsible for delay due to buyer's agent.

Where delay in shipment of nails was due to failure of buyer's agent, a forwarding company, to obtain necessary permit, and the shipment arrived at seaport in time to be loaded on the very boat upon which space had been booked, and buyer had attempted to resell and consign the goods to purchaser in Japan, seller held not responsible for the delay.

10. Evidence $\S$ 601(4)—Proof of value at time of sale sufficient showing of value at date of delivery in absence of contrary showing.

In action for reasonable value of nails sold by contract silent as to the price, proof of value at time of sale is sufficient to establish value at date of delivery, in absence of any showing to the contrary.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by M. Dickerman against the Ohashi Importing Company, a copartnership consisting of Kunisaburo Ohashi and another. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward J. Lynch, of San Francisco, for appellant.

Byrne & Lamson, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in amount of \$3,349.61. The plaintiff is the assignee of Harris Bros., a firm engaged in business in

Chicago, Ill., and the defendant is an importing and exporting company doing business in San Francisco, Cal. The negotiations between the parties were carried on by means of telegrams and letters, and inasmuch as there appears to be some question as to whether or not a valid contract resulted from said negotiations, it will be necessary to follow the transaction through in all its details.

The negotiations between the parties evidently started by a visit of one Anderson at the office of Harris Bros., in Chicago, who inquired if they could furnish a carload of nails for export to Japan. Upon being advised that the nails could be furnished for \$5.50 per keg, f. o. b. Chicago, Anderson indicated that advice would follow later from San Francisco with regard to the shipment. Whether or not Anderson ever proceeded with this transaction does not appear, but a party named Chrisman, a broker, called at the office of defendant in San Francisco, and represented that he had 800 kegs of nails in Chicago, and could sell them at \$5.50 per keg. It appears that some of the nails were sizes which could not be used, whereupon Chrisman said:

"If you want them you can wire yourself."

On September 10, 1918, defendant telegraphed to Harris Bros. as follows:

"If you can make eight hundred kegs car nails two to eight penny smooth box barbed box fine extra fine shingle and blued we will accept rush answer."

In answer it was stated that but 550 kegs of the sizes mentioned could be furnished. The defendant wired Harris Bros. to try and secure the sizes desired, to which the following telegram was received:

"Can furnish only five hundred fifty kegs nails like your specifications stop will equalize freight charges if you can use them stop wire answer."

On the following day defendant wired:

"We accept nails open credit including freight so you prepay."

A few days later Harris Bros. received a letter of guaranty from the Yokohama Specie Bank, Ltd., of San Francisco, agreeing to guarantee payment of a sight draft for the nails in a sum not exceeding \$3,535, providing same was accompanied by a full set of shipping documents for 550 kegs of nails on or before October 15, 1918. Due to war conditions at this time it was necessary to have a government license to ship goods, and upon demand by Harris Bros. the defendant wired as follows:

"Telephone Judson Freight Forwarding Co. at once and see if you can arrange ocean space at thirty-two dollars ton if they can furnish you space they will also furnish you with railroad permits stop license number two six three four five three expiring November nine-

teenth Marks S and K in diamond notify Saji and Kariya, Yokohama, Japan."

Space at \$35 per ton was secured by the Judson Company, but for some reason the permit to ship was not received on October 12th, and the plaintiff made efforts to get an extension of the letter of credit, which expired October 5th, and advised defendant that unless this extension was granted the order would be canceled. The extension was granted to November 5th, and upon receipt of advice from the bank to this effect, the shipment was delivered to the Judson Forwarding Company as requested by defendant. The bill of lading for the shipment was turned over to the Judson Company to exchange for an import bill of lading, the bill of lading covering the shipment by Harris Bros. being receipted for by the Judson Company as follows:

"Chicago, U. S. A.,

"October Thirtieth, Nineteen Eighteen.

"Received from Harris Brothers, Chicago, 35th and Iron Streets, straight bill of lading for one carload of nails, 549 kegs, shipped from Kokomo, Indiana, to the Judson Freight Forwarding Company, Yokohama, Japan, via San Francisco.

"Yours very truly,

"Judson Freight Forwarding Company,

"[Signed] W. J. Riley,

"Manager Export Department.

"W."

It appears that the Judson Company was unable to procure the import bill of lading for the reason that the permit of the defendant was restricted to a certain tonnage and the shipment of nails, together with other merchandise being handled for the defendant, exceeded the maximum tonnage allowed. Before they could get the bill of lading it was necessary for the railroad company to get authorization for the additional tonnage. The time within which the letter of credit was valid being short, every effort was made to present the sight draft to the Yokohama Specie Bank within the allotted time. The said sight draft was in the hands of the Crocker Bank for collection on November 4, but for some reason was not presented, and on account of November 5 being a holiday, it was not presented until the 6th, at which time payment was refused by the Yokohama Specie Bank. In the meantime the nails were en route to Richmond, booked for shipment on the S. S. "Tempaision Maru," November 10th. The sailing date had been delayed, however, and though the nails did not arrive until November 19th, the ship had not sailed and there was ample time for loading and shipment on the very boat in which space had been reserved. However, the parties in Japan who had ordered the nails from defendant had canceled their order, which undoubtedly was the reason for the refusal on the part of the Yokohama Bank to pay the sight draft. The

Judson Company therefore canceled the space on said steamer.

[1-3] The first contention of the defendant is that there was a custom among shippers, importers, exporters, and merchants that where a contract is entered into by telegram and the buyer established a letter of credit, the obligation to present the draft with proper documents was a condition precedent, the nonperformance of which excused performance by defendant. From the facts detailed above it will be noted that the letter of credit was procured at the demand of plaintiff's assignor in its telegram of September 17th for a guarantee of payment on the part of defendant. This was an additional guarantee to them, and in no way restricted the obligation of defendant under a contract, such as in the case at bar, especially in view of the fact that any delay after delivery by Harris Bros. to the Judson Forwarding Company was in nowise attributable to said Harris Bros. It must be conceded that the Yokohama Bank was discharged of its separate contract of guaranty by the failure in presentation of the draft within the allotted time, but as the transaction was carried through as far as the defendant was concerned, the rights of the parties to this action were not changed by the refusal of the guarantor to pay the draft. The point is made that defendant had sold the nails to a foreign firm, and was protected in this regard by a letter of credit. This does not alter the contractual relations of the parties, as no such element appeared in the details of the transaction or contemplation of the parties. In connection with the cancellation of the letter of credit, the point is made that the evidence showed that no bill of lading was attached to the draft when presented. This failure was due to the failure of the agent of defendant, the Judson Forwarding Company, to get the import bill of lading in time for presentation, and Harris Bros. were not responsible for the delay.

[4-7] The main point raised by defendant is that the contract was void under the statute of frauds. It is insisted that there is no mention of price in the documents containing the contract, and as there is no sufficient memorandum of the price in writing the contract itself is void. After going exhaustively into the law in other jurisdictions, defendant concedes that as to California "we do not find any case * * * directly on the point where personal property only is involved." The California cases cited by defendant are distinguishable. In the case of *Levy v. Mautz*, 16 Cal. App. 666, 117 Pac. 936, the price was to be fixed from time to time by agreement of the parties, and was therefore held to be an incomplete contract, and in the case of *Booth v. Levy*, 21 Cal. App. 427, 131 Pac. 1062, the facts

were also different from the case at bar in that the price was to be fixed at a future time, in which case the court held that such an agreement "does not satisfy the Statute of Frauds." Respondent contends the rule to be that where there is no actual agreement as to price, the note of the bargain is sufficient, even though silent as to price, because the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price. In support of this contention respondent cites the case of *Hoadley v. McLaine*, 10 Bing. 482, in which it was held that even in the case of an executory contract, where no price was named in the contract, none need be named in the memorandum. This rule has been followed by some of our most learned text-writers (*Williston on Sales*, § 103; *Benjamin on Sales*, § 249 [4th Am. Ed.]; *Brown on the Statute of Frauds*, § 377), and in the case of *Toomy v. Dunphy*, 86 Cal. 639, 25 Pac. 130, though a contract for the sale of real estate, it was held that the agreement being in writing raised a presumption that the defendant had agreed to pay a consideration for the services rendered, and no certain amount appeared to have been stipulated for, "evidence tending to show the reasonable value of such services should have been admitted." This rule seems to be supported by the Civil Code, § 1611, providing that:

"When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained * * * the consideration must be so much money as the object of the contract is reasonably worth."

The case was tried upon the second and third counts of plaintiff's amended complaint, the court finding that under the terms of the contract the defendant agreed to pay Harris Bros. the reasonable value of the nails, and that delivery was to be made within a reasonable time. These findings are amply supported by the evidence. It does appear that a call was made upon each of the parties to the contract by a party or parties, but there is nothing to indicate that it was the same individual, or that the principals had agreed on a price by virtue of the activities of other parties. The actual dealings between the parties was evidenced by the telegrams and letters exchanged. It is strenuously urged by defendant that the lower court was misled by the argument that where goods are delivered and accepted, a reasonable price will be paid, and contends that there was no delivery or acceptance. The evidence does not support this contention. The defendant designated the Judson Forwarding Company to receive and handle the shipment for them, and the import bill of lading showed that a resale had been made to a firm in Japan; indeed, it is admitted by defendant in its brief that this was the fact, and had the sight draft and

its supporting documents been presented on or before November 5, it is evident the letter of credit in defendant's favor would have protected it. It thus appears that there was a delivery and an acceptance. This being so, the price is supplied by the implication that a reasonable price is intended. *Levy v. Mautz*, supra.

[8] The next contention raised is that the failure to supply 550 kegs of nails, by only shipping 549, excused performance of the contract on the part of defendant. It is clear from the evidence that the defendant knew of the deficiency at the time the Judson Company was instructed to handle the shipment, or shortly thereafter, and by electing to proceed with the transaction affirmed the contract, and waived the deficiency in amount. (Code Civ. Proc. § 2076.)

[9] The claim is made that Harris Bros. were guilty of unreasonable delay in forwarding the nails. It is true that quite a space of time elapsed between the time of the first telegram, September 10, 1918, and the delivery of the nails to the Judson Forwarding Company, October 24, 1918, but the evidence shows that the delay in shipment was due to the failure of defendant's agent, the Judson Forwarding Company, to obtain the necessary permit to permit the shipment to go forward, and as a matter of fact the shipment did arrive in time for November sailing on the very boat upon which space had been booked. Having thus received the nails, and after attempting to resell and consign them to a purchaser in Japan, and the shipment having arrived in time to go forward on the boat designated, it would appear that the seller is in nowise responsible for any delay or the results thereof.

[10] The final contention urged by defendant is as to the sufficiency of the proof of reasonable value. The trial court found that the reasonable value of the nails "is now and was at all of the times herein mentioned, \$3,019.50." It appeared that Thomas L. Riordan, after qualifying as an expert on the price of nails, testified that he was familiar with the reasonable value of nails and wire products at the time of the sale of nails to the Ohashi Importing Company, and that the reasonable value was \$5.50 per keg in the Chicago market. It is insisted that where goods are sold and the seller endeavors to recover the reasonable value thereof, he must prove the said value as of the time and place of delivery. The proof of the value of the nails at the time of the sale is sufficient to establish their value at the date of delivery, in the absence of any showing to the contrary, and we are therefore of the opinion that the above-quoted finding is sustained by the evidence.

Finding no error in the record, the judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

63 Cal. App. 338

CONNER et ux. v. DALE. (Civ. 4595.)

(District Court of Appeal, First District, Division 1, California. Aug. 1, 1923.)

1. Municipal corporations ⇨706(5)—Evidence held to sustain judgment for plaintiff for injuries in automobile collision.

In an action for personal injuries and injuries to an automobile caused by a collision, evidence held to sustain a judgment for plaintiff.

2. Municipal corporations ⇨706(5)—Evidence held insufficient to establish negligence of plaintiff in action for automobile collision.

In an action for personal injuries and to an automobile by a collision, evidence held insufficient to establish contributory negligence under Motor Vehicle Act § 20f.

Appeal from Superior Court, Fresno County; J. E. Wooley, Judge.

Action by L. H. Conner and wife against J. J. Dale. From a judgment for plaintiff and from an order overruling a motion for new trial, defendant appeals. Affirmed.

Gallagher, Simpson & Hays, of Fresno, for appellant.

Geo. Cosgrave, of Fresno, for respondents.

RICHARDS, J. This action arose out of an automobile collision in the city of Fresno on or about the 16th day of January, 1921. Plaintiffs were proceeding in their machine in a southerly direction on Blackstone avenue in said city, and defendant was traveling in a general westerly direction along Divisadero street in the same city. Blackstone avenue and Divisadero street intersect at right angles. The record does not disclose the exact widths of either of these two intersecting streets, although it does appear that Divisadero street is a narrow street, while Blackstone avenue is a much wider street and is, in fact, wide enough to accommodate a double line of street railway tracks with ample space for its ordinary vehicle travel. It is alleged that defendant by reason of his careless, negligent, and reckless driving and management of his automobile, violently ran into and collided with plaintiffs' machine at the intersection of said streets, causing plaintiffs' automobile to be wrecked and demolished to their damage in amount of \$1,000; and that by reason of this collision the plaintiff Bertha Conner sustained severe injuries, the nature and extent of which are specifically set forth in the complaint, necessitating treatment in a hospital for 15 days and was confined to her bed for a period of four months; that by reason of said treatment, attendance of nurses, purchase of drugs and medical supplies, plaintiffs have incurred expenses in amount of \$400 and liability for physicians' services \$300. Plaintiffs therefore prayed for judgment in the sum of \$11,700 and costs. The trial came on for hearing

before the court without a jury, at the conclusion of which the court filed its findings of fact and conclusions of law, finding that the injuries suffered were due to the carelessness, negligence, and recklessness of defendant and assessing damages in the sum of \$6,700 and costs. Judgment was rendered accordingly. Defendant thereupon moved for a new trial, which the court ordered denied. From said judgment defendant now prosecutes this appeal.

[1] Appellant's first contention is that there is no evidence to support the finding that the defendant drove his automobile carelessly, negligently, and recklessly. There is substantial conflict in the testimony with regard to the speed of the automobiles and their position when moving just prior to the accident, plaintiff L. H. Conner stating that he first saw the lights of defendant's car when his (Conner's) machine was about 10 feet north of Divisadero street and that defendant's car at that time was about to enter the square forming the intersection of the two streets; that he was going about 15 miles per hour, and estimated that defendant was traveling about 25 miles per hour; that—

"I said something to my wife at that time about the car and I kind of looked back over my shoulder, and I seen it was going to hit us, and I tried to give her the speed, and being a new car she wouldn't get away. I tried to avoid him hitting me and he swung to his left and pinned us against the post on that corner."

Mrs. Bertha Conner corroborated the statements made by her husband. On the other hand, defendant testified that—

"After I had practically crossed the second track, an automobile whipped out from behind the car at a very terrific rate of speed."

Defendant estimated his speed at from 10 to 12 miles per hour and was corroborated in this regard by L. F. Ward, a passenger with him in his machine, and H. Beaverson, motorman on the street car which Conner states he passed 30 feet back from the intersection going in the same direction. The motorman testified that he first saw defendant's car when the same was on the east car track, and that "I had to slow down, applied my air going across there." This witness testified that he did not see the Conner machine.

[2] Defendant also contends that L. H. Conner was himself guilty of negligence in that the evidence showed that defendant was closer to the point of intersection of the line of travel of the two machines than the plaintiff's car approaching from the right, and that Conner's action was a violation of section 20f, c. 147, of the Motor Vehicle Act (Stats. 1919, p. 215). Defendant's analysis of L. H. Conner's testimony brings him to the conclusion that at the time defendant entered the intersection, Conner was 10 feet from the

intersection and 30 feet ahead of the street car. A review of Conner's testimony does not sustain this contention. Conceding that the plaintiff's car was 10 feet northerly from the northerly intersecting line of the two streets at the time the defendant's car was at the easterly intersecting line of the two streets, it does not follow that under the section of the Motor Vehicle Act above cited the defendant would have the right of way, since under that section the question as to which of two motor vehicles has the right of way at intersecting streets depends upon the relative distance of each from the intersection of their respective lines of travel, and the evidence herein shows that the plaintiff, even accepting the defendant's statement as to where it was at the time defendant entered the intersecting square, was still much nearer to the intersection of their respective lines of travel than the defendant was, and hence under said section of the Motor Vehicle Act had the right of way. The testimony of the respective parties is in sharp conflict as to their respective positions when each discovered the other's approach on entering the intersecting square. The trial court, in effect, adopted the plaintiffs' version as to this situation and held that under the circumstances the plaintiffs should have been accorded the right of way in pursuance of the provisions of section 20f of chapter 147 of the Motor Vehicle Act, *supra*, regulating the duties of drivers of automobiles at street intersections.

Appellant further contends that there is no issue raised by the pleadings as to the amount of damages caused by the injuries to the wife, other than the amount pleaded as to doctor bills and hospital expenses, sufficient to justify the admission of evidence as to such injuries or sufficient to justify the finding of the trial court as to the amount of damage sustained by Mrs. Conner by reason of such injuries. The contention is made that timely objection was made to the introduction of any evidence other than to establish the fact that the injuries necessitated incurring doctor bills and hospital expenses. There is no merit in either of these contentions. In *Riser v. Walton*, 78 Cal. 490, 21 Pac. 362, it was held that a complaint which did not contain a formal allegation of the amount of damage sustained by the plaintiff, but which did state facts sufficient to sustain a judgment for damages and concluded with a prayer for judgment for a specific amount, sufficiently stated a cause of action, and that the prayer for judgment was the equivalent of a statement in the complaint as to the amount of damage which the plain-

tiff had sustained. This case was cited with approval in *Barr v. Southern California Edison Co.*, 24 Cal. App. 22, 140 Pac. 47, the court saying:

"Moreover, the prayer of the complaint was for a specific sum which plaintiff sought to recover upon the facts alleged, and it has been held that this is equivalent to a formal allegation of the amount of damages sustained."

In *Tucker v. Cooper*, 172 Cal. 663, 158 Pac. 181, the court says:

"The fact that several of the items entering into the damage are formally alleged in the complaint does not preclude the plaintiff from praying for judgment for the total damages suffered, of which such items are a part."

The language quoted in the latter case also meets our approval that—

"The controlling claim for damages is contained in the prayer for judgment, and will obviate the necessity of stating the amount elsewhere in the complaint." Page 666 of 172 Cal., page 182 of 158 Pac.

Appellant further contends that the amount of damage claimed to have been suffered by plaintiffs' automobile was not supported by the evidence. Plaintiff L. H. Conner was an experienced automobile mechanic and after the accident repaired the car himself and sold it for \$1,000. The automobile was practically new, having been driven only 400 miles. The purchase price of said car was \$2,070. The rule followed in this state is that damage sustained is the difference in value immediately before and immediately after the injury, subject to the proviso that if it can be entirely repaired at a less expense than the diminution of value because of the injury the measure of damages is the reasonable cost of repairs. *Rhodes v. Firestone Tire & Rubber Co.*, 51 Cal. App. 569, 197 Pac. 392. Conner testified without contradiction that the car depreciated in value in amount of \$1,070. In the absence of any evidence to the contrary, this must be taken as the proper measure of damage in this case.

The final contention of appellant is that the plaintiff had a clear opportunity to avoid the danger and the resulting collision. The evidence in connection with this contention, as before stated, is in sharp conflict and was resolved by the court below in favor of plaintiffs and against the defendant's contention in this regard. We therefore see no reason for disturbing this conclusion of the trial court.

The judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

(63 Cal. App. 199)

RAHN et al. v. PETERSON et al. (Civ. 4178.)

(District Court of Appeal, Second District, Division 1, California. July 25, 1923.)

Judgment ¶143(12)—Default held properly opened on ground of mistake of defendants' attorney as to time to answer amended complaint.

Where on sustaining demurrer, the court allowed plaintiffs 10 days to amend, and gave defendants five days to plead or move to strike out, and defendants' attorney waived notice, supposing that he would have 10 days in which to answer under Code Civ. Proc. § 432, which gives such time "or such other time as the court may direct," but default was entered after five days on the same day that defendants' attorney filed a demurrer to the amended complaint, *held*, that the default was properly opened on the ground of mistake, inadvertence, surprise, or excusable neglect, under section 473; it appearing that the attorney did not hear that part of the order limiting his time to answer, and was unaware of a custom in the department whereby five days were given defendant in which to plead to an amended pleading, and that the demurrer was prepared in good faith to present issues of law.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action by Louis N. Rahn and another against J. Y. Peterson and another, for money due. From an order vacating judgment and setting aside defendants' default, plaintiffs appeal. Affirmed.

Harry M. Irwin and John C. Packard, both of Los Angeles, for appellants.

Woodruff & Shoemaker, of Los Angeles, for respondents

CONREY, P. J. Appeal from an order vacating judgment and setting aside default entered against the defendants.

On January 16, 1922, at the close of the hearing on demurrer to the amended complaint an order was made sustaining the demurrer and allowing the plaintiffs 10 days to amend, and giving to the defendants five days to plead to amended pleadings or move to strike out. At the time of making the order, the judge asked Mr. Shoemaker, one of defendants' attorneys, if notice thereof would be waived; to which Mr. Shoemaker replied in the affirmative. Accordingly, the clerk entered in the minutes relating to said order the words "Notice waived."

The second amended complaint was served on the 21st day of January, and filed on the 23d. On January 30th, at 1:00 p. m., default of the defendants was ordered by plaintiff's attorneys and entered by the clerk. At 4:00 o'clock of that day defendants filed a demurrer to the second amended complaint, but after filing the same, the clerk discovered that the default had been entered, and there-

upon sent notice to the defendants' attorneys that, on account of said default entered, the demurrer could not be placed upon the calendar for hearing. On January 31st the plaintiffs brought the case before the court and introduced evidence, whereupon judgment was rendered, signed, and filed in favor of the plaintiffs. This judgment was entered on February 2, 1922. On the 1st day of February the defendants gave notice of application for relief from the default and for order setting aside default and judgment; the motion to be made upon affidavits served and filed with the notice, and upon proposed answer of the defendants, likewise served and presented for filing, and upon the files, minutes and pleadings in the case. The affidavits included a sufficient affidavit of merits which was supported by the proposed answer which raises substantial issues of fact. At the hearing of the motion on February 3d counter affidavits were filed on behalf of the plaintiffs. After hearing the motion the court made its order, from which this appeal is taken.

Appellants contend that the evidence fails to sustain the implied finding that the default was taken, and the judgment rendered against the defendants through or by reason of mistake, inadvertence, surprise or excusable neglect of the defendants, and that the granting of the motion was an abuse of discretion; and that the defendants did not present any sufficient grounds for relief under section 473 of the Code of Civil Procedure, the section which governs the instant case.

The affidavit of Mr. Shoemaker states that the only order which he heard the court make in ruling upon the demurrer was that the demurrer be sustained, with 10 days' leave to the plaintiffs to amend; that he did not hear the court make any order giving the defendants five days' time in which to plead to the amended complaint to be filed by the plaintiffs; that he did not know that the court made any order allowing defendants five days to plead to the amended pleading, and has not known at any time that such an order was made until the afternoon of January 31, 1922; that when the second amended complaint was served he believed that defendants had 10 days' time within which to plead thereto; that, accordingly, he caused his clerk to enter upon her office calendar the date January 30th as the last day in which to plead, thereby noting a date one day prior to the supposed last day.

Mr. Packard, who represented the plaintiffs at the hearing of the demurrer, stated in his affidavit that when the judge announced that the demurrer would be sustained, Mr. Packard stated that the plaintiffs were anxious to get the action at issue as soon as possible; that at that time, and for a long time prior thereto, it had been the rule and gener-

al practice of the superior court, when making an order in that department, sustaining a demurrer to a complaint, to give the defendant five days in which to plead to the amended pleading to be filed by the plaintiffs; that so universal was this practice that the judge in said department used a rubber stamp in his note of the order upon his docket, which stamp contained words providing for said five days in which to plead to the amended pleading or to move to strike out.

That such rubber stamp was used, and that the general practice was as stated, seems to be an established fact. We do not understand that it is contended that there was any formal rule of court to that effect. Section 432 of the Code of Civil Procedure provides that upon the filing of amendments to a complaint or an amended complaint, the defendant must answer thereto "within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases." Manifestly, under the general rule thus established by the Code, the defendant would have 10 days in which to answer the amended complaint, after service thereof, unless the court in the particular case ordered that the defendant be allowed less time than 10 days for that purpose. There could be no valid rule of court contravening this provision of the statute.

It is conceded that a broad discretion is allowed to courts in granting relief against default, and that it is only where that discretion has been abused that the appellate court will reverse the action of the lower court. "Where a party in default makes seasonable application to be relieved therefrom, and files an affidavit of merits alleging a good defense, and the plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the default." *Berri v. Rogero*, 168 Cal. 736, 740, 145 Pac. 95, 97. In the case at bar the plaintiffs by their affidavits have attempted to show that they will suffer prejudice and loss, by reason of the facts stated in certain of their affidavits. On this point their contention is that the proffered defense is not meritorious or made in good faith; that the prop-

erty of the defendants is heavily mortgaged, and they are in a bad financial condition; that one of the defendants has stated (prior to the commencement of this action) that he had arranged his affairs so that no one could collect any judgment against him, and that he then was execution proof.

The judgment in this case is a judgment for money alleged to be due from the defendants to the plaintiffs. We have examined the answer and we are satisfied that it indicates a defense made in good faith. The proposed answer is verified by the defendant Peterson, and it directly denies the existence of alleged facts essential to the cause of action of the plaintiff. We have no doubt that the order should be affirmed unless it must be held that the facts alleged in the affidavit of Mr. Shoemaker are wholly insufficient to show that the failure of the defendants to plead to the second amended complaint resulted from "mistake, inadvertence, surprise or excusable neglect" on the part of the attorneys for the defendants. But we think that those facts are legally sufficient, at least to establish that inadvertence and consequent excusable neglect contemplated by the provisions of section 473, Code of Civil Procedure, as a ground for such relief. It is true that Mr. Shoemaker, if he had been thoroughly careful at the time when he "waived notice," without having heard a statement of the judge limiting his time to answer, would have examined the minutes or would have made specific inquiry on that point. But inadvertently, yet in good faith, he omitted that examination or inquiry, and assumed that he would have the time provided by section 432, Code of Civil Procedure, without any limitation to a shorter time by order of court. At the very time when the default was taken, he was preparing his demurrer to the second amended complaint, and actually served and presented it for filing on the same afternoon when the default had been taken. There is nothing to indicate that the demurrer was not prepared in good faith for the purpose of presenting issues of law. It does not appear to have been filed for the purpose of causing delay. The court had reasonable ground for granting the motion to set aside the judgment and default.

The order is affirmed.

We concur: HOUSER, J.; CURTIS, J.

63 Cal. App. 149

AMERICAN SURETY CO. OF NEW YORK v. BANK OF ITALY. (Civ. 2596.)

(District Court of Appeal, Third District, California, July 23, 1923. Hearing Denied by Supreme Court Sept. 20, 1923.)

1. Banks and banking ⚡136—"Banker's lien" defined.

By the settled law and under Civ. Code, § 3054, a banker has a lien upon, and can appropriate any money or property in his possession belonging to a customer to the extinguishment of any matured debt of such customer to the bank, to the extent of the money or property so possessed if necessary, provided such property or money has not been charged, with the knowledge of the bank, with the subservience of a special burden or purpose, or does not constitute a trust fund of which the banker has notice.

2. Banks and banking ⚡153—"Deposit in bank held not a "special deposit."

Where a building contractor deposited money in a bank in an account headed "Ernest Green, Silva Garage," wherein he placed money received as pay for the construction of the garage named, such account was not a "special deposit," which is created when the whole contract between the depositor and the bank is that the thing deposited shall be safely kept and that identical thing returned to the depositor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Deposit.]

3. Banks and banking ⚡154(8) — Evidence held not to show agreement that building contractor's deposit was to be applied to claims of laborers and materialmen only.

In an action by the surety on a building contractor's bond to recover money deposited by the contractor in defendant bank in a particular account, and by defendant appropriated to a debt of the contractor to it, evidence held not to show an understanding between the bank and the contractor that the deposit was to be appropriated to the payment of laborers and materialmen only, so as to prevent its application to the contractor's debt to the bank.

4. Banks and banking ⚡153—Bank held not put on inquiry as to source of moneys deposited by building contractor in particular account.

Where a building contractor opened a particular account in defendant bank wherein he deposited money arising from payments on the contract, and which deposit was applied by the bank to the contractor's individual indebtedness to it, the bank was not put on inquiry as to the source from which the contractor obtained the moneys deposited, and that they were to be devoted to paying laborers and materialmen, the bank's duty being fulfilled if it handles moneys deposited according to the requirements of the depositor, or the conditions of the deposit which must be clear and unequivocal.

5. Banks and banking ⚡153—In absence of agreement or special instructions, money deposited in a specially designated account is part of the depositor's general account.

A depositor may establish an account in a bank under a special designation, or earmark as a particular account, and yet, in the absence of an agreement with, or instructions to, the bank that the account is a special deposit, or to be used for a specific purpose, the deposit is to be regarded as belonging to the general account of the depositor, and may be so treated by the bank.

6. Trusts ⚡30½(1)—No trust relation between building contractor and materialmen and laborers as to moneys received on contract price.

The relation between a building contractor and those he employs to assist in the construction of the building by furnishing materials or labor, is that of debtor and creditor and no trust relation exists as to moneys received by a contractor on the contract price of the building as between him and his materialmen, mechanics, and laborers.

7. Constitutional law ⚡83(3)—Embezzlement ⚡2—Statute as to use of money by building contractor held invalid as providing for imprisonment for debt.

Pen. Code, § 506, as amended by St. 1919, pp. 1090, 1091, making it embezzlement for certain enumerated persons to appropriate to any use or purpose moneys with which they are intrusted, and including contractors receiving their compensation and failing to pay laborers and materialmen for work performed or material furnished, is invalid as violating Const. art. 1, § 15, interdicting imprisonment for debt.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by the American Surety Company of New York against the Bank of Italy. Judgment for plaintiff, and defendant appeals. Reversed.

Louis Ferrari and Richard Fitzpatrick, both of San Francisco, for appellant.

Dennett & Zion, of Modesto, for respondent.

HART, J. This action was commenced by the plaintiff to recover from the defendant bank the sum of \$4,000, which had been deposited with and in said bank by one Ernest Green, and which, it is alleged, was deposited as a trust fund for a special purpose, and which, it is further alleged, was wrongfully, or without authority from said Green, appropriated by the defendant to the extinguishment of a personal indebtedness due it from Green. The plaintiff was given judgment in the sum of \$3,024.81, and from said judgment the defendant appeals. The defendant moved for a new trial and also moved that the judgment be vacated and in lieu thereof judgment upon the findings be entered in its favor. The first-mentioned motion was made upon the ground that the evi-

dence was insufficient to justify and support the findings, and the latter motion upon the ground that the conclusions of law "are erroneous, not consistent with, and not supported by, the findings." Both motions were denied.

The case was tried upon an agreed statement of facts, except as to the question whether the defendant had knowledge, at the time the money sued for was appropriated as above indicated, of the alleged "trust character" of said deposit, and as to this question oral testimony was taken. The court's findings of fact follow the facts as stipulated by the parties, there being added, however, a finding based upon the testimony of a witness as to the knowledge of the defendant as to the character of the deposit in dispute. The facts as agreed upon by the parties, and which, it was stipulated, might, as far as they go, stand as the findings of the court, are as follows:

"II. That on the 19th day of November, 1919, Ernest Green entered into a contract with C. M. Maze, W. C. Shackelford, and W. J. Silva for the construction of a certain garage known as Silva Garage in Modesto, Cal. The contract was in the usual form and contained the stipulations usual in building contracts.

"III. That at the said time the plaintiffs above named, the American Surety Company of New York, became the surety of Green for the faithful performance of said contract as alleged in the complaint of the plaintiff, and executed and delivered a bond and undertaking in the usual form for the payment of laborers, mechanics, materialmen, and for the faithful performance of the contract, a copy of which is attached to the complaint on file herein, which said bond and contract were duly filed in the office of the county recorder of the county of Stanislaus, in which county the property upon which the work was to be done is situated, within the time and in the manner required by law.

"IV. That at said time, Ernest Green had an account with the Bank of Italy, Modesto Branch, in the name of Ernest Green, and about the time of the execution of the contract, he opened a new and additional account with the Bank of Italy and received a book showing such deposits from the Bank of Italy, marked by the officials thereof, 'Bank of Italy, Modesto Branch, Modesto, Cal., in account with Ernest Green, Silva Garage.'

"V. That from the time of the entering into the contract aforesaid with C. M. Maze, W. C. Shackelford, and W. J. Silva, Ernest Green from time to time deposited in the Bank of Italy in said account marked 'Ernest Green, Silva Garage' certain money.

"VI. That said Green proceeded under said contract with the construction of said work until some time in February, 1920, at which time he was unable to proceed with the work. At said time upon the demand of the owners of the building, the said plaintiff above named, the American Surety Company, in accordance with the provisions in their said bond, paid to the owners of the said building, to wit, Maze, Shackelford, and Silva, the sum necessary for the payment of the demands of laborers and me-

chanics and materialmen and to complete the said building, which sum was in excess of \$14,000, and the plaintiff was legally liable under its bond as surety for the payment of said amount and was compelled to pay the same under the stipulations of said bond, and that it paid of said amount an amount in excess of \$5,000 to pay the claims already accrued of laborers, mechanics, and materialmen for work, labor, and materials actually furnished for and used in the construction of the said Silva Garage, which said amount was due on or became due before the 11th day of February, 1920, and was not paid on said day, but remained due and unpaid, and plaintiff paid in full all such claims for labor and material.

"VII. That on the 11th day of February, 1920, Ernest Green had on deposit with the Bank of Italy, Modesto Branch, in the account of Ernest Green, Silva Garage, the sum of \$3,024.81.

"VIII. That on the 11th day of February, 1920, the said Bank of Italy, Modesto Branch, without any order authorizing, or authority from Ernest Green or from the owners of said building, Maze, Shackelford, or Silva, or from this plaintiff, transferred from said account of Ernest Green, Silva Garage, the sum of \$3,024.81; that said transfer was made from the funds deposited by Green in said account of Ernest Green, Silva Garage, and while Green was indebted in a sum in excess of \$3,024.81 for work, labor, services, and material actually furnished to and used upon and in the construction of the said Silva Garage.

"IX. That said Ernest Green and the said Maze, Shackelford, and Silva have assigned to the plaintiff herein, and it has become subrogated to their rights and the rights of laborers and materialmen therein and to all of their rights to said money on deposit with the Bank of Italy in the account marked 'Ernest Green, Silva Garage,' and more particularly to the aforesaid \$3,024.81, and it is stipulated that, if the defendant is not entitled to obtain the money, plaintiff is entitled thereto with interest from February 11th, 1920.

"X. That Ernest Green, said Maze, Shackelford, and Silva, and the said plaintiff subsequent to the transfer of said \$3,024.81 demanded of the defendant that it return to the account of Ernest Green, Silva Garage, the aforesaid \$3,024.81, and that the bank has refused to return said money to said account or to pay the same to Green, the plaintiff herein, or Maze, Shackelford, and Silva, and claims that it is entitled to hold the said account and apply it upon the indebtedness owing to it by the said Green; that at the time of the said transfer of \$3,024.81, on February 11, 1920, Green was indebted to the Bank of Italy in a sum in excess of that amount. That on the 11th day of February, 1920, and for some time prior thereto, Ernest Green had five accounts in the Bank of Italy under the following names: (1) Ernest Green account. (2) Ernest Green, Milliken Bridge account. (3) Ernest Green, Kewin Garage account. (4) Ernest Green, Davis Garage account. (5) Ernest Green, account of son—I don't know the exact words, but it was his son's account, Mr. Dennett. Yes."

Lyle Green, son of Ernest Green, above referred to, testifying for the plaintiff, stated that he was his father's bookkeeper, and was

familiar with the contract for the construction of the Silva garage and other building contracts of his father; that there was, at the time of the making of said contract, an account in said bank marked "Ernest Green, Milliken Bridge account," said account having been so marked on the suggestion of a Mr. Davis, an officer of said bank; that, immediately upon the execution of the contract for the erection of the Silva garage, said Ernest Green opened an account in said bank and marked or designated the same as the "Ernest Green, Silva Garage," and at that time, from his personal funds, deposited in said account the sum of \$300; that, from time to time thereafter, as work on the Silva garage progressed and he received payments from the owners under the contract, said Ernest Green made deposits in the Silva garage account with the moneys so received. In connection with the examination of the witness, there was introduced in evidence a pass or deposit book which was issued by the defendant to Ernest Green, and upon which the following words were written: "Bank of Italy, in Account with Ernest Green—Silva Garage." This book showed that 12 deposits of money had been made in said account, which were made on as many different dates after the first deposit of \$300 made therein by said Green out of his private funds. All these deposits, so the witness Green testified, were entirely of moneys received by Ernest Green as payments under the Silva garage contract. The witness, on cross-examination, testified that, while the defendant, from time to time, loaned his father money to be, and which was, appropriated to the uses of other accounts he had in the bank, no money was ever borrowed from the bank by his father for the Silva garage account, nor was any of the money loaned or advanced by the bank to his father appropriated to the uses or purposes of said account.

There was also introduced in evidence a memorandum showing a check whereby the defendant, through its officers, transferred the sum of \$4,000 from the Silva Garage account to the Milliken Bridge account, said memorandum containing the statement that the latter account had been overdrawn to the extent of the sum of \$4,000. As to this, though, it should be stated counsel for plaintiff, in their brief, explain that, while said check called for a transfer of \$4,000, the sum actually in the Silva Garage account, at the time of said transfer, was the sum of \$3,024.81, which is the sum for which the plaintiff was awarded judgment. The above comprehends a statement of all the facts admitted and established at the trial and as found by the court.

The theory of the complaint, as well as that of the decision below and of the plaintiff on this appeal, is that the account in controversy involved or constituted a special

deposit or a trust fund, and upon this it is contended that the defendant, having (it is claimed) knowledge at the time said account was opened that such was its character, was not at liberty to charge the account with an overdraft of Green on another or a general account opened and maintained by the latter with and in the defendant bank, in the absence of authority so to do from said Green; that there is no evidence showing, or tending to show, that Green ever authorized, either expressly or by acts or conduct, the bank to use or disburse any moneys deposited in said account for any other purpose than that for which it was "specially" deposited, to wit, the payment of claims of materialmen and laborers arising under the Silva garage building contract. On the other hand, the defendant contends that the evidence affords no justification whatever for the conclusion that the account constituted, or was intended by the parties to constitute, either a special deposit, or a deposit for a special purpose, or, upon any view of the circumstances of the transaction, as involving a trust fund; that therefore it must be assumed and, indeed, presumed as a fact, that the deposit was made in the usual course of business; that it was general in character; that as to it, therefore, as is true of any general deposit in a bank, the relation of debtor and creditor was established and existed between the bank and the depositor, and that, consequently, the account was subject to the operation of a banker's lien, which is expressly created and authorized by section 3054 of the Civil Code.

[1] It is settled law, and, indeed, as above indicated, it is expressly so provided by the law of this state (Civ. Code, § 3054, *supra*), that a banker has a lien upon and so is vested with the right to appropriate any money or property in his possession belonging to a customer to the extinguishment of any matured indebtedness of such customer to the bank to the full extent of the money or property so possessed, if necessary, and so far as it may go toward such extinguishment, provided, of course, that such property or money so deposited has not been charged, with the knowledge of the bank, with the subservience of a special burden or purpose, or does not constitute a trust fund, of which the banker had notice.

"A banker's lien ordinarily attaches in favor of the bank upon the securities and funds of a customer deposited in the usual course of business, for advances supposed to have been made upon their credit, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or conduct inconsistent with its assertion." Footnotes to *Garrison v. Union Trust Co.*, 111 Am. St. Rep. 423, 424.

Of course, no such lien will prevail as against the equity of a beneficial owner of

which the bank has notice, either actual or constructive. *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693; *Bank of New South Wales v. Goulburn Valley Butter Factory*, 71 L. J. P. C. 112 [1002] App. Cas. 543; *Arnold v. San Ramon Valley Bank*, 184 Cal. 632, 635, 194 Pac. 1012, 13 A. L. R. 320; *Melander v. Western Nat. Bank*, 21 Cal. App. 462, 467, 132 Pac. 265, and cases therein cited.

The court below, however, in its conclusions of law found that the deposit constituted "a special deposit, but that, irrespective of the fact as to whether or not said deposit was a special deposit, the same was a trust fund, and earmarked under the instruction and with the knowledge and consent of the officials of the defendant bank with the trust character, and with knowledge that said money had been received from the Silva garage contract," etc. Much of the foregoing "conclusion of law" is a finding of fact, but this is of no consequence in the decision of this case.

[2] The account, it is clear, is not technically a special deposit, which is by all the text-writers, and the cases generally, said to be created when "the whole contract is that the thing deposited shall be safely kept, and that identical thing returned to the depositor." 1 *Morse on Banks and Banking*, § 183; *Magee on Banks and Banking*, p. 290. In such case, the bank becomes a bailee and holds the money or thing in trust for the depositor or the bailor. There is no evidence, nor, indeed, is it so claimed, that any such a contract was made by the defendant and Ernest Green. In fact, from the general theory of plaintiff's case, it is in effect conceded that the identical moneys deposited in said account were not to be returned to Green, but that they were to constitute an account upon which Green could draw his check in favor of materialmen, mechanics, and laborers furnishing materials and labor for the Silva garage, in satisfaction of their claims for such material and labor. But, as will be observed, the court found, as a matter of law, that irrespective of whether the account involved a "special deposit," said account constituted a "trust fund." The plaintiff advances two different theories upon either one or both of which, it contends, that conclusion is to be upheld, to wit: (1) That the evidence shows that the moneys were deposited with the defendant upon an agreement between the latter and Ernest Green, or under specific instructions by Green to the defendant, and subject to which instructions the latter received the deposit; that they were to be used for or appropriated to a special purpose, to wit, the payment of the claims of the materialmen, mechanics, and laborers, for materials furnished for, and used in, and labor performed on the Silva garage; (2) that the moneys received by Green on the contract price and deposited in said account con-

stituted, as a matter of law, a trust fund, which was to be held by him for the benefit of such materialmen, mechanics, and laborers, and that the defendant was charged with notice of the trust character of the moneys so deposited.

[3] Such an agreement as the plaintiff claims the evidence shows was made between Green and the bank as to the account in dispute, while creating in a sense a trust relation between the bank and Green as to said account, would, strictly, involve merely an agreement on the part of the bank to waive its right to appropriate the moneys deposited in the account as a set-off to any indebtedness of the depositor to it; that is, it would amount only to a waiver of its right of lien. But, be that as it may, no express agreement or understanding between the bank and Ernest Green that the moneys in question were to be used for or appropriated to the payment of the claims of such persons as furnished materials for use in the construction of the Silva garage and of mechanics and laborers who bestowed labor on said building is shown by the evidence. Nor is there any direct evidence that Green gave the bank instructions to the effect that the moneys deposited in said account were to be appropriated or applied to a special purpose. If, then, there was such agreement or direction to the bank by Green of the asserted special purpose of said account, it must be extracted from the circumstances under which the account was opened and made. And, as to this, we are not reluctant to express the opinion that the evidence does not reasonably or fairly warrant any such implication. The only circumstances shown by the evidence from which an agreement or understanding between the bank and Green, or that instructions were given by Green to the bank at the time the account was opened, that the moneys deposited therein were to be appropriated to and disbursed by the defendant in the payment of the claims of the materialmen, mechanics, and laborers furnishing materials and labor in the construction of the Silva garage are that the said account was earmarked "Ernest Green, Silva Garage," and that said Green kept in the defendant bank a separate account of his own, one for his son with himself, and one each for three other building contracts which, we infer from the evidence, were in course of execution at the time of the opening of the account in dispute. It is true that the court found that the account in question was marked or designated as indicated upon the suggestion of the officials of the defendant. But that finding derives no direct support from the evidence. There is testimony showing that the "Milliken Bridge" account was so designated on the suggestion of an officer of the defendant, but there is no testimony, nor does such fact appear in the statement of the stipulated facts, that the "earmarking" of the account

involved herein was suggested by any officer of the bank. But it is the circumstances mentioned which counsel for the plaintiff contend are sufficient, if not to show an agreement or understanding between the bank and Green that the account was opened for the purpose stated, to put the bank upon inquiry as to the source from which said Green obtained the moneys deposited in said account and so ascertain that said moneys were so deposited for the express purpose, so far as necessary or as they might do so, of satisfying the claims of those furnishing materials used in the construction of the Silva garage and performing labor thereon. The proposition is as untenable as it is novel, so far as the present consideration is concerned.

[4, 5] A banker is not required to go "snooping" about to learn from what source his depositors obtain the moneys which they deposit in his bank. His duties as a depository of moneys are fulfilled if he keeps and handles the moneys deposited with him according to the requirements of the depositor or the conditions upon which the deposit is made, and these requirements or conditions, if they impose something beyond his usual or ordinary obligations in the matter of the handling of deposits of money, must be brought home to him by instructions by the depositor or an agreement between him and the depositor so clear or so unambiguous and unequivocal as to leave no room for a reasonable doubt as to their meaning and scope. A depositor may establish an account in a bank under a special designation or earmarked as a particular account, and yet, in the absence of an agreement with or instructions to the banker that the account so earmarked is a special deposit or is to be used for a specific purpose, the moneys deposited therein are to be regarded as belonging to the general account of the depositor and may be so treated by the bank. In this case, unless, as is the contention here which is later to be considered herein, the moneys received by a building contractor as payments under a contract made in pursuance of the provisions of the mechanic's lien law constitute, as a matter of law, trust funds in the hands of the contractor, and so marked when deposited, there was no duty resting upon the defendant to prosecute an inquiry to determine from what source the moneys so deposited were derived by Ernest Green or what the character of the deposit was with respect to the legal or contractual relation of the depositor thereto. The "earmarking" of a bank deposit or giving to it a special or particular designation, even when the bank has, by the request of the depositor, entered in its deposit books the deposit as so earmarked or designated, can mean nothing, so far as the bank is concerned, in the absence of specific instructions to the bank by the depositor that the deposit is to be used for the special

purpose indicated by the "earmark" or designation. So far as the record here shows to the contrary, Ernest Green might have caused the several accounts opened by him in the defendant bank and given each a special and different earmark for his own convenience. Such a practice, as we know from common knowledge, is quite general among business men, particularly those engaged in the wholesale trade. For their own convenience they keep a separate account of the different commodities in which they deal. Thus they are the more readily able to learn whether there be profit or loss in the sale of any particular commodity. And so, probably, with building contractors having a number of different contracts for the construction of buildings concurrently in the course of execution. But the outstanding fact in this case is, as above explained, that there is no evidence in this record showing that there was any understanding between the bank and Green or any direction by the latter to the bank that the account in controversy was opened and the money therein deposited to be appropriated to a special purpose, and it follows that the said account, unless for other reasons it involves a trust fund, constitutes a general deposit of said Green, even though the defendant knew or had reason to believe that the funds so deposited were to be devoted to the payment of the claims of materialmen, mechanics, and laborers furnishing material for and performing labor on the Silva garage. *Cabrera v. Thannhauser*, 183 Cal. 604, 607, 192 Pac. 45; *McBride v. American Lighting Co.*, 60 Tex. Civ. App. 226, 127 S. W. 229. In the case last named it is said:

"When money or its equivalent is deposited in a bank without any special agreement, the law implies that it is to be mingled with the other funds of the bank, the relation of debtor and creditor is created between the bank and the depositor, and the deposit is general."

In *Tiffany on Banks and Banking*, p. 20, the rule as to deposits in banks is thus stated:

"Where * * * money is deposited for the purpose of paying the indebtedness of a third person, if no contrary instructions are given, it is customary to mingle the money with the funds of the bank, and upon principle it seems that the bank is to be regarded as the debtor of the depositor. In this view neither the depositor nor the beneficiary under the agreement is entitled to any preference over other creditors if the bank fails to apply the funds according to the agreement."

See, also, *People v. Calif. Safe Deposit & Trust Co.*, 23 Cal. App. 199, 137 Pac. 1111, 1115; *Plumas County Bank v. Rideout, Smith & Co.*, 165 Cal. 126, 138, 131 Pac. 360, 47 L. R. A. (N. S.) 552; *Newmark Grain Co. v. Merchants' Nat. Bank*, 166 Cal. 203, 135 Pac. 958.

2. We come now to the consideration of the theory that the moneys received by Ernest Green on the contract price of the Silva garage constituted trust funds in the hands of said Green and by him held for the benefit and use, pro tanto, or so much thereof as might be found necessary to satisfy their claims, or those furnishing the materials used in and the labor required to construct the garage.

[6] It certainly cannot be considered that a trust relation, as to the moneys received by a contractor on the contract price of a building, between such contractor and his materialmen, mechanics, and laborers, can be worked out of the mechanic's lien law itself. Manifestly this cannot be done, since the relation between a building contractor and those he employs to assist, and who do assist, in the construction of a building by furnishing materials therefor and performing labor thereon, is only that of debtor and creditor. This is even true where the building contract is made in pursuance of the provisions of the mechanic's lien law. Such a contract, in and of itself, is, in its general legal characteristics, the same as any ordinary agreement between two or more parties to do or not to do a particular act or thing. It is taken out of the class of ordinary contracts only because the Constitution has guaranteed to persons furnishing materials for and performing labor upon a building under it a special remedy, inapplicable to other kinds of contracts, for the satisfaction of their claims for such materials and labor. The statutory provisions relative to mechanics' and laborers' liens are merely intended for the effectual enforcement of the remedy so given, and the constitutional guaranty of such remedy and the Code provisions designed for its proper enforcement have not had, nor were they intended to have, the effect of changing the legal relation between a building contractor and those whose materials and labor the former employs in furthering the construction of the building from that of debtor and creditor. The mechanic's lien law itself affords ample protection to the rights not only of persons furnishing materials to be used and used in and those performing labor upon the building, but also to the rights of the owner of the structure, and all this without impairing or in any manner jeopardizing the just rights of the contractor. With the safeguards thus thrown around and protecting the rights of all the interested parties in a building contract by the mechanic's lien law, there was no necessity for injecting into such contracts the elements of a trust relation between any such parties, and it is certain that such was not the intention of the Legislature.

[7] Counsel for the plaintiff, however, seem to suppose or assume that by the provisions of section 506 of the Penal Code, as said section was amended in 1919 (Stats.

1919, pp. 1090, 1091), a trust relation, as to payments to a building contractor on the contract price of the structure, is established between such contractor and materialmen, mechanics, and laborers contributing with their materials and labor to the construction of the building. That section, prior to its purported amendment, provided that it is the crime of embezzlement for certain persons enumerated therein to appropriate to any use or purpose not in the due and lawful execution of their trust any moneys or property with which they are intrusted. Included in the list of such persons, as the section read prior to the attempt to amend it in the year 1919, is "any contractor who appropriates money paid to him for any use or purpose, other than that for which he received it." The amendment of 1919 added the following provision:

"And the payment of laborers and materialmen for work performed or material furnished in the performance of any contract is hereby declared to be the use and purpose to which the contract price of such contract, or any part thereof, received by the contractor shall be applied."

Undoubtedly, if this amendment were valid or infringed no right or immunity guaranteed to every person within this state by the Constitution of California, the account in question, having been made by moneys received by Ernest Green on the contract price of the Silva garage, would constitute a trust fund, or a fund held in trust by said Green for the benefit, at least pro tanto, or for so much as their claims amounted or might amount to, of materialmen, mechanics, and laborers furnishing materials for use, and labor performed in the construction of said garage. And in such case the defendant would be charged with notice, or at least by the earmarking of the account as "Ernest Green, Silva Garage," put upon notice of the trust character of the moneys deposited therein. But, unfortunately for the plaintiff, so far as this case is concerned, but, as may pertinently be added, fortunately for building contractors that thus they are guaranteed immunity from the menace or peril of a prison sentence from the inception of every building contract into which they enter until its completion, section 506, as amended in 1919, has been declared to be violative of article I, section 15, of our state Constitution, interdicting imprisonment for debt. *People v. Holder*, 53 Cal. App. 45, 199 Pac. 832, opinion by Finlayson, P. J. The opinion in that case and the conclusion therein arrived at were approved by the Supreme Court by its denial of a petition to hear the case after judgment in the District Court of Appeal. In that opinion it is made very plain that the obvious object or purpose of the above-mentioned provision of the Constitution of this state, whose language is, *inter alia*, that "no person shall be imprisoned for

debt in any civil action, * * * unless in cases of fraud," cannot be circumvented or in any wise rendered abortive by an act of the Legislature making the act of failing to pay a debt a public offense, where fraud does not enter as an element into such act.

Counsel ask this court, if a reversal of the judgment herein be ordered, to order the court below to enter judgment upon its findings and the agreed statement of facts for and in favor of the defendant. This, we think, we should not do. Upon a retrial a different state of facts might be shown upon the question of notice to the bank or of an agreement between the latter and Ernest Green that the account in question was opened for the use and benefit of a special purpose.

However, for the reasons hereinabove considered and expressed, the judgment is reversed.

We concur: FINCH, P. J.; BURNETT, J.

63 Cal. App. 308

KUGLER v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 4270.)

(District Court of Appeal, Second District, Division 1, California. July 30, 1920. Hearing Denied by Supreme Court Sept. 27, 1923.)

Insurance §375(2)—Requirement as to indorsements on policy held not waived by statements of unauthorized employees.

Under workmen's compensation policy, covering specified locations and providing against waiver or alteration, except by indorsement, signed by manager, and countersigned by duly authorized representative, provision for indorsement of additional locations was not waived by statement of insurer's employee, when policy was issued, that it would only be necessary for insured to telephone additional locations, and statement of the same or another employee, in response to telephonic communication, that everything would be O. K., where authority of such employees was not shown.

Proceeding under the Workmen's Compensation Act (St. 1917, p. 831) by Frank Berko, opposed by Joe Kugler, doing business as the Broadway Window Cleaning Company, employer, and the State Compensation Insurance Fund, insurer. Compensation was awarded against the employer, and he brings certiorari. Affirmed.

Paul Blackwood, of Los Angeles, for petitioner.

A. E. Graupner, Warren H. Pillsbury, and Frank J. Creede, all of San Francisco, B. E. Pemberton and W. J. O'Connor, of San Francisco, for respondents.

HOUSER, J. This is a certiorari proceeding brought to this court for the purpose

of reviewing an order of award made by the Industrial Accident Commission in connection with a policy of insurance issued by the State Compensation Insurance Fund. On April 6, 1922, the Fund issued its policy of insurance to petitioner Joe Kugler, doing business as the Broadway Window Cleaning Company, insuring him against all loss or liability to his employees by reason of injuries received by them, or from death resulting from such injuries, sustained while such employees were engaged in the course of their employment with the insured. The policy specified the particular places at which the employees of petitioner might perform their work, but also contained a further provision to the effect that, under certain conditions, other such places might be added thereto—the language thereof being as follows:

"Anything in this policy to the contrary notwithstanding, it is understood and agreed that this policy shall not extend to or cover injuries or death sustained by any employees other than those engaged in connection with work at the following locations, but additional locations may be added by indorsement to the policy when description of such additional locations are furnished to the Fund by Broadway Window Cleaning Company (an individual). Insurance covering work in connection with such additional locations will be effective only when, and from the date notice is accepted in writing by the Fund. * * * Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements, or limitations of this policy, other than as above stated."

The policy also contained the following standard provision:

"No condition or provision of this policy shall be waived or altered, except by indorsement attached hereto signed by the manager and countersigned by a duly authorized representative of the Fund; nor shall notice to any representative, nor shall knowledge possessed by any representative, or by any other person, be held to effect a waiver or change in any part of this policy."

On September 11, 1922, one of the employees of petitioner was injured while working at a location neither specified in the original policy nor later accepted in writing by the Fund, nor added to the policy by any indorsement thereto. At the hearing of the matter before the Industrial Accident Commission the evidence tended to show that at the time the policy was procured in the office of the Fund, in reply to an inquiry made by petitioner as to the necessary procedure to properly cover petitioner by insurance as to any locations to be added to the policy, it was stated in effect that all that was necessary was for petitioner to telephone the new location to the office of the fund, and thereupon the coverage would im-

mediately ensue. The testimony of petitioner on that point was as follows:

"They told me when I took the policy out that the minute I got a job, I should call up and it is covered right away immediately as soon as I called them up."

And again:

"When I took out the policy I asked them. I took the policy out from a young lady and she told me that is all that is necessary, to call up the State Compensation, and they would take care of it."

It further appears from the evidence that in the latter part of the month of June or early in the month of July, 1922, an employee in the office of petitioner telephoned to some one in the office of the Fund regarding a new location (and being the place at which petitioner's employee received the injury), for the purpose of having such new location added to petitioner's policy of insurance—the testimony being as follows:

"Q. When you called the Fund that day did you have any difficulty in getting the right person right away? A. No; there was not any difficulty that I recall; a lady's voice answered and took the notation, and said everything would be O. K."

In substance it was also shown by the evidence that the place where the accident occurred was not at a private residence, but that it was at a business building and came under the restriction quoted in the policy; that the Fund never made acceptance in writing of the new location, nor was any such acceptance ever received by the petitioner. Neither was any indorsement of such new location, signed by the manager and countersigned by a duly authorized representative of the Fund, or by either of them, ever attached to the policy. There was testimony to the effect that other new locations had been telephoned to the Fund, upon some of which there had been written acceptance, followed by properly authenticated indorsements to be attached to the policy. There was also testimony to the effect that the amount to be paid as premium on the policy depended upon the pay roll of petitioner, and that petitioner paid the premium upon his policy in accordance therewith. But there was no evidence tending to show that any premium was ever paid on account of a pay roll covering the location where the accident occurred. No direct evidence was introduced by the Fund refuting any of the testimony of petitioner or his witnesses, and the effect of such evidence stands uncontroverted, excepting as to certain claimed deductions, inferences, and presumptions—as to which, in view of the conclusion reached by this court regarding other issues herein, it is not deemed of vital importance that they be thoroughly considered.

The Industrial Accident Commission

reached the conclusion that, as far as the new location was concerned, the Fund was not an insurance carrier for petitioner, and thereupon made its award against petitioner and in favor of the injured employee in a fixed sum as liability for accrued damages, and in an additional sum as a weekly liability thereafter until the termination of the disability of the employee, or until further order of the Commission. The principal question here to be determined is that of the alleged waiver by the Fund (as a part of its insurance contract) of the written acceptance of the new location and the indorsement upon the policy of such waiver or alteration, signed by the manager and countersigned by a duly authorized representative of the Fund.

That in certain circumstances an insurance company may waive any of the provisions contained within its contract of insurance is not doubted. It is contended in this case that there was a waiver as to the clause that "insurance covering work in connection with such additional locations will be effective only when, and from the date notice is accepted in writing by the Fund," and the cases of *Carroll v. Girard Fire Insurance Co.*, 72 Cal. 300, 13 Pac. 863, and *Mackintosh v. Agricultural Fire Insurance Co.*, 150 Cal. 447, 89 Pac. 102, 119 Am. St. Rep. 234, are cited as authority. In the case first cited the contract required the assured, in case of loss, to forthwith give notice thereof to the insurer and to produce a certificate of preliminary proof from a notary—neither of which acts was performed. The insurer, however, joined with the insured in arbitration proceedings which, under the terms of the policy, were to be commenced after proof of loss had been received. It was held that such conduct on the part of the insurance company constituted a waiver, notwithstanding the fact that the policy also contained a provision to the effect that no condition of the policy should be waived except by written indorsement by the president or the secretary of the insurer. In the second case it was held that a failure of the general agents of the insurance company to accurately describe the property on an indorsement slip attached to the policy was the fault of the company and that it should be estopped from taking advantage of the defect; also that general agents have power to orally waive conditions in the policy, notwithstanding stipulations in the contract of insurance requiring waivers to be in writing and indorsed upon the policy.

It will be remembered that the contract here requires that any added locations must be first acknowledged in writing, to be followed by an indorsement on the policy signed by the manager and countersigned by a duly authorized representative of the Fund. The evidence is not that at the time the policy

was issued either the manager or any other duly authorized representative made or attempted to make any waiver of any provisions of the policy, or indeed that either of such persons either said or did anything in that connection. The only testimony in that regard is:

That "they told me when I took the policy out that the minute I got a job I should call up, and it is covered right away immediately as soon as I called them up"; also, "when I took out the policy I asked them; I took the policy out from a young lady and she told me that is all that is necessary, to call up the State Compensation, and they would take care of it."

No evidence was adduced from which it might be determined what authority, if any, the young lady possessed to make any such statement. Certainly there was none to show that she was either the manager or any duly authorized representative of the Fund. With respect to the telephonic communication regarding the new location, the evidence is also singularly lacking—the evidence being that "a lady's voice answered and took the notation and said everything would be O. K." The lady was not even identified as being connected in any way with the office of the Fund, much less as being the manager or a duly authorized representative thereof. Neither is it claimed that any authorized agent of the company was ever notified of any of the facts going to make up the alleged waiver, or that such officer had any independent knowledge thereof.

Such cases as *Sharman v. Continental Insurance Co.*, 167 Cal. 117, 138 Pac. 708, 52 L. R. A. (N. S.) 670, *Belden v. Union Central Life Insurance Co.*, 167 Cal. 740, 141 Pac. 370, and *Madsen v. Maryland Casualty Co.*, 168 Cal. 204, 142 Pac. 51, are authority for the rule that in circumstances such as are disclosed by the evidence in this case no waiver results. In the *Sharman* Case the policy was subject to the condition that it was void if the stipulation therein contained, that the insured was the sole and unconditional owner of the property, was untrue, and the contract further provided that "no officer, agent, or other representative of this company shall have power to waive any provision or condition in this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added thereto," and as to such provisions or conditions such officer, agent, or representative should not be deemed to have waived them unless such waiver was written upon or attached to the policy. The soliciting agent for the insurance company who procured the policy to be issued to the insured had drafted an agreement between the insured and a third person by which the insured had agreed to sell on the installment plan the property covered by the policy. The agent had also prepared

the written application of the insured for the insurance which contained a statement that the insured was the sole and unconditional owner of the property, and the agent had assured him that it was proper and correct for him to sign such a statement. In considering the case the court said, in part:

"But the authority of an agent to effect the waiver in the face of such a limitation as here is not vested in every agent who may represent the company. Unless such authority be given to some particular agent to do so, then, as a general rule, it is only agents of the company who are empowered to issue and deliver policies who may be regarded as having the power to waive conditions and forfeitures. * * * But Wade [the agent] was merely a soliciting agent of the defendant. He had no authority, actual or ostensible, to waive conditions in the policy. This was not within the scope of any apparent authority he possessed, and his knowledge of the true condition of the title of plaintiff, not communicated to the general agent of the company, was not the knowledge of the latter. * * * He had no authority to consummate the contract of insurance and issue the policy, and it is only an agent of this character who could waive conditions, notwithstanding the apparent limitations of the power of all agents to waive the conditions or stipulations of a policy. * * * [Citing cases.]"

The same principles are upheld in the *Madsen* Case, 168 Cal. 204, 142 Pac. 51. In the *Belden* Case, a general agent of an insurance company attempted to waive forfeitures and to reinstate lapsed policies of life insurance. The policy contained a provision to the effect that such an act could be performed only by an agreement in writing signed by certain officers of the company whose powers in that regard could not be delegated, and it was held that such a limitation in the contract on the power of the general agent was binding upon the assured.

While the law appears to be well settled that in the instant case the manager of the Fund might have orally waived the condition of the policy which required that additional locations would become effective only after notice thereof had been accepted in writing and an indorsement of such locations, signed by the manager, etc., had been attached to the policy, there is no evidence of the fact that he either personally did so or that he ever had any knowledge that any other person had attempted to do so for him. The contract of insurance here specially limits the liability of the Fund to certain locations and to such other locations as it may thereafter accept in writing and subsequently thereto indorse upon the contract. That some unauthorized person in the office of the Fund assumed to alter the terms of the contract, either in the manner of acceptance of new locations or otherwise, while unfortunate in its result upon petitioner, cannot affect the terms of the contract as between the parties thereto. The insurance contract in that regard

does not differ from any ordinary contract between individuals. It cannot have new terms inserted therein, nor original terms altered or withdrawn, save with the consent of the contracting parties or their duly authorized agents acting within the scope of their authority. The "young lady" in this case was not, so far as the evidence shows, duly or at all authorized to state to petitioner that the notice by telephone of a new location, without written acceptance by the Fund thereof, would be a sufficient compliance with the terms of the policy with respect to new locations, nor could there be any waiver of the condition in the contract to which reference has been made by any person other than the manager countersigned by a duly authorized representative of the Fund.

The award against the petitioner is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

63 Cal. App. 218

HOUGHTON et al. v. LAWTON et al.
(Civ. 4527.)

(District Court of Appeal, First District, Division 1, California. July 26, 1923.)

1. Contracts — 247—Proof of oral agreement modifying written contract must be clear and convincing.

Under Civ. Code, § 1698, providing that contract in writing may be altered only by contract in writing, or by executed oral agreement, proof of the oral agreement and of its execution must be clear and convincing.

2. Damages — 22—Conjectural and speculative damages properly excluded.

Testimony as to damages from breach of contract, conjectural and speculative in character, was properly excluded.

3. Appeal and error — 1011(1)—Findings on conflicting evidence not disturbed.

Where plaintiff's books, showing transactions with defendant, were in evidence, and accountants testified with regard thereto, and there was ample opportunity to examine the accounts, finding on conflicting evidence against defendant's contention that there were errors in the account will not be disturbed.

4. Trial — 68(1)—Refusal to reopen case not abuse of discretion, in absence of excuse for failure to produce evidence at trial.

Refusal to reopen action after close of the trial, for purpose of admitting additional evidence, is not abuse of discretion, when there is no showing of any excuse for not having produced the evidence at the trial.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Shirley Houghton and another against Oswald G. Lawton and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Haven, Athearn, Chandler & Farmer, of San Francisco, for appellants.

Aitken, Glensor, Clewe & Van Dine and Courtney L. Moore, all of San Francisco, for respondents.

ST. SURE, J. Defendants appeal from a judgment in favor of plaintiffs in the sum of \$2,805.16. The controversy arises out of a claim of the plaintiffs that there are certain moneys due them under the terms of an agreement dated January 1, 1915. The complaint consists of three causes of action, viz.: (1) Upon an account; (2) upon an open book account; and (3) upon an account stated. The answer admits the making of the contract, but denies the indebtedness, and sets up a counterclaim.

The counterclaim alleges that on or about December 1, 1915, the parties modified that portion of the written contract providing for a 50 per cent. participation in profits and losses, by allowing the plaintiffs to contract independently thereof for the construction and repair of the Reliance Building, and that, in consideration of the waiver by the plaintiffs of their rights to participate equally in the profits and losses thereof, the plaintiffs agreed that they would pay defendants 3½ per cent. of the cost of the reconstruction and repair of said building, and that the actual cost of the same was \$70,000, and that 3½ per cent. of \$70,000 is \$2,450, which defendants are entitled to receive, and that because of this modification of the contract they are not in any manner liable for the losses on this job.

It is further alleged in the counterclaim that prior to August 1, 1916, the parties, acting under the contract of January 1, 1915, undertook the construction of a church building; that prior to August 1, 1916, defendants had superintended the work of constructing the church building in accordance with the terms of the original agreement, and had in all respects complied with the contract and were ready and willing to carry out the contract and superintend and complete the construction of the church building, but were prevented from so doing by the plaintiffs, and were ousted from said work and prevented from carrying on same to completion; that thereupon plaintiffs assumed the responsibility for the further conduct of the work, and carried on the same in a careless and negligent manner, whereas, if the defendants had been allowed to continue the work, they would have made a profit of \$3,500 under said contract; that there was a profit of only \$1,450 on said work; and

that thereby the defendants lost the sum of \$1,025.

The counterclaim further alleges that, in accordance with the provisions of the agreement of January 1, 1915, and between the 1st day of January, 1915, and the 30th day of December, 1916, the plaintiffs advanced to the defendants the costs and expenses of maintaining an office, to wit, the sum of \$5,369.81; that by reason of the services performed by these defendants in the supervising and management and construction of divers buildings the plaintiffs received for the benefit of the defendants the sum of \$8,188.98; and that there is now due and owing to these defendants, on account of the services rendered under said contract and the modification thereof, as hereinbefore set forth, and by reason of the plaintiffs having ousted the defendants from the supervision of said church as hereinabove set forth, the sum of \$2,819.17.

After issue joined, and trial, the court found that the parties entered into the agreement, referred to herein as the agreement of January 1, 1915, or the original agreement; that during the time that said agreement was in force defendants did not pay all the costs and expenses in maintaining an office, nor all costs and expenses incurred or arising in estimating and bidding on all work undertaken under the agreement, nor did defendants bear 50 per cent. of the losses suffered on all work undertaken under the agreement; that, on the contrary, plaintiffs paid out certain sums for costs and expenses of maintaining an office and of bidding and estimating on work; that plaintiffs have also borne certain losses in full on work undertaken under said agreement, and that the sum so paid out and 50 per cent. of the losses so borne by plaintiffs is the sum of \$7,519.14; that defendants are entitled to various credits against plaintiffs, amounting to the sum of \$4,713.98.

The court further found that it is untrue that between January 1, 1915, and December 30, 1916, the plaintiffs, in accordance with the terms of the agreement, advanced to the defendants the sum of \$5,369.81, and no more, but in this connection the court found that the plaintiffs advanced to the defendants the sum of \$7,519.14 in accordance with the terms of said agreement; that the defendants did not repay to the plaintiffs the sum of \$7,519.14, or any other sum whatsoever in excess of \$4,713.98; that plaintiffs are not indebted to the defendants in the sum of \$2,819.17, or any other sum whatsoever, but in this connection the court finds that the defendants are indebted to plaintiffs in the sum of \$2,805.16. The court further found in favor of plaintiffs upon the first and second causes of action stated in their complaint, and against them on the third. It further found against defendants upon their claim that the original agreement had been modified, and also

against them upon their claim of the losses due to them of \$1,025 on the construction of the church building.

Defendants' first contention is that there was a special agreement made by the parties with regard to the Reliance Building repairs, which reduced plaintiffs' claim by the sum of \$2,698.64. This so-called "special agreement" is mentioned in defendants' counterclaim as an amendment, change, and modification of the agreement between the parties, dated January 1, 1915. The record shows that the following occurred during the course of the trial:

"The Court: You had better proceed with the defense then. If you claim a modification of the agreement, it is up to you to prove it, I presume. Have you pleaded a modification?"

"Mr. Athearn: Yes."

"The Court: * * * Will you stipulate that we may take under advisement the broader question whether or not there was a special contract touching the Heeseman [Reliance] job; and, second, whether there was an account stated between Mr. Lawton and Mr. Raymond, and when the court has come to some conclusion on those matters, I will send for you and Mr. Athearn, and we will arrange what, if anything, further should be done."

"Mr. Moore: That is very satisfactory."

"Mr. Athearn: We so stipulate."

"The defendants then proceeded to introduce evidence to sustain their affirmative defense of a modification of the written agreement. * * *

"Thereupon, pursuant to the prior stipulation, the following two issues were submitted to the court for decision:

"(1) Was there a modification of the agreement of January 1, 1915, as to the Heeseman [Reliance] job?"

"(2) Had an account been stated between the parties?"

"On February 23, 1921, the following order appears in the minutes of the court: 'It is ordered and adjudged that there was no modification of the contract herein, and that there was no account stated.'"

"On March 31, 1921, the following proceedings were had:

"Mr. Haven: I understand your honor did not file an opinion on the preliminary ruling that you made."

"The Court: No, sir."

"Mr. Haven: I would like to know for my own information the basis for the decision with regard to the Reliance Building."

"The Court: Simply a question of the preponderance of the evidence; it is purely a question of fact. I thought that your defense here in regard to a change or modification of the contract was not supported by a preponderance of evidence, and I thought their contention concerning the account stated was not supported by a preponderance of evidence. There was not sufficient convincing force to the testimony which was adduced in support of either one of the propositions which would justify me in giving a judgment. That is the whole thing in a nutshell; it is purely a question of fact, a question of the weight of evidence. I don't know that I can say any more about it to you."

"Mr. Haven: That is sufficient."

"The Court: I have intimated I do not really

feel that this defense that Mr. Lawton made here in regard to the modification of the contract was supported by a preponderance of the evidence. The burden was upon you to do that."

[1] It is thus plainly seen that the case was tried in the lower court upon the theory that there was a modification of the original agreement with reference to the repair of the Reliance Building. Section 1698 of the Civil Code provides that "a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Defendants make no claim that there was a subsequent written agreement, but predicate their case on the claim of an executed oral agreement. Before courts will set aside solemn binding written contracts and substitute therefor oral agreements, proof of the latter as to every element thereof, as well as execution, must be clear and convincing. We have read and considered the entire record, and from such reading and consideration we are of the opinion that the evidence does not sustain the contention of defendants that there was an executed oral agreement. On the contrary, we believe that the evidence supports the finding of the trial court in the premises.

Disagreements between the parties occasioned defendants to notify the plaintiffs of the termination and cancellation of the agreement under which they were working. The dispute, evidenced by correspondence between the parties, had particular bearing upon the church job. Defendant Lawton testified as follows:

"With regard to the Second Church of Christ job, which I will refer to as the church job, Lawton & Vezey carried on the construction of at least 90 per cent. of this job under the terms of the agency agreement, and when the job was within 10 per cent. of being finished we were ousted from the job by the Van Sant-Houghton Company."

The evidence shows that the profit on the church job was \$1,450, for which defendants were given credit for one-half, or \$725. Defendants urge that they offered to prove that the profits on the church job were greatly reduced by reason of defendants' wrongful dismissal, by showing that plaintiffs and defendants had estimated the profits on the job just prior to the time when defendants were called off by plaintiffs, and that at that time the defendants had kept within the estimates on the building, which evidence the court refused to admit.

[2] The record shows that no competent evidence was offered of "estimated profits on the job"; that the trial court did not refuse to admit evidence of damages occasioned by defendants' dismissal, but what the court did was to rule, and quite properly, that offered testimony as to damages, conjectural

and speculative in character, was inadmissible.

[3] With reference to errors in plaintiffs' account, complained of by defendants, the record shows that there was in evidence all of plaintiffs' books showing accounts of transactions had between the parties. Accountants testified explaining the accounts and the system of accounting. Witnesses testified concerning the transaction between the respective parties. Ample opportunity was had by the parties to examine the accounts. Upon these matters, involving questions of fact, there was a conflict of evidence, and under such circumstances we may not disturb the finding of the trial court.

[4] Defendants attack as error the refusal of the court to permit them to offer further evidence upon issues which had been theretofore determined by the trial court and hereinabove adverted to. The offer was to "prove by Mr. Lawton that, subsequent to the matter being submitted to your honor, he first discovered his diary for the year 1916; that that diary contained," etc. The court, in sustaining an objection to the testimony offered, observed that it was self-serving and came at a belated hour.

The action of the trial court in refusing to reopen an action after the close of the trial, for the purpose of allowing the introduction of additional evidence, is not an abuse of discretion, where there is no showing of any excuse for not having produced the evidence at the trial. Consolidated National Bank v. Pacific Coast S. S. Co., 95 Cal. 1, 30 Pac. 96. 29 Am. St. Rep. 85.

The judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

63 Cal. App. 194

LYON v. FAIRWEATHER et al. (Civ. 4554.)

(District Court of Appeal, First District, Division 2, California. July 25, 1923.)

1. Libel and slander  19—Finding that newspaper account of perjury prosecution, with comments thereon, not a true and fair report, held warranted.

Where a newspaper article, after giving a fair and true report of a prosecution for perjury in making a false affidavit attacking certain persons, was followed by comment to the effect that accused was more sinned against than sinning, and that he had been made use of by others, but that good might come out of the vicious attacks on respectable people "by an element that has for years made such a course a political and business weapon," leaving it to be inferred that plaintiff, who had been previously named as securing the affidavit, was one of the persons referred to, a finding that the article was not a true and fair report, and therefore not privileged, under Civ. Code, § 47, subd. 4, was warranted.

2. Libel and slander ⚡19—**Alleged libelous article must be read and construed as whole.**

To determine whether an article is libelous, it must be read and construed as a whole.

3. Appeal and error ⚡996—**Appellate court cannot substitute its inference from facts for trial court's finding.**

The power to draw inferences from facts is for the jury or for the trial court sitting without a jury, and the appellate court cannot substitute its inference for that of the trial court.

4. Libel and slander ⚡123(1, 8)—**When language unambiguous, question of privilege for court; when ambiguous, for jury.**

In an action for libel, the question of the meaning of language used is in the first instance for the court, and if such meaning is not ambiguous it is the duty of the court to decide whether it was privileged, but if the language is ambiguous the proper practice is to submit the question of its meaning to the jury.

5. Libel and slander ⚡42(1)—**Comments on judicial proceedings, or facts outside record, not privileged.**

Civ. Code, § 47, subd. 4, providing that a fair and true report of judicial proceedings without malice in a public journal is a privileged publication, does not include publication of facts outside the record or comments by the writer.

6. Libel and slander ⚡121(1)—**\$750 verdict for libel held not excessive.**

In an action against a newspaper for libel from which it could be inferred that plaintiff was guilty of suborning perjury, a verdict of \$750 held not excessive as showing passion or prejudice of the court.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by O. D. Lyon against J. H. Fairweather and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Harris & Hayhurst, of Fresno, for appellants.

Mark H. Edwards, of Reedley, and Andrew R. Schottky, of San Francisco, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover damages for an alleged libel. The defendants answered, and a trial was had in the lower court, the judge thereof sitting without a jury. The plaintiff was awarded damages in the sum of \$750, and from the judgment the defendants have appealed.

In his complaint the plaintiff alleged that the defendants published an article in their newspaper, the Reedley Exponent, an article of and concerning the plaintiff, which the plaintiff alleged to be libelous. In their answer the defendants denied certain of the allegations of the plaintiff's complaint and pleaded affirmatively that the article in question was a fair and truthful report of

a judicial proceeding. The trial court made findings that the defendants were not guilty of malice in fact, but otherwise the findings were in favor of the plaintiff.

[1] Some time prior to the month of October 1919, the Reedley Telephone Company had made application to the railroad commission for an increase of its rates. A hearing on that application was about to be had and those persons who were opposed to the granting of the application were desiring to obtain a continuance. In their showing for that purpose they obtained the affidavit of Robert Chance. Afterwards a charge of perjury was presented against Chance. A preliminary examination was had on the charge, and thereafter the article in question was published in the "Reedley Exponent." As stated above, the defendants contended in the trial below, and now contend, that the publication was a fair and true report without malice, in a public journal, of a judicial proceeding, and that it is privileged. Civ. Code, § 47, subd. 4. The article is quite long, and there is no necessity of setting it forth in extenso. The appellants in their brief commence with the first line of the article and proceed to the end, arguing as they go that each particular statement is an accurate report of the judicial proceeding, that is, the preliminary examination. The respondent takes the same course and argues that it is not a fair report. At this point we pause to remark that the whole of the article down to the fourth paragraph from the end seems to be a fair and true report of the judicial proceeding as the defendants claim for it. The general tenor of the first part of the article is to the effect that Chance had formerly worked for the Reedley Telephone Company, and also for the Reedley Electrical Company; that for the purpose of making the showing before the railroad commission, the plaintiff and others sought to get an affidavit from Chance; that Chance at that time was residing at a distant point, and when he heard that he was wanted he went to Reedley, and upon arriving there he was met by the plaintiff and others, who greeted him as a long-lost friend; that an affidavit was prepared; that the affiant did not read the affidavit, but executed the same; that the affidavit was false, and in short was an act of perjury. The article then continues with these closing paragraphs:

"As one listened to the story of Chance there came upon them a feeling that he had been sinned against more than he had sinned and that he had been made use of by others.

"In this case, however, they misjudged the character of the man they intended to injure, with the result that the injury to character and integrity is not upon the man who Chance was influenced to attack but upon the plotters themselves.

"Good may come out of the vicious attack upon Terkel, however, for it will probably stop some of the vicious attacks upon respectable people of Reedley by an element that has for years made such a course a political and business weapon.

"In court to-day Chance practically repeated the story told to Deputy District Attorney Hayes."

[2, 3] In the paragraphs which we have quoted it will be noted that the plaintiff is not named, but the entire article, of course, is to be read as one written instrument, or considered as one transaction and construed accordingly. 25 Cyc. 501; *Bradley v. Gardner*, 10 Cal. 371; *Newby v. Times-Mirror Co.*, 46 Cal. App. 110, 188 Pac. 1008, 1015. Although the plaintiff is not named in any one of the last four paragraphs, it is patent, if one reads the entire article, that a reasonable person might reasonably draw the inference that, among others, the plaintiff was included as one of the persons referred to in the article. The power to draw inferences from the facts rested with the jury, or in this case, with the trial court sitting without a jury. Under these circumstances this court has no power to substitute its inference for the inference drawn by the trial court.

[4] In the third paragraph quoted the article stated:

"Good may come out of the vicious attack upon Terkel, however, for it will probably stop some of the vicious attacks upon respectable people of Reedley that has for years made such a course a political and business weapon."

The intent of expression "such a course" is ambiguous. The article is susceptible of being construed "such a course of suborning perjury, a political and business weapon," or of being construed "such a course of vicious attacks, a political and business weapon." The question of the meaning of the language of the publication was in the first instance for the court. If such a meaning was not ambiguous, then it was the duty of the court to decide whether it was privileged. If the meaning was ambiguous, the proper practice was to submit the question to the jury. *Caylor v. Nunn* (Tex. Civ. App.) 235 S. W. 264, 267. As this case was tried by the trial court sitting without a jury, we must assume, in support of the judgment, that the trial court so construed the language of the article, as to resolve the ambiguity mentioned in favor of the plaintiff.

[5] The publication which the statute designates as privileged is a fair and true report of the facts; the statute does not include as privileged facts outside of the record or comments by the writer. If the article in question had left out the last four paragraphs, it would then have come within the privilege as defined in the statute, but one needs only to read the last four paragraphs to note at

once that said paragraphs are matters of comment and do not purport to state any fact or facts developed in the judicial proceeding which the article purports to report.

[6] The appellants complain as to the amount of the verdict. There is nothing in the amount of the verdict, nor in the record, to show that there was a particle of passion or prejudice on the part of the trial court. This court may not say, therefore, that the verdict was excessive.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

63 Cal. App. 315

WOLLESON v. COBURN. (Civ. 4052.)

(District Court of Appeal, Second District, Division 2, California. July 30, 1923.)

1. Appeal and error $\S$ 110—Order denying new trial not appealable.

An order denying a new trial is not appealable, and attempted appeal therefrom will be dismissed.

2. Specific performance $\S$ 121(8) — Finding held warranted that purchaser knew of deficiency in acreage before supplemental agreement was made.

Testimony of one party to exchange of lands that he "figured it out" from abstract that premises were 10 acres short warranted finding that he knew of such shortage when executing supplemental escrow agreement, some time after receiving the abstract.

3. Exchange of property $\S$ 3(2)—Deficiency in acreage held waived by new agreement.

Where party to exchange of lands, after learning of deficiency in acreage, voluntarily entered into new agreement, changing conditions under which papers had been placed in escrow, he waived right to claim shortage.

4. Specific performance $\S$ 121(8) — Evidence held to warrant finding that representation was not fraudulent.

Evidence held sufficient to warrant finding that no deceit was practiced by agent of party to exchange of lands in representing that there were springs on such party's lands which held water during the winter months when it rained.

5. Specific performance $\S$ 53—Representation that there would be plenty of water for stock not fraudulent.

Representation by party to exchange of lands that in the winter months when there was rain there would be plenty of water for stock, was but an unfulfilled prediction or erroneous conjecture as to future event, and would not support claim of deceit.

6. Specific performance $\S$ 6—That plaintiff did not have title when contract made held not to defeat remedy on ground of want of mutuality.

Where party to exchange of lands knew when supplementary escrow agreement was

made that the other party did not have title, and that it would be necessary to administer her deceased husband's estate and to procure deeds from her coheirs, all of which was done in reliance on the contract as amended by the supplementary escrow agreement, specific performance was not defeated by rule that mutuality of remedy must exist when contract is made.

7. Specific performance $\Rightarrow$ 114(2)—**Complaint held to show sufficiently that contract of exchange was reasonable, and consideration adequate.**

In action for specific performance, complaint alleging that property to be conveyed by plaintiff equalled in value the money and properties which defendant agreed to convey, with other allegations as to reasonableness, *held* sufficient to show that contract was just and reasonable, and consideration adequate.

8. Specific performance $\Rightarrow$ 14—**Defendant held not entitled to reversal because his wife claimed interest.**

Where defendant's wife was not party to contract for exchange of lands sought to be specifically enforced, though she signed escrow instructions, and defendant in offering to exchange the properties declared himself the owner of all the lands offered, he cannot ask reversal because his wife claimed to be joint owner of one piece of property, as plaintiff can elect to take such title as defendant has.

9. Specific performance $\Rightarrow$ 121(3)—**Evidence held to support finding of rental value.**

In action for specific performance, evidence *held* sufficient to support finding as to rental value of property of which defendant wrongfully retained possession after time appointed for delivery.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Alice G. Wolleson against J. M. Coburn. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Judgment affirmed, and appeal from the order dismissed.

Geo. F. Kapp, of Long Beach, for appellant.

Clock, McWhinney & Clock, of Long Beach, for respondent.

FINLAYSON, P. J. [1] This is an appeal by defendant from a judgment in favor of plaintiff in an action for the specific performance of a contract for the exchange of lands. Defendant also appeals from the order denying his motion for a new trial, but as that is not an appealable order, the attempted appeal therefrom must be dismissed.

The facts necessary to an understanding of the points presented for decision are these: On August 6, 1919, defendant made a written offer to pay \$2,000, and to exchange his properties for land described in the offer as "440 acres located about 7 miles west of Coulterville." The last-mentioned property is referred to in at least one of the exhibits as the

"Wolleson Ranch." Defendant's offer recites that he is the owner of the properties which he is to give in exchange. They are particularly described in the offer. They consisted of a house and lot at Long Beach, a house and lot in Redlands, and two lots in Palm Springs. The offer states that defendant desires to exchange his properties, paying in addition thereto the \$2,000 in cash, for a piece of property "owned by Mrs. A. G. Wolleson [plaintiff] of Coulterville, Calif., and particularly described as follows, to-wit: situate in or near the city of Coulterville, county of Mariposa, state of California, being 440 acres located about 7 miles west of Coulterville, Calif., together with all the stock & farm implements, also household goods, all clear of incumbrance," the exchange to be negotiated by one Fred B. Palmer, a real estate agent whose office is at Long Beach.

The Wolleson ranch consists of two or more contiguous parcels of land, the patents to which were issued to the patentees at different times. One of these parcels consisted originally of 120 acres, namely, the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 35, township 2 south, range 15 east, M. D. M., patented to Helen S. Wolleson on September 3, 1908, and by her conveyed, on June 29, 1909, to Peter Wolleson, plaintiff's deceased husband. Peter Wolleson, on September 8, 1910, conveyed to one G. J. Wren 10 acres out of this parcel of 120 acres, and ever since then the Wolleson ranch has consisted of 430 acres and not 440 acres.

On August 13, 1919, plaintiff executed a written acceptance of defendant's offer, wherein she stated that she is the owner of the piece of property described in defendant's offer as the 440 acres located about seven miles west of Coulterville, and agreed to furnish a certificate of title or abstract from a competent searcher of records "showing property vested as deeded," and to furnish a good and sufficient deed of conveyance.

On the day when plaintiff accepted defendant's offer, August 13, 1919, plaintiff and defendant and the latter's wife signed certain escrow instructions to the Exchange National Bank of Long Beach. In these instructions the bank is directed to carry out the conditions of the agreement "wherein Mrs. A. G. Wolleson, a widow, agrees to sell, and J. M. Coburn agrees to purchase, the property described as follows: 440 acres, as per deed description herewith taken in exchange" for the \$2,000 in cash and the Long Beach, Redlands, and Palm Springs properties described in plaintiff's offer of August 6, 1919.

Deeds were executed by the respective parties, and were deposited with the bank as escrow holder. The deed which Mrs. Wolleson executed as grantor, and which was deposited by her with the bank to hold in escrow, bears date August 15, 1919, and describes the property as follows:

"The Wolleson ranch situated about seven miles west of Coulterville, Mariposa county, state of California, containing four hundred forty (440) acres, more or less, being portions of section two (2), township 3, range 15 east, also portions of sections thirty-five (35) and thirty-six (36), township two (2), range 15 east."

The abstract of title which plaintiff caused to be made, and which was delivered to defendant for his inspection, showed that the part of the ranch which is referred to as "the 120 acres" in the supplementary escrow instructions presently to be set forth, stood of record in the name of plaintiff's deceased husband, Peter Wolleson. In order to perfect plaintiff's title to this part of the ranch, it was necessary that administration of her deceased husband's estate should be had, and that she should procure deeds from the other heirs. This she did some time prior to June 30, 1920.

On November 7, 1919, plaintiff and defendant executed and delivered to the escrow holder supplementary escrow instructions reading as follows:

"11-7-1919. Referring to these escrow instructions, we would amend same as follows: Mrs. Wolleson shall deposit in escrow a deed in favor of J. M. Coburn, covering all of the Mariposa county property which she is to convey, excepting 120 acres, on account of the title being in probate, and deed shall be made covering said portion as soon as clear title can be given. Also, Mr. Coburn is to get possession of said ranch property at this time, and pay \$1,500 cash, instead of \$2,000 as in the original instructions; same to be delivered to Mr. Coburn at this time. Also, Coburn delivers at this time title to the Redlands and Palm Springs property, free of incumbrance, and Coburn to hold title to the Long Beach property until title to the 120 acres of Mariposa county can be delivered free of incumbrance. Title to be acceptable to Mr. Coburn. Taxes for 1919-1920 to be paid by present owners."

The abstract of title which plaintiff caused to be made, and which was delivered to defendant some time prior to the supplementary escrow instructions of November 7, 1919, showed that Peter Wolleson, during his lifetime, had conveyed to G. J. Wren the above-mentioned 10 acres, i. e., the 10 acres which originally formed a part of the parcel referred to in the amended instructions as "the 120 acres," and that, therefore, of the 120 acres originally patented to Helen S. Wolleson, Peter Wolleson's estate owned but 110 acres.

In his answer defendant set up by way of affirmative defenses: (1) That plaintiff falsely and fraudulently represented to him that 120 acres was the area of the parcel which the supplementary escrow instructions referred to as "the 120 acres," whereas it really contained but 110 acres; and (2) that plaintiff falsely and fraudulently represented to him "that springs of water would begin to flow and continue flowing for about eight

months in each year on said 120 acre tract as soon as the fall rains came."

The trial court found in favor of plaintiff, and against defendant on all the issues tendered by the pleadings, and gave judgment for plaintiff accordingly.

The finding with respect to the alleged false representation regarding the area of the parcel which the parties referred to as "the 120 acres" was as follows:

"That the tract of land referred to as the 'one hundred and twenty (120) acre tract' described in the supplemental agreement, in fact contained one hundred and ten (110) acres of land, constituting the following described premises: N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ Sec. 35—and all of the N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ Sec. 35, T. 2 S., R. 15 E., except that portion lying south of the county road known as the La Grange and Coulterville road. This land was pointed out to the defendant, J. M. Coburn, by Herbert Wolleson, the son of the plaintiff, Alice G. Wolleson, and referred to as a 'one hundred and twenty (120) acre tract of land'; that the abstract of title submitted to defendant prior to the execution of the supplemental agreement of November 7, 1919, showed the tract of land to contain but one hundred and ten (110) acres, and that thereafter the parties to the transaction in dealing with this tract of land did so knowing that it contained but one hundred and ten (110) acres of land, but it was referred to generally in their transactions as the 'one hundred and twenty (120) acre tract'; that the defendant knew at the time of the supplemental agreement of November 7th, 1919, when five hundred dollars (\$500.00) was reduced from the cash payment to the plaintiff, that the tract contained but one hundred and ten (110) acres. The additional ten (10) acres, to wit: That portion of said N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Sec. 35, T. 2, S., R. 15 E., lying south of the county road known as the La Grange and Coulterville road, necessary to constitute the full one hundred and twenty (120) acre tract of land, was not material to the defendant's possession and enjoyment of said property, and the defendant had knowledge of the actual acreage at the time of entering into the supplemental agreement of November 7, 1919."

[2] Appellant contends that the evidence is insufficient to support the finding that when the parties entered into the supplementary agreement of November 7, 1919, defendant knew that the parcel referred to therein as "the 120 acres" contained but 110 acres. This contention is based upon appellant's testimony to the effect that it was not until the spring of 1920 that he noticed that the abstract of title showed a shortage of ten acres. While there was no direct contradiction of appellant's testimony that he did not discover the true area until the spring of 1920, there were circumstances which warranted the trial court in disbelieving it. It is conceded that appellant had possession of the abstract some time prior to the supplementary agreement of November 7, 1919, and that he had an opportunity to examine its contents. He testified that he looked at the abstract in Feb-

ruary or March of 1920, and, as he expressed it, "figured it out that there were 10 acres short there." This testimony shows that an examination of the abstract was alone sufficient to apprise appellant of the fact that Peter Wolleson had conveyed the 10 acres, and that his heirs, including respondent, had no title thereto. Having had the abstract in his possession before he executed the supplemental escrow instructions of November 7, 1919, the trial court was warranted in inferring that appellant was aware of the shortage prior to the execution of those instructions, notwithstanding his testimony that it was not until the spring of 1920 that he made the discovery.

"While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact; and as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy." *Davis v. Judson*, 159 Cal. 128, 113 Pac. 150.

Appellant knew that he had been furnished with the abstract in order that he might satisfy himself respecting the nature of respondent's asserted title to the land which she had agreed to convey. The court, therefore, was justified in inferring that it was inherently improbable that appellant neglected to make a searching examination of the abstract as soon as it came into his possession. We cannot disturb the court's finding.

[3] Having chosen, without objection, voluntarily to enter into the new agreement of November 7, 1919, after his discovery of the true area of the parcel referred to as "the 120 acres," appellant must be held to have waived the right to claim there was a shortage. *Lee v. McClelland*, 120 Cal. 147, 151, 52 Pac. 300.

With respect to the defense that plaintiff falsely represented that springs flowed upon the land, the trial court found as follows:

"That it is not true that the plaintiff, acting through her son, represented to the defendant that springs of water would begin to flow, or would continue to flow for a period of eight (8) months in each year, on the one hundred and ten (110) acre tract, but that it was represented to the defendant that springs had risen on said land 'practically' every year for a long period of years prior to the year 1919 and that

it was the opinion stated by Herbert Wolleson, son of the plaintiff, that they would continue to do so in the future when the rains fell in that vicinity, and that no fraud nor deceit was intended or accomplished by said statement of opinion."

[4] So far as the representation refers to a past fact, namely, that there were springs which held water during the winter months when it rained, there was ample testimony to support the court's finding that no deceit was practiced. Respondent's son testified unequivocally that there were two springs on this tract of land; that he had lived on the ranch nine years and that there never was a winter during those nine years when water did not flow from the springs. He testified:

"I never knew it that those springs didn't have water in—in the winter months. * * * We generally had to have a good rain before the water would come there, and after that we always had plenty of water. * * * Q. Well, it required, usually, a good rainfall to start this water flowing? A. Yes, it required a good rain. Q. And how long would the water flow? A. Well, there would be water there—some years I have known it up into the last of May or the first of June. It just depended upon the winter months—the rain that we had in the winter months. * * * Q. Did you ever know a season when there was not water in the springs for that purpose [the watering of the stock]? A. No; I never did. There has always been water whenever I have been on the place."

This witness further testified that in the winter months there always had been enough water in the springs to water the 25 or 30 head of stock which he pastured on the parcel referred to by the parties as "the 120 acres."

[5] That part of the representation which refers to the future—that wherein respondent's son told appellant that "in the winter months when there is rain there will be plenty of water for the stock"—was but an unfulfilled prediction or an erroneous conjecture as to a future event.

"Mere expressions of opinion and predictions are not generally considered as representations of fact. Consequently they are not fraudulent, and are insufficient for the purpose of maintaining an action of deceit, or for the purpose of rescinding a contract." *Elliot on Contracts*, vol. 1, p. 137. See, also, *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Nounnan v. Sutter County L. Co.*, 81 Cal. 1, 6, 22 Pac. 515, 6 L. R. A. 219; *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Lee v. McClelland*, supra; *Henry v. Continental Bldg., etc., Ass'n*, 156 Cal. 667, 105 Pac. 960; *Ayers v. Southern Pacific R. Co.*, 173 Cal. 74, 79, 159 Pac. 144, L. R. A. 1917F, 949; *Bickel v. Munger*, 20 Cal. App. 633, 637, 129 Pac. 958; *Clark v. Ralls*, 50 Iowa, 275, and 26 C. J. 1087.

In *Clark v. Ralls*, supra, the Supreme Court of Iowa held that a statement by a vendor in the sale of a mill and water power that "the stream would furnish water to run the mill day and night eight months in the year" was not an actionable representation, and

that if it was untrue it would not entitle the vendee to damages as for a false and fraudulent representation.

[6] Because all of the title to the 110 acres was not in respondent until after the administration of her deceased husband's estate and the execution to her of deeds by her coheirs, that is, because all of the title to the 110 acres was not in respondent at the time when she and appellant entered into their contract for the exchange of properties, it is argued that the contract lacked the necessary element of mutuality. To support his position, appellant relies upon the doctrine of mutuality as enunciated in *Norris v. Fox* (C. C.) 45 Fed. 406, where it was held that if at the time when the contract was executed it is not specifically enforceable against one of the parties, he cannot, by subsequent performance of those conditions which he could not then perform, put himself in a position to demand specific enforcement against the other party.

That mutuality of remedy must exist from the time the contract was entered into—the rule announced in *Norris v. Fox*—is open to so many exceptions that, as Professor Pomeroy says, "it is of little value as a rule." *Pom. Eq. Jur.* vol. 5, § 2191. It further is said by that author in a note to section 2191 (vol. 5, p. 4925) that "the rule in its older formulation—that mutuality of remedy must exist from the time the contract was entered into—has been entirely devoured by the generally admitted exceptions, as will appear from the sections following." A generally recognized exception to the rule is that if the purchaser knows that his vendor has no title when the contract to convey is made, but expects to procure it in time to enable him to carry out his agreement, the buyer cannot avoid specific performance on that account, if his vendor becomes vested with the title before time for performance has matured. *Olson & Nessa v. Rogness*, 173 Iowa, 331, 155 N. W. 301. Indeed, many leading authorities go to the extent of saying that if the vendor obtains the title which he promised to convey at any time before the decree is entered, or before the time for performance is due, the vendee may be compelled to specifically perform his part of the contract. *Pom. Eq. Jur.* vol. 5, §§ 2194 and 2230; *Wolff v. Cloyne*, 156 Cal. 746, 106 Pac. 104; *Dore v. Southern Pacific Co.*, 163 Cal. 182, 195, 124 Pac. 817. Here appellant, when he entered into the supplementary agreement of November 7, 1919, knew that at that date the title to the 110 acres stood of record in the name of Peter Wolleson, deceased, and that before respondent could perfect title in herself, and convey a good title, administration of her deceased spouse's estate would be necessary, and also that it would be necessary for her to procure deeds from her coheirs. All of this respondent did, relying on appellant's contract, as amended by the supplementary escrow in-

structions; and she did all of this in order that she might be able to perform her part of the agreement. The case is thus clearly brought within the exception recognized by the Iowa Supreme Court in *Olson & Nessa v. Rogness*, supra.

[7] Appellant argues against the sufficiency of the complaint, because the paragraph which is designed to show that the contract of exchange was fair, and the consideration adequate, does not aver the monetary value of the property which plaintiff agreed to give in the exchange—citing *Salisbury v. Yawger*, 184 Cal. 783, 195 Pac. 682. In that case the vendor had agreed to sell his land, i. e., he had agreed to convey for a monetary consideration. The case cited is not applicable here. In the present case the complaint alleges that the property agreed to be conveyed by respondent equals in amount the value of the money and properties which appellant agreed to convey. This allegation, with the other averments as to reasonableness—the contract being one for the exchange of properties—is sufficient to show that the contract was just and reasonable, and that the consideration was adequate.

[8] It is claimed that appellant's wife should have been made a party defendant because she signed, with her husband, the original escrow instructions, and testified that she was a joint owner with her husband of the Long Beach lot. Though she signed the original escrow instructions—unnecessarily, as we think—appellant's wife was not a party to the contract to exchange properties. She did not agree to sell or purchase any property, nor did she agree to exchange any property. If she owned the Long Beach property jointly with her husband, as she claimed she did, that fact would not prevent respondent from electing to exchange the Wolleson ranch for such title as appellant might have to the properties which he had agreed to give in exchange. In his offer to exchange properties appellant declared himself to be the owner of all the lands which he offered to give in exchange, including the Long Beach property. He declared that his title was "clear of incumbrance." Throughout all of the pleadings he is treated as the sole owner of all the properties which he had agreed to give in exchange for the Wolleson ranch. It does not lie in his mouth to ask for a reversal of the decree simply because his wife, at the trial, claimed to be a joint owner with him of a lot of which he had represented himself to be the sole owner, and which he had agreed to convey, with his other properties, in exchange for respondent's ranch.

[9] The decree adjudges that plaintiff recover of defendant the sum of \$600. This amount the trial court found to be the reasonable rental value of the Long Beach property at the rate of \$50 per month from the time when possession should have been delivered to plaintiff. This judgment for an

amount which the court found to be the reasonable rental value of the premises was given pursuant to the rule that a vendor who wrongfully retains possession after the time appointed for delivery is chargeable with the fair rental value of the property. It is claimed that the evidence is insufficient to support the finding that \$50 per month was the fair rental value of the Long Beach property. That property was to be conveyed to respondent unfurnished. Appellant testified that he had rented the property furnished for \$50 a month, and that unfurnished its rental value was but \$35 a month. A witness for respondent, Fred Palmer, the real estate agent who had carried on the negotiations for the exchange of properties, who had an office at Long Beach, and who was, presumably, qualified as an expert on the rental values of properties in that vicinity, testified that in his opinion the rental value of the Long Beach property was \$50 per month. It is true that this witness, on his cross-examination, testified that appellant had told him that the property had rented for \$50 per month, and that he did not know whether appellant had rented it furnished or unfurnished. It also is true that this witness, on his cross-examination, employed language which might have warranted the conclusion that he based his opinion of the rental value of the premises solely upon what appellant had told him the property had rented for. But we cannot say that this was the only reasonable construction which could be put upon the testimony of the witness. Because it was not the only construction of which it was reasonably susceptible, the trial court was justified in adopting the view that the witness, irrespective of anything which appellant might have said to him, was of the opinion that the Long Beach property, unfurnished, had a fair rental value of \$50 per month. We conclude, therefore, that the finding that \$50 per month was the fair rental value is sufficiently supported by the evidence.

The judgment is affirmed, and the appeal from the order denying defendant's motion for a new trial is dismissed.

We concur: WORKS, J.; CRAIG, J.

63 Cal. App. 273

RICE SECURITIES CO. v. DAGGS et al.
(Civ. 2548.)

(District Court of Appeal, Third District, California. July 27, 1923.)

1. Guaranty — Is independent contract.

Under Civ. Code, § 2787, defining "guaranty" as promise to answer for debt, default, or non-carriage of another, guaranty is contract

entirely independent of any contract of debt, the payment of which is assured.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guaranty.]

2. Appeal and error — 1036(2)—Joinder of principal and guarantor in one action held not prejudicial.

Under Code Civ. Proc. § 383, providing that persons severally liable on obligation may be included in one action, and Civ. Code, § 2807, providing that guarantor of payment is liable immediately on default, no prejudice resulted from suing principal and guarantor in one action.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by the Rice Securities Company against Clara Daggs and W. H. Newton. From a judgment for plaintiff, defendant Newton appeals. Affirmed.

Clark Clement, of Lemoore, for appellant.
J. C. C. Russell, of Hanford, for respondent.

HART, J. On the 13th day of June, 1921, the defendants, Daggs and Newton, entered into a written contract, whereby the first named purchased from the last named a Stutz automobile for the sum of \$2,800, of which the sum of \$1,000 was paid on the execution of the contract, and the balance to be paid on the 13th day of October, 1921, the deferred payment to draw interest at the rate of 8 per cent. per annum, payable monthly. The agreement, among other things, provides that the title to the automobile shall remain in the seller until the purchaser has made all payments thereby required; that, in case any such payments were not made at or within the time stipulated therein, the seller may declare the entire balance of the purchase price and accrued interest due and payable without notice, or may take immediate possession of said automobile, etc.; that the seller may assign and transfer the agreement to a third party. Time is made of the essence of the agreement.

The complaint alleges that on the date of the execution of said agreement, to wit, the 13th day of June, 1921, the defendant W. H. Newton assigned and transferred to the plaintiff all of his right, title, and interest in and to said agreement; that said assignment was and is attached to said contract, and reads, in part, as follows:

"For value received, the undersigned does hereby sell, assign, and transfer to Rice Securities Company his, its, or their right, title, and interest in and to the within agreement, the property therein described and all moneys to become due thereunder, and hereby guarantees that the purchaser will make prompt payment of all of said moneys and will fully per-

form each and every term thereof. The undersigned hereby consents that Rice Securities Company may extend the time within which payments may be made under said agreement, and that Rice Securities Company may waive the performance of such other terms and provisions therein as he may determine. The foregoing shall inure to the benefit of the successors and assignees of said Rice Securities Company.

"Dated at Hanford, California, this 13th day of June, 1921.

W. H. Newton.

"(Seller Sign Here.)"

The complaint alleges that the balance due under said contract was payable on the 13th day of November, 1921, the time for payment of the said balance and the accrued interest having been extended by plaintiff to the date just mentioned; that "said defendants, or either of them, have not paid the plaintiff the sum due upon said contract, and that said plaintiff has elected that the whole of said sum, together with interest, is due and payable"; that said sum, with interest thereon from the 13th day of January, 1922, and a reasonable attorney's fee, "still remain due, owing, unpaid, and payable."

The defendants each demurred to the complaint on the general ground, the defendant Newton specially as follows:

"That there is a misjoinder of parties defendant, in that defendant W. H. Newton is joined as a defendant with the defendant Clara Daggs, when it appears from said complaint that the said Clara Daggs is the only principal debtor, and that the said W. H. Newton is only guarantor, and that there is no joint liability resting on said defendants."

The said demurrer was overruled, and Newton answered, admitting all the allegations of the complaint, but setting up as a special defense the alleged misjoinder of parties defendant in language substantially the same as that in which the same ground was set forth in his demurrer. The defendant Daggs also demurred on special grounds, and the same was overruled. She failed to answer the complaint, and judgment was taken against her by default. Findings were waived by the parties and judgment passed for the plaintiff. The defendant Newton appeals from said judgment upon the judgment roll alone.

The special ground of the demurrer and of the answer interposed by the defendant Newton presents the only point urged for a reversal, to wit: That there is a misjoinder of parties defendant in this: That the obligation of the principal debtor and that of the guarantor are separate and distinct and independent obligations; that therefore there is no joint liability upon them, and hence they cannot properly be jointly sued on an obligation as to which two different, distinct, and independent liabilities have been created.

[1] There can be no controversy upon the

proposition that a guaranty is an independent contract—"that is, entirely independent of any contract of debt the payment of which is thus assured." Civ. Code, § 2787; Kelley v. Goldschmidt, 47 Cal. App. 38, 42, 190 Pac. 55. And, in the absence of statutory authority therefor, the principal debtor and his guarantor could not properly be joined in an action to recover the debt to guarantee the payment of which the guaranty was given, although, it is to be observed, to require the creditor, in a case where the guaranty is of the payment of the debt, to proceed first against the principal debtor, and then, finding his action unavailing in the matter of securing satisfaction of his judgment, require him to sue the guarantor to obtain satisfaction of the same debt, does not harmonize entirely with the spirit or one of the primary purposes of the code system, viz. to obviate the necessity of bringing and prosecuting a number of different actions for the establishment of a single right or the redress of a single wrong. As to the redress of wrongs, it is to be remarked that the right to join two or more parties in an action by a third party for personal injuries received through the concurrent negligence of such parties has for many years been recognized in California, and this is even so where the respective duties of the parties to the injured party are separate and disconnected, and the negligence of each was without concurrent understanding but where each several negligence, joined together, proximately caused the injury. See cases cited in the footnotes under section 414 of Kerr's Code of Civil Procedure.

In such case, of course, the plaintiff, although securing a separate judgment against each of the defendants, would be entitled to but one satisfaction. On principle, it would seem that the same rule should apply to actions sounding in contract, where, as here, the liability, though separate and independent, arises from precisely the same right or debt, and where the guarantor, as here, guarantees the payment, and not merely the collectibility of the debt. But there is no necessity for abstract reasoning on this proposition, for there are decisions in this state which, construing the code sections bearing upon the question, hold that in certain indicated instances the principal debtor and the guarantor may be united as parties defendant in an action to enforce payment of the debt.

[2] Section 383 of the Code of Civil Procedure contains, among others, the following provision:

"Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff; and all or any of them join as plaintiffs in the same

action, concerning or affecting the obligation or instrument upon which they are severally liable."

Under section 2807 of the Civil Code the owner of the debt the payment of which is guaranteed is not required to proceed first against the principal debtor to secure payment of the debt before the right to sue the guarantor accrues to him. He may, upon the default of the principal, proceed at once against the guarantor. Said section provides:

"A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice."

The above section would perhaps not apply where the guarantor merely guaranteed the collectibility of a debt, for in that case it would be, in the very logic of the situation, the duty of the creditor to exhaust all available means for enforcing payment of the debt by the principal debtor before proceeding against the guarantor. And for that reason the principal debtor and the guarantor could not properly or consistently be joined in an action by the creditor to collect the debt. Here, however, the guarantor guaranteed the payment of the debt, and his liability therefor attached the moment that the principal debtor defaulted in the payment thereof. We know of no good reason why, in such a case section 383 of the Code of Civil Procedure should not be held to apply, and, as stated, there are cases which so hold. In *Rodabaugh v. Kauffman*, 53 Cal. App. 676, 200 Pac. 747, in which a hearing was denied by the Supreme Court, the Court of Appeals of the First District, dealing with an action on a promissory note in which the maker and the guarantor of the payment of said note were jointly sued, stated the rule as follows:

"If the guaranty is on the same instrument, the guarantor is properly joined as a party with the maker of the note. Section 383, Code Civ. Proc.; *Melander v. Western Nat. Bank*, 21 Cal. App. 462, 471, 132 Pac. 265; *Titus v. Woods*, 188 Pac. 68. Here, though the guaranty was executed upon a separate paper, it was a part of the same transaction, demanded by the payee and agreed to by the guarantor before the note was executed. The appellant was a guarantor of payment, and as such became liable on default or the principal without demand or notice. Section 2807, Civ. Code. It could have been sued separately or joined with the maker of the note at the option of respondent."

It will be noted that the guaranty in this case was on the same written instrument which evidenced the obligation of the principal debtor.

But, regardless of the above considerations, it is clear that, "since in the first in-

stance the guarantor herein could have been sued alone for the entire debt, it is at least true that no prejudice has resulted" from the fact of joining him in the action as a defendant with the principal debtor. *Titus v. Woods*, 45 Cal. App. 541, 547, 188 Pac. 68, 70.

The judgment is affirmed.

We concur: BURNETT, J.; FINCH, P. J.

63 Cal. App. 331

METCALFE et ux. v. PACIFIC ELECTRIC RY. CO. (Civ. 4053.)

(District Court of Appeal, Second District, Division 2, California. July 31, 1923.)

1. Appeal and error — 1170(3)—No "prejudicial error" when plaintiff was apprised at trial of defense of contributory negligence and had opportunity to rebut.

Any error in overruling demurrer to plea of contributory negligence was not "prejudicial error," within meaning of Const. art. 6, § 4½, when defendant at the trial made it known that evidence of contributory negligence was to be offered, and plaintiff had all his witnesses in court and had opportunity to rebut it.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Prejudicial.]

2. Trial — 260(8)—Not necessary to define contributory negligence when defined in other instructions.

Where the instructions to the jury on proximate cause, ordinary care and negligence, sufficiently defined the term "contributory negligence" a specific definition of that term was not necessary.

3. Railroads — 401(2)—Unavoidable accident not issue calling for instruction thereon.

Where the answer in a personal injury action, besides contributory negligence, pleaded that after plaintiff's automobile had been placed upon the tracks in a position of danger, defendant could not stop its train to avoid an accident, and the evidence was consistent with the defenses, instructions relating to unavoidable accident were properly refused.

4. Appeal and error — 1064(4)—Repetition of expression in instruction held not prejudicial error.

Expressions in instructions that plaintiff's negligence "however slight," or "no matter how slight," or "contributing in the slightest degree," precluded a recovery, even if repeated, held not prejudicial error.

5. Appeal and error — 1015(5)—Affidavit of juror that poll incorrect, insufficient to overcome showing of record.

Where, according to the record, a poll of the jury showed that nine of the twelve jurors answered that the verdict was theirs, the refusal of the trial court to grant a new trial on an affidavit of one of the nine that he did not upon the poll answer that the verdict was his will not be disturbed.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Earl F. Metcalfe and wife against the Pacific Electric Railway Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Lee Riddle and Paul Blackwood, both of Los Angeles, for appellants.

Frank Karr, R. C. Gortner, and W. R. Millar, all of Los Angeles, for respondent.

WORKS, J. This is an action to recover damages for personal injuries. The plaintiffs are husband and wife, and the injuries in question were suffered by the latter as the result of her automobile having stopped on certain car tracks in front of one of defendant's electric interurban trains, and having been run down by the cars. Judgment went for defendant, and plaintiffs appeal.

[1] Among other things, appellants contend for a reversal of the judgment on the ground that the trial court erred in overruling their demurrer to a special defense contained in the answer, and which alleges:

"That said plaintiffs did not, nor did either of them, exercise ordinary care, caution or prudence in the premises, and that the injury of said plaintiff, Ulva Metcalfe, * * * if any, and the damages, if any, by plaintiffs or either of them sustained, were directly and proximately contributed to by the fault, carelessness and negligence of said plaintiffs and each of them, and their failure and that of each of them to exercise ordinary care, caution or prudence in the premises."

The demurrer, under both general and special grounds, presented the question whether this averment was a sufficient plea of contributory negligence. If we grant, for the sake of argument, although we do not decide, that the plea is insufficient, and that the trial court erred in overruling the demurrer (on this point see *Griswold v. Pacific Electric Ry. Co.*, 45 Cal. App. 81, 187 Pac. 65) we are at once constrained to say that the error was harmless, and did not result in a miscarriage of justice, as that term is used in section 4½ of article 6 of the Constitution. Appellants assert in their brief that they were prejudiced at the trial because of the fact that the answer did not notify them of the specific acts or omissions included in the charge of contributory negligence made against them by the general language of the pleading. We have examined the entire cause including the evidence, and are unable to see that any prejudice to appellants' rights followed the ruling on the demurrer. They were notified of respondent's specific claim as to contributory negligence when the evidence of that party was offered, and they had full opportunity to rebut it. In fact, appellants had notice of respondent's claim, in a general way, from respondent's statement to the jury, made before any evidence was

introduced. Appellants made no claim that they were taken by surprise, and they apparently had in court all the witnesses who could have been marshaled in their behalf. We think that appellants were not harmed by the ruling on the demurrer, even granting that the plea of contributory negligence was technically insufficient. The cause seems to have been tried fully on the merits.

[2] Appellants contend that the trial court erroneously omitted to define to the jury the term "contributory negligence" and erroneously refused to give an instruction containing the definition. The court did, however, fully instruct upon the questions of proximate cause, ordinary care, and negligence. The instructions upon the question of negligence were so framed as to inform the jury plainly that they related to the conduct of appellant Ulva Metcalfe, who was driving the automobile at the time of the accident, as well as to that of respondent. Also, the term "contributory negligence" finds frequent mention in the instructions. Among those given was the following:

"In determining the issue of negligence, and of contributory negligence, the court instructs you that the burden of proving negligence is upon the party asserting it. In this case, the burden of proving the negligence of the defendant is upon the plaintiff; the burden of proving the negligence, or contributory negligence, of the plaintiff, is upon the defendant. But in determining whether or not there has been such negligence, you will consider all the evidence bearing upon that subject, regardless of which party introduced it. That is to say, if you find that the greater weight of all the evidence is in favor of the negligence of the defendant, you should accept that as a proved fact in the case, while if the evidence on the issue is, in your judgment, evenly balanced, or preponderates against such negligence, it is not proved, and you should find that the defendant was not negligent. If you find that the greater weight of all the evidence is in favor of the contributory negligence of the plaintiff, you should accept such contributory negligence as a proved fact, or if the evidence on that issue is, in your judgment, evenly balanced, or preponderates against such contributory negligence, it is not proved, and you should find that the plaintiff was not guilty of contributory negligence."

Another instruction was in this language:

"It was * * * the duty of the plaintiff, on the occasion in controversy, to operate her machine in a careful manner, and with due regard for her own safety and the safety and convenience of others, and if you believe from the evidence that the plaintiff failed in these particulars, or either of them, such failure would be negligence on her part; and if that negligence proximately contributed to the injury, then she could not recover."

Taking all the instructions together, it was not necessary specifically to define the term "contributory negligence." The sum total of

the instructions gave to the members of the jury everything that a specific definition could have conveyed to their minds.

[3] It is next contended that the court erred in refusing to give certain instructions upon the law relating to unavoidable accident. Respondent insists that neither the pleadings nor the evidence imported the question of unavoidable accident into the action. As to the pleadings, we have already quoted the portion of the answer setting up the defense of contributory negligence. That is the only affirmative defense alleged and specifically designated as such. There are in the answer, however, intermixed with denials of averments of the complaint, affirmative allegations upon which appellants base their claim that the question of unavoidable accident is in the case. These affirmative allegations, together with the denials which accompany them, are to the effect that respondent—

"denies that said automobile was then and there, or at any time or place, stuck upon said tracks, or that said Ulva Metcalfe was unable to start said motor, and defendant alleges that when said automobile stopped upon said tracks said train of defendant was so close thereto that collision therewith was unavoidable by any act or thing which could have been done by said defendant, and alleges that not until said automobile had so stopped on said railroad tracks did the occupants thereof signal said train or warn defendant, or any of its employees or agents, of their perilous position, and not until such automobile so stop [sic] on said tracks did any perilous position of said occupants thereof exist, nor was any perilous position discoverable or seen or discovered by defendant or any of its agents; and defendant denies that at the time and place in said complaint mentioned, or at any time or place, it negligently failed to stop said train, or negligently continued to propel same forward, or propel said train at an unlawful or high or negligent rate of speed into, against or over said automobile or said plaintiff; and, on the contrary, defendant alleges that immediately upon said automobile and its occupants stopping on said track, every effort possible was made to stop said train and avoid striking same, but that the distance was too short for said collision to be avoidable."

These affirmative allegations do not amount to a plea of unavoidable accident, even when considered apart from the affirmative defense of contributory negligence. They, together with the denials with which they are intermixed, merely amount to this: Respondent, after the automobile had been placed in a position of danger on the tracks, laying aside all question as to how it came there, was unable to stop its train in time to avoid a collision. When the affirmative defense of contributory negligence is considered, the situation is entirely clarified. Taking respondent's pleading as a whole, it is apparent that the defense is that Mrs. Metcalfe's car was put in a place of danger

through her negligence; that after it was so placed, respondent, by the exercise of reasonable care, could not stop its train soon enough to avoid an accident, and that, therefore, defendant was not guilty of negligence, but that Mrs. Metcalfe's injuries proximately resulted from her own careless acts. The evidence offered by respondent was consistent with the defense thus pleaded.

[4] Another point made by appellants is that the trial court erred in several of its instructions upon the question of contributory negligence. These instructions, taking a composite view of them, were to the effect that Mrs. Metcalfe's negligence, "however slight," or "no matter how slight," or contributing "in the slightest degree," to the accident, would preclude a recovery by appellants. In all, these and similar expressions were employed eight times in the course of the instructions, and appellants' objection is not merely that they were used at all, but that they were used so often. There is some slight confusion in the decided cases upon the question whether such qualifying terms are proper in an instruction on the law of contributory negligence, but this confusion is more apparent than real, and is thoroughly dispelled if due regard be paid to the difference between the terms "care" and "negligence" and the relation which one bears to the other under the law. In an early case the Supreme Court said that "the law regards the plaintiff as innocent, unless he has been guilty of what has been called (somewhat awkwardly) 'ordinary negligence'; that is, unless the evidence shows a want of ordinary care and prudence on his part. His failure to take great care is no defense. * * * The formula is, not that any degree of negligence on the part of the plaintiff which directly concurs in producing the injury (however slight) will constitute a defense; but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall contribute, in any degree, proximately to the injury, the plaintiff shall not recover." *Robinson v. W. P. R. Co.*, 48 Cal. 409. Due attention to this language will convince that it declares the law to be exactly as the trial judge stated it to the jury in the present case. Taking the excerpt as a whole it is plain that the Supreme Court, in saying, "not * * * any degree of negligence on the part of the plaintiff * * * will constitute a defense," intended to convey the idea that no negligence consisting only of a failure to exercise great care will constitute a defense. No other construction of the language last quoted will harmonize with the final statement of the court, "but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall contribute, in any degree, proximately to the injury, the plaintiff shall not recover." The law thus declared has never been departed from

in this state. See *Strong v. S. & P. R. Co.*, 61 Cal. 326; *Tobin v. Omnibus Cable Co.*, 4 Cal. Unrep. 214, 34 Pac. 124; *Sinclair v. Pioneer Truck Co.*, 51 Cal. App. 174, 196 Pac. 281. It is true that in the case last cited the appellate court declined to reverse because the trial court had refused to use the qualifying words "in any degree" in an instruction upon the law of contributory negligence. Nevertheless, the language of the court shows that it would have adopted the same attitude toward an objection to an instruction on the ground that it contained those words. As to appellants' objection that the trial court so often used the qualifying words with which they find fault, it is enough to say that if it was right to use them once it was right to use them in every instance in which the court did use them. No harm was wrought by the repetitions found in the instructions.

[5] Appellants also contend that their motion for a new trial should have been granted, and that the judgment should be reversed for the reason that nine jurors did not agree upon the verdict. That three of the twelve did not join in the verdict is beyond question. When the verdict was returned into court a poll of the jury was taken, and the record of the trial court shows that thereupon nine members of the jury answered that the verdict was theirs. On the motion for a new trial, however, an affidavit of one of the nine was presented in which the statement is made that the affiant had never voted for the verdict in the jury room and that he did not upon the poll answer that the verdict was his. This affidavit, though proper for the consideration of the court, was alone insufficient to overcome the showing of the record as to what had transpired at the time the jury was polled. The poll having occurred in open court, the judge could from his own knowledge determine whether the affidavit or the record spoke the truth. His determination of the question, expressed in his denial of the motion for a new trial, is conclusive upon us.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

63 Cal. App. 235

BOWMAN v. SEARS et al. (Civ. 2555.)

(District Court of Appeal, Third District, California. July 26, 1923. Hearing Denied by Supreme Court Sept. 24, 1923.)

1. Gifts $\S$ 49(5)—Evidence held to show that money with which wife purchased note against husband was gift to her by husband.

A renewal note held by a bank had been executed by codefendants as a partnership, and was adequately secured by a pledge of corpo-

rate stock belonging to one of the partners. The partnership business being on the verge of collapse, the owner of the stock pledged, to prevent the entire burden of the partnership obligation falling upon him, caused a chattel mortgage to be given the bank as additional security and subsequently before the note fell due, had his wife, the plaintiff, sign a check drawn on his bank account and paid from proceeds of his separate property, such check being delivered in payment of the note, which, together with the mortgage, was then assigned to plaintiff, who thereupon brought suit to foreclose, the stock pledged in the meantime having been delivered to its owner. *Held* that the evidence showed that the money with which plaintiff purchased the note was a gift to her by her husband.

2. Chattel mortgages $\S$ 235—Evidence held to show agreement by holder of note to sell it to purchaser thereof.

Where defendant indebted to a bank caused the chattel mortgage to be given the bank as additional security, and thereafter placed funds separately owned by him in a checking account, out of which his wife was entitled to draw money, and caused his wife to sign a check drawn on such account and to deliver it to the bank, which thereupon assigned to the wife "without recourse" the note evidencing the indebtedness, and the wife sued to foreclose the mortgage, claiming that the money furnished to purchase the note was a gift as against a contention that the note was in fact paid by the husband, evidence *held* to show an agreement on the part of the bank to sell the note to the wife and on the wife's part to buy it.

3. Gifts $\S$ 30(1)—Verbal gift of money in bank with which to pay note and mortgage held valid.

Where one owing a debt to a bank caused a chattel mortgage to be given the bank as additional security, and subsequently before the note fell due, had his wife, plaintiff, sign a check drawn on his bank account and paid from proceeds of his separate property, which check was delivered in payment of the note, which together with the mortgage, was then assigned to plaintiff, who brought suit to foreclose, the gift was not invalid because plaintiff did not receive actual physical possession of the money itself, within Civ. Code, $\S$ 1147, enumerating the essentials of a valid gift.

4. Partnership $\S$ 154—Waiver by wife on assignment of stock pledged to secure husband's indebtedness, held not a fraud as to husband's partner.

A renewal note held by a bank had been executed by codefendants as a partnership, and was adequately secured by a pledge of corporate stock belonging to one of the partners. The partnership business being on the verge of collapse, the owner of the stock pledged, to prevent the entire burden of the partnership obligation falling upon him, caused a chattel mortgage covering the partnership property to be given the bank as additional security and, subsequently before the note fell due, had his wife, the plaintiff, sign a check drawn on his bank account and paid from proceeds of his separate property, which check was delivered

in payment of the note, which together with the mortgage, was then assigned to plaintiff, who thereupon brought suit to foreclose, the stock pledged in the meantime having been delivered to its owner. *Held*, that no fraud was disclosed on the part of either plaintiff or her husband as to the husband's partner, the wife having the right to waive the security represented by the stock pledged which the assignment of the note carried with it, under Civ. Code, § 2936.

5. Chattel mortgages — 253—Waiver of collateral security held not to affect right to foreclose.

Where a note is secured by a pledge of shares of the capital stock of the corporation and also by a chattel mortgage, waiver by the holder of the note as to the stock does not affect his right to foreclose the mortgage.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Suit by Olgo Bowman against L. C. Sears and another to foreclose a chattel mortgage. Judgment for plaintiff, and defendant named appeals. Affirmed.

Irving D. Gibson, of Sacramento, for appellant.

C. A. Bliss and White, Miller, Needham & Harber, all of Sacramento, for respondent.

HART, J. This appeal was considered and decided by this court on March 8, 1923, 40 Cal. App. Dec. 606. In due time after the handing down of the decision a petition for a rehearing was presented, and the same granted. The ground upon which the rehearing was asked was that this court misinterpreted the evidence and the legal effect thereof. The rehearing was granted for the purpose of further considering whether the evidence sufficiently showed that a gift of the money with which the plaintiff made the purported purchase of the mortgage, to foreclose which was and is the purpose of this suit, had been made to the plaintiff by her husband, one of the mortgagors.

The former opinion contained the following statement of the case, which, with the elimination therefrom of an inaccuracy as to the manner in which the plaintiff's husband deposited in the bank certain money which he had received in the form of a draft on a Chicago bank, we hereby adopt as a part of the present opinion:

"This action was for the foreclosure of a chattel mortgage given to secure the payment of a promissory note for the sum of \$2,800, executed and delivered by the defendants to the California National Bank of Sacramento.

"For some time prior to the execution of the note and the mortgage in suit, the defendants were copartners, engaged, as the record sufficiently, though rather vaguely, discloses, in the farming business in the county of Sacramento. The plaintiff is and was at all times mentioned in the pleadings herein the wife of the defendant, L. W. Bowman.

"The note and the mortgage in controversy were executed by the defendants to evidence and secure a partnership obligation to the said bank, the mortgage covering partnership personal property. As the brief of counsel for the appellant states: 'The note sued upon was one of several renewal notes executed from time to time by the defendants, all evidencing the same obligation, except that the indebtedness was originally for the sum of \$2,500 only, but which was afterwards increased to the sum of \$2,800. At all times the note was secured by a pledge of 28 shares of the capital stock of the Pittsburgh Plate Glass Company belonging to the defendant Bowman.

"The chattel mortgage was not given until the execution of the note in suit. The cashier of the bank testified that the stock in the plate glass company which was pledged as collateral security for the note was of value in excess of the amount evidenced by said note; that it was considered sufficient security, and that the bank did not require or demand additional security for the note in the form of a mortgage or otherwise; that it was the defendant L. W. Bowman who suggested and requested the bank to take the chattel mortgage in question.

"The execution of the mortgage, and the subsequent payment of the note by the plaintiff and thereupon the assignment of the note and the mortgage to her by the bank came about under these circumstances: It appears that the partnership business was not in a prosperous condition. In fact, all indications pointed to a complete failure of the business enterprise in which the defendants, as copartners, were engaged. The defendant and his wife (the latter plaintiff herein), having reason to believe that the partnership was on the verge of a complete collapse or failure, and after some consideration of the situation, arrived at the conclusion that, to prevent the entire burden of the partnership obligation to the bank from falling on the shoulders of the defendant L. W. Bowman, or, in other words, to save the latter's stock from being appropriated to the extinguishment of said obligation, conceived the idea of giving to the bank a mortgage, to be jointly executed by the defendants on the partnership personal property. This scheme was carried out, the defendants having, contemporaneously with the execution of the note sued on (which, as seen, was only a renewal note to take the place of a previous note of the firm to the bank, in an increased amount, however), executed the mortgage to foreclose which this action was inaugurated. On the 24th of September, 1918, the bank mailed to the defendant a written notice of the fact that the said note, together with accrued interest, would be due and payable on the 29th day of said month, and therein requested payment of the interest and a partial payment on the principal. On the 25th day of September, 1918, the defendant L. W. Bowman deposited in said bank in his own name and to his separate account, a draft on Chicago for the sum of \$2,782.62. This money was, so the plaintiff testified, the separate property of her husband, said L. W. Bowman. At the time the latter so deposited said draft, the plaintiff was with him at the bank. On the same day—that is, the day on which said draft was deposited as indicated—L. W. Bowman filled out a blank check for a sufficient amount to

pay the principal sum of and the accrued interest on the note in suit, and the plaintiff signed the check, and with it took up the note. Thereupon, in obedience to her demand, the bank assigned to her the note in controversy, indorsing on the back of the instrument the following words: 'Pay to the order of Olgo Bowman. Without recourse. The California National Bank.' The stock in the plate glass company which had been pledged as collateral to secure said note was then turned over to the defendant L. W. Bowman. On the 27th day of September, 1918, the defendant L. W. Bowman went to the bank alone or unaccompanied by the plaintiff, and obtained from the bank a formal assignment of the note and the mortgage to the plaintiff. Up to that time the mortgage had not been acknowledged by either of the defendants, or filed for recordation in the office of the county recorder. On the date last named Bowman acknowledged the mortgage, and thereupon filed the note and mortgage with the county recorder for recordation.

"The amended complaint is in the usual or characteristic form in actions for the foreclosure of liens. Paragraph 2 thereof refers to the execution of the note and the chattel mortgage, enumerating the articles of personal property covered by the latter, and also states that said mortgage was made in good faith and without any design to hinder, delay or defraud creditors, 'and at the same time was duly acknowledged by said mortgagors, and certified, so as to entitle the same to be recorded, and the same was thereafter, to wit, on the 27th day of September, 1918, duly recorded,' etc. It is also alleged in said complaint that the note and the mortgage in suit were on the 27th day of September, 1918, for a valuable consideration, by an instrument in writing, assigned to the plaintiff by the said bank. It is further alleged that, by the mistake of the person who prepared the written assignment, said instrument erroneously referred to the mortgage purporting thus to be assigned as having been executed on the '13th' instead of the '30th' day of August, 1918, which was the date of the execution of the last-mentioned instrument. Besides the prayer for a decree of foreclosure, etc., the plaintiff asked that the assignment be reformed in the particular indicated.

"The answer, apart from the admission of the existence of the indebtedness and the execution of the note sued upon, as alleged in the amended complaint, consists of specific denials, upon information and belief, of all the other material averments of said pleading. With the answer, the appellant filed a cross-complaint substantially alleging that the plaintiff did not, at the time said note was paid, own or possess, in her separate right, sufficient or any funds with which to purchase said note, and that the indorsement and delivery of said note was made by said bank to the plaintiff without any consideration whatever being paid or moving to said bank from said plaintiff, but that the entire consideration for said indorsement and delivery of said note and assignment of said chattel mortgage to her by the bank was paid and furnished by the defendant L. W. Bowman, one of the makers of said note; that said Bowman has been at all times and is now the true owner of said note and chattel mortgage, and also of any and all rights and liabilities thereunder, including said stock deposited as collateral securi-

ty; that the plaintiff has no actual right, title, or interest therein; that the transfer of said note, chattel mortgage, and stock was made to plaintiff in fraud of the rights of the defendant Sears, and for the purpose of enabling defendant Bowman to escape his liability on said note, and to compel the defendant Sears to pay the whole thereof; that said stock, so pledged, etc., was delivered to defendant Bowman, either directly or through the plaintiff, and that he (said Bowman) thereafter and prior to the commencement of this action, disposed of said stock and also purported to transfer to the plaintiff certain real estate 'heretofore owned by him, and that he personally is now, or pretends to be, insolvent and judgment proof, and that it would, therefore, be impossible for this defendant to collect any judgment which he might obtain against said L. W. Bowman for contribution of one-half of the indebtedness evidenced by said promissory note,' etc.; that said defendant Bowman caused the note and chattel mortgage to be ostensibly assigned and delivered to the plaintiff for the purpose and with the intention of concealing the fact that the consideration for the transfer of said note and mortgage by said bank to the plaintiff was paid to the bank by said Bowman who is 'the true owner and holder of said promissory note, chattel mortgage and of any and all rights and liabilities thereunder' and the real party in interest as party plaintiff in this action. The cross-complaint further states that the defendant Bowman should be made a cross-defendant, so that the matter of his share of the liability on the note may be fixed and determined, and contribution by him to the defendant Sears of said liability be adjudged, thereby avoiding circuity of actions between the defendants. The prayer is for a decree that said Bowman be joined as cross-defendant herein; that said chattel mortgage is without consideration, and that it be canceled; that the plaintiff holds said note and chattel mortgage as trustee for said defendant Bowman; that the amount of the liability of said defendant Bowman upon said note to this defendant in contribution for his, said Bowman's, share of the indebtedness evidenced by said note, be found and determined, and that the amount so found to be due from said defendant Bowman in contribution be credited as an offset upon the amount, if any, found to be due from this defendant to plaintiff as trustee for said Bowman, etc.

"The answer of the plaintiff to the cross-complaint, besides denying all the material allegations contained in said pleading, except that as to the execution of the mortgage, as above explained, admits 'that as one of the makers of said note said defendant Bowman is liable to defendant Sears in contribution for one-half of the indebtedness evidenced by said note, if when the same shall have been paid by said defendant Sears, but not otherwise; that defendant Bowman has been at all times and still is ready and willing and able to pay to plaintiff one-half of the amount due from said defendants L. W. Bowman and L. C. Sears, and that said plaintiff has been at all times, since she acquired said note, and still is, ready and willing to accept from said defendant Sears one-half of the amount due from said defendants Bowman and Sears on said note, and to give said defendant Sears, upon the payment by him of the amount so due, a full and complete

release and satisfaction of his indebtedness and liability under and by virtue of said note and mortgage, all of which has been and still is well known to defendant Sears.'

"The defendant L. W. Bowman by his answer denies all the material averments of the cross-complaint, with the exception of the allegation as to his liability to defendant Sears in contribution for one-half of the indebtedness evidenced by said note, 'if and when the same shall have been paid by said defendant Sears, but not otherwise.' Said defendant also alleges that he 'has been at all times and still is ready and willing and able to pay to plaintiff one-half of the amount due from said defendants to L. W. Bowman and L. C. Sears.'

"We have thus given an extended statement in substance of the allegations of all the pleadings in the case, because the court's findings, except as to one or two propositions of fact, are not specific, referring only in general language to the allegations of the various pleadings as a statement of the facts found, viz.: That each and all of the allegations of plaintiff's amended complaint are true; that defendant Bowman made no denial of said allegations, and that the denials and allegations of the answer of defendant Sears are untrue; that the funds used as a consideration for the assignment mentioned in said paragraph 2 were freely given by the defendant L. W. Bowman to the plaintiff, and the same became and were her separate property, and the note and mortgage sued upon were purchased and acquired by her as her separate property, and were and are held and owned by her as such; that the denials and averments of the answers of L. W. Bowman and of the plaintiff Olgo Bowman to the cross-complaint of the defendant L. C. Sears are true.

"The judgment decreed the reformation of the written assignment of the chattel mortgage by inserting the word 'thirtieth' in lieu of the word 'thirteenth,' 'where the same appears in said instrument in the reference to the date of the mortgage thereby assigned.' The decree also adjudged that the defendants were indebted to the plaintiff on said promissory note in the sum of \$2,519.19; that the personal property described in the mortgage be sold by a commissioner appointed by the court for that purpose at public auction and the proceeds of such sale, after the payment of necessary costs and expenses incurred in the sale of the property, be paid to the plaintiff or her attorneys in satisfaction of the judgment. Judgment for any deficiency shown to exist was ordered to be entered against the defendants for the amount of such deficiency.

"Appellant makes three points upon which he insists that the transaction crystallized in the judgment should be set aside. They are: (1) That the payment of the note on September 25, 1918, operated to extinguish the obligation; (2) that the note having been paid on September 25, 1918, the attempted assignment of September 27, 1918, was ineffectual and inoperative; (3) 'that the entire transaction of the 25th of September, 1918, was for the benefit of the husband, in fraud of this defendant, and the court must treat the situation as though Mrs. Bowman were but a dummy to enable Mr. Bowman to perpetrate the fraud on appellant.'

The real question deducible from or involved in the points thus separately present-

ed, however, is whether the money with which the note was taken up was a gift to the plaintiff by her husband, the defendant, Bowman, and this question must, of course, be answered by the determination of the further question whether the finding of the trial court that said money was a gift to the plaintiff is evidentially well-grounded, or that the evidence as to the transaction is such as to require this court to declare, as a matter of law, that the transaction did not involve a gift of said money.

The testimony of the cashier of the California National Bank was to the effect that the defendant Bowman maintained a deposit account in said bank in his own name from June 5, 1916; that the account always remained in said Bowman's name, but that at some time before the note was taken up—whether at the time the account was opened or subsequently, is not made clearly to appear by the record—said Bowman authorized the bank to honor the plaintiff's checks on said account, and that the bank thereupon made a record of said authorization by means of a ledger card, the account, however, still remaining in the name of the defendant Bowman. The cashier testified that it was the custom of the bank to pay checks issued by a party other than the depositor on the latter's checking account where he (the depositor) authorized it to be done, without changing the account on the ledger from the separate account of the depositor to the joint account of the latter and the party properly authorized by the depositor to draw on said account, in which case, of course, either was at liberty to check on such account. The testimony of the cashier further shows that the Chicago draft, above referred to, for the sum of \$2,782.62, was deposited by defendant Bowman in said bank in his name and to his separate account; that, as before stated, on the day on which the Chicago draft was deposited (September 25, 1918), the plaintiff drew on the account in the bank a check for \$2,814.15 for the purpose of purchasing the note in controversy. As to the giving of the chattel mortgage, the cashier testified that, at some time prior to the execution of the note in suit as a renewal of the note previously given, the defendant Bowman called at the bank and suggested that a mortgage be given by the defendants on the partnership chattels as security for their indebtedness to the bank; while it did not ask for or require additional security, the pledged stock being sufficient, the bank did not refuse to accept the mortgage; that, on the day on which the note in suit was executed to supersede the previous note, the mortgage having been duly executed by the defendants, or as the law requires as to chattel mortgages (sections 2955, 2956 and 2957, Civ. Code), was delivered to the bank, and the latter accepted the same. The cashier further testified as

to the matter of assigning the note and mortgage to the plaintiff upon her payment of the note on the 25th day of September, 1918, as above explained.

The plaintiff testified that she and her husband, before the note in suit fell due, foresaw that failure of the partnership business of the defendants would inevitably occur, and that the result, under the then existing circumstances, would be that the stock of her husband, pledged as security for the note, would be sold to satisfy the partnership obligation; that she and her husband, after consideration of the situation, called on their attorney, who, having been by them put in possession of all the facts, advised them that the stock could be saved by the plaintiff purchasing the note and mortgage; that said attorney advised them that the defendant Bowman could make a gift to plaintiff of sufficient money to purchase the note; that, in pursuance of said advice, the defendant Bowman sent for the money (presumably that represented by the Chicago check) "and arranged so she could draw a check on the account." She further stated that the understanding between her and her husband was that, upon her taking up or purchasing the note, the same and the chattel mortgage were to be her separate property; that the money covered by the Chicago draft or check was the separate property of the defendant L. W. Bowman. The manner in which the money was given to her by her husband and the taking over the note and mortgage by her has been explained. She testified that, after she became the owner of the note, and on October 1, 1918, the defendant Bowman paid the accrued interest thereon, amounting to the sum \$16.34, and that on the 29th day of November, 1918, he made a payment on the principal of \$313.49. (These payments were noted on the back of the note in the handwriting of the plaintiff, and they account for the fact that the judgment is a trifle over \$300 less than the face value of the note sued on.) The plaintiff admitted that the purpose of giving the mortgage to the bank as additional security for the payment of the note was to prevent the appropriation by the bank of the pledged stock to the payment of the note, said stock being, as we have seen, the property of the defendant L. W. Bowman, or possibly the community property of the plaintiff and said Bowman; that the purchase of the note by her was a part of the plan to prevent the pledged stock from being sold to satisfy the note.

The above in substance is all the evidence presented by the plaintiff in support of the theory that the money with which she took up the note and mortgage was a gift to her from her husband. From said evidence the court, believing it, could have made specific findings as follows: That the plaintiff desired to become the owner of the note and mortgage;

that she and her husband were advised by their attorney that she could accomplish that result by her husband making her a gift of sufficient money to purchase the obligation; that she and her husband agreed to that plan, and to that end he sent for and received certain money, which was his separate property, deposited the same in the bank, and authorized the bank to honor her check on said account for the sum necessary to buy the note; that her husband, being present, with the intention of making a gift of the money to the plaintiff, filled out a blank check in favor of the bank (mortgagee) for the amount of the note, delivered said check to the plaintiff, who thereupon signed her name thereto, and delivered it to the bank as the purchase price of the note; that the bank thereupon delivered the note and mortgage to the plaintiff, with the indorsement as indicated above. Upon these facts can this court say as a matter of law that the transaction did not constitute a gift of the money by the husband to the plaintiff? Are we legally authorized to declare that the trial court's interpretation of the transaction as it was exposed to it by the testimony—testimony given by the witnesses in its presence—is erroneous? We do not feel that we are at liberty to answer those questions in the affirmative.

[1] The conclusion that the money with which the plaintiff purchased the note was a gift to her by her husband and so became and was at the time she purchased the note her separate property was obviously founded mainly upon the testimony of the plaintiff. There is nothing in the character of her testimony or in the record which would justify us in holding that the court, believing her story to be true and so accepting it, erred in concluding therefrom that the money was a gift to her by her husband. From the viewpoint of a court of review, the fact that the motive prompting the plaintiff and the defendant to consummate the transaction under the circumstances as indicated was to save the defendant Bowman from being required alone to bear the liability for the obligation does not militate against the force or probative strength of the testimony of the plaintiff that the money was a gift to her by her husband. Said motive might have been a matter for the trial court to consider in determining the weight or the credit which should be assigned to the testimony of the plaintiff in that particular. Such a consideration, however, is not one by which reviewing courts may be guided in determining whether the testimony is sufficient to support findings upon which a judgment is planted. As is well understood, courts of review are precluded from passing upon evidence, except where it falls so short as in proof of the facts to which it is addressed, or is characterized by such inherent improbability as to make the question of its sufficiency to support the findings or a verdict one of law. And the fact that the bank

was, at the time of the execution of the mortgage, sufficiently secured upon the note, and did not require or demand further security than that which it already had and that the mortgage was given at the request or upon the proposal of the defendant Bowman cannot be treated by us as in derogation of the testimony of the plaintiff that the money she used in purchasing the note was a gift from her husband or of the finding following from said testimony. This matter was also one entirely for the consideration of the trial court in determining the weight and effect of the evidence. The defendant Sears did not testify in the case and there is, therefore, in the record no explanation from him as to the particular reason actuating him in signing the mortgage, nor is it made to appear that his act in signing the mortgage was not freely and voluntarily done. Hence, it is to be assumed that the giving of the mortgage was with his entire consent and acquiescence, and that the purpose of giving it was to relieve, at least pro tanto, or so far as the proceeds of the sale of the mortgaged chattels would effect that result, the individual stock of the defendant Bowman from bearing the burden of the partnership obligation.

The appellant contends, however, that the transaction, as it was shown by the evidence of which a synoptical statement is given above, does not measure up or square with the requirements essential to the consummation of a completed verbal gift as the same is described by section 1147 of the Civil Code, which thus lays down the essentials of a valid gift:

"A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

It is first argued that the transaction, as it was shown by the evidence, and as it was found by the court to have been conducted and consummated, cannot be considered in any other light than that of a payment of the note by the defendant himself, or in other words, that it was within the rule that, where a promissory note is taken up by a third party with funds furnished by the maker of the note, the legal effect thereof is the extinguishment of the obligation evidenced by the note (*Porter v. Title Guaranty & Surety Co.*, 17 Idaho, 364, 106 Pac. 299, 302, 27 L. R. A. [N. S.] 111; *Binford v. Adams*, 104 Ind. 41, 3 N. E. 753); that, furthermore, in order to show a purchase of a promissory note, it is essential that there be shown an agreement, express or implied, on the part of the holder to sell, and, on the part of the party paying the money due on the note, to buy (*Lee v. Field*, 9 N. M. 435, 54 Pac. 873, 874; *Daniel on Negotiable Instruments*, § 1221; *Lancey v. Clark*, 64 N. Y. 209, 21 Am. Rep. 604; *Burr v. Smith*, 21 Barb. [N. Y.] 263); that one who voluntarily pays the note of another cannot make him-

self by such payment the owner of the note without the knowledge and consent of the holder thereof; that "the doctrine of subrogation has no application to payments made by a mere volunteer" (*People's & Drivers' Bank v. Craig*, 63 Ohio St. 374, 59 N. E. 102, 52 L. R. A. 872, 81 Am. St. Rep. 639).

[2] These several propositions involve sound legal doctrines, but, if we are correct in the view we take of the transaction as above expounded, they have no application to this case. As to the proposition that to show a purchase of a promissory note it is essential that there be shown an agreement, express or implied, on the part of the holder to sell, and on the part of the party paying the money due on the note to buy, it is to be remarked that the character of the assignment indorsed on the back of the note, together with the fact that the plaintiff did take up the note with money given to her as her own separate property, is evidence sufficient to show (and sufficient to support a finding to that effect) that there was an understanding or agreement on the part of the bank to sell the note to the plaintiff and on the part of the latter to buy it. The assignment, it will be noted, reads: "Pay to the order of Olga Bowman. Without recourse." It is manifest that if the bank had understood that the plaintiff intended to pay the note, or that that was the purpose of both plaintiff and her husband in the transaction, and the bank so understood it, the instrument would have been marked or indorsed as paid, and not transferred by assignment to the plaintiff "without recourse."

But it is further argued in effect that, even conceding that the transaction could in any view have been intended to constitute a gift, or, in other words, that the evidence clearly enough shows that the intention of the defendant Bowman was to effect a gift of the money to the plaintiff, yet all that the transaction amounted to was the delivery to the plaintiff, not of the thing itself which was supposed to be the subject of the gift, but of a check, which, as counsel for the appellant well declares, is nothing more than an order by the owner of a deposit in a bank directing the latter to pay the payee a certain sum of money. It is true, as the learned counsel for appellant states, that the depositor of money in a bank is not, by reason of such deposit, the owner of specific money or funds in such bank, but is a mere creditor owning only a chose in action as against the bank for the amount due him from the latter. It follows, therefore, that the delivery of a check by the depositor to one to whom he desires and intends to make a gift of the money so deposited, or any portion thereof, does not itself effect the gift—the delivery of the check, in other words, does not itself constitute a delivery of the thing intended to be given. *Pullen v. Placer County Bank*, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19; *Fidelity*

Sav., etc., *Ass'n v. Rodgers*, 180 Cal. 683, 132 Pac. 426; *Arnold v. San Ramon Valley Bank*, 184 Cal. 632, 194 Pac. 1012, 13 A. L. R. 320. And, as the counsel further affirms, to make a valid gift *inter vivos*:

"If the thing is not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion of the property. If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed." 2 Kent's Commentaries, p. 429.

Or, as the rule is stated in *Cook v. Lum*, 55 N. J. Law, 373, 26 Atl. 803:

"The transfer" must "be such that, in conjunction with the donative intention, it completely" strips "the donor of his dominion of the thing given, whether that thing was a tangible chattel or a chose in action."

See *Adams v. Merced Stone Co.*, 176 Cal. 415, 418, 419, 178 Pac. 498, in which it is held, adversely to the position of counsel for the respondent in that case, that it is not true that section 1147 of the Civil Code is complied with in every case of a gift of a chose in action—

"Where, at the time the donor makes the gift, he knows that the donee has it within his power to secure possession and control of the thing given, and that in such a case no delivery or transmission from the donor to the donee of the means of obtaining possession and control of the subject of the gift is necessary."

It is the settled doctrine, as the appellant here further maintains—

"that an order or writing for the payment of money or the delivery of property which does not by its legal effect constitute an assignment and which is executed as a gift and for no other consideration, will not be upheld or enforced as an equitable assignment." *Fidelity Sav., etc., Ass'n v. Rodgers*, 180 Cal. 683, 687, 182 Pac. 426.

See, also, *Pullen v. Placer County Bank*, supra; *Brokaw v. Brokaw*, 41 N. J. Eq. 221, 4 Atl. 66; 5 Corpus Jur. p. 931.

[3] The above-stated propositions are, as declared, unassailable. But it is not claimed here that the check which the defendant Bowman authorized the plaintiff to sign and draw on his separate funds for the purpose of securing the money with which to buy the note itself operated as an equitable assignment or any assignment of the money. The theory of the plaintiff and of the decision of the court was that the transaction involved an executed gift of the money, and that the check merely constituted the means adopted by the defendant to effect a gift of the money to the plaintiff. We do not understand that it is contended that, where a party, with the intention of making a gift to another of money which he has on deposit to his credit in a bank, issues and delivers to the intended donee his check on such bank for the amount

he intends so to give, and the donee, before the death of the donor, or before the check has otherwise been revoked or annulled by the latter, presents the check and receives from the bank the money, or has the money credited to his account in the bank, a completed gift has not thus been consummated. No case has been cited, and we feel certain that none can be found, which stands for such a proposition. Indeed, the cases which have been brought to our notice, including some of those cited in the petition for a rehearing of this cause, in effect hold that a gift of money is consummated by the payment of the donor's check to the donee by the bank upon which it is drawn, and that a gift thus effected will stand irrevocable, in the absence of a showing of fraud or mistake or any other cause which might vitiate a contract founded upon a consideration. The contention that, since the plaintiff did not receive actual physical possession of the money itself, there was not and could not be such a delivery thereof as is legally essential to the consummation of a gift, is without merit, so far as this case is concerned. Let it be supposed that in the case of *Pullen v. Placer County Bank*, supra, the facts were like these: That the son was indebted to said bank in the sum of \$1,000, payment of which was due; that the father desired and intended to make a gift to his son of a sufficient sum to cancel such indebtedness, and with that purpose in view, having previously told his son that he intended to make the gift to him, accompanied the latter to the bank, filled out a check on his funds in said bank for an amount equal to his son's indebtedness, requested his son to sign it, and then authorized the bank to honor the check; that the son thereupon declared to the bank that he desired that the sum called for by the check should be accepted and stand as in satisfaction of his indebtedness to it, and that the bank accepted the check, and canceled the son's indebtedness, returning to him his note marked paid. In such case no one would for a moment doubt that the father had thus effected a gift to the son of the sum of \$1,000 or that the legal effect of such transaction was a gift of said sum by the father to the son. There is no distinction in the facts between the supposititious case and the one at bar.

Of course, the fact that the donor and donee here were husband and wife was one which, under the circumstances of this case, called for a scrutinizing examination and consideration of the transaction, and we may assume that the trial court gave the transaction such consideration, since there is an absence of clear ground for holding that the conclusion of that court from the facts and circumstances proved and found is upon its face, or when measured by the proofs, erroneous. As to the fact of the relationship

between the plaintiff and the defendant Bowman it was for the trial court to consider it in connection with all the other evidence in determining whether or not the facts proved justified it in concluding, as a matter of law, that the transaction constituted a gift of the money to the plaintiff.

"Of course," as was stated in the former opinion filed herein, "it is not disputed that a husband and wife may enter into contracts with each other or with other persons respecting property the same as they might were they unmarried. This proposition is established by section 158 of our Civil Code. Under said section a husband may make a transfer to his wife, whether the same be his own or community, and in such case it is well settled that, in the absence of a contrary intent, the transfer will vest in the wife the property conveyed as her separate property. *Hamilton v. Hubbard*, 134 Cal. 603, 65 Pac. 321, 66 Pac. 860; *Tillaux v. Tillaux*, 115 Cal. 672, 47 Pac. 691; *Ions v. Harbison*, 112 Cal. 260, 44 Pac. 572; *Carter v. McQuade*, 83 Cal. 274, 23 Pac. 348; *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715, 3 L. R. A. 781, 12 Am. St. Rep. 58; *Taylor v. Opperman*, 79 Cal. 468, 21 Pac. 869."

In the instant case as we have concluded, after a reconsideration of the record, the money given to the plaintiff was of the separate property of the defendant Bowman, and deposited in the bank to his separate account. It will not be maintained, though, that any dealings between the husband and wife with respect to property, as authorized by the section of the Civil Code named, may not involve money as well as any other character of property. And this leads us to declare that, although the money received by plaintiff was at all times the separate property of her husband until the transaction herein involved occurred (and which, so far as this feature of the transaction is concerned, would seem to furnish a stronger reason for considering the transaction as a gift than if the money had been of the community), we adhere to the conclusion stated in the former opinion herein filed, that this case is, in the facts, substantially the same as the case of *Mack v. Mechanics*, etc., Bank, 50 Hun (N. Y.) 477, in which, it appears, there was testimony before the trial court tending to show that after the deposit had been made, the depositor went to the bank with his mother, and had the deposit changed to their joint names and at a subsequent time made a gift of the deposit to her. The transaction was upheld as a gift. The only difference between the two cases was in the means whereby the gift was effected. In both cases the donor put it in the power of the donee to secure the money, and while, in neither case, the actual, physical possession of the money was received or taken by the donee, the exclusive ownership thereof was vested in the latter, and simultaneously, of course, the owner divested of ownership and dominion of the money.

[4, 5] As to the charge of fraud in the transaction on the part of defendant Bowman and plaintiff, made in appellant's cross-complaint, we adopt the following views expressed in the opinion originally filed herein:

"The appellant wholly failed to sustain the charge of fraud against the defendant Bowman or the plaintiff or both in the transaction. The averments of the cross-complaint as to the charge of fraud are on information and belief, and these the answers of defendant Bowman and the plaintiff in direct and positive language deny. There is no evidence that the defendant Bowman was an insolvent, or 'pretended' to be. There is no evidence that by the transaction he intended to evade the payment of his just part of the obligation. To the contrary, in his answer it is stated that he was at all times and is now able, ready and willing to pay his part of the note, and in the answer of the plaintiff it is declared that she was and is now ready and willing to discharge Sears from any further obligation on the note upon his payment to her of one-half thereof. The fact that plaintiff did not take over the stock pledged to secure the obligation when she bought the note and had it transferred to her is not of itself evidence of any fraudulent design against Sears on the part of defendant Bowman or his wife, the plaintiff. The assignment of the note to her was sufficient in form, and carried with it any and all security which had been given for the payment of the note. Civ. Code, § 2936. But she had the right to waive the security represented by the stock pledged to secure the note, and this she did, the same having been returned to her husband, the owner thereof, upon her purchase of the note. This waiver, as seen, was due to her desire to save the stock from being sold to pay the obligation. But what was there intrinsically wrong about that? Why should she not—why should the defendant Bowman not—consistently with good faith and an honest motive in the transaction, do that which would prevent his separate property from being entirely appropriated to the extinguishment of a partnership obligation? There is no conceivable just reason for saying that the conduct of the plaintiff in pursuing that course was fraudulent or was adopted with a design to wrong the defendant Sears or that by reason of her waiver of the security, so far as the stock was concerned, fraud is to be imputed to the defendant Bowman. And the fact that the plaintiff waived her right to so much of the security as was represented by the pledged stock obviously would not have the effect of precluding her from the right to foreclose the mortgage. Indeed, it is hardly necessary to say that it is a well-established principle that the payee of a promissory note, secured by a pledge of personal property, may sue the maker of the note without first exhausting the subject of the pledge. In this case the bank could have sued the defendants upon the note without resorting to the subject of the pledge for the extinguishment of the obligation, and necessarily this right passed to the plaintiff as a bona fide purchaser of the note. See *Ehrlich v. Ewald*, 66 Cal. 97, 4 Pac. 1062; *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Farmers' & Merchants' Bank v. Copesey*, 134 Cal. 287, 66 Pac. 324; *Commercial Sav. Bank v. Hornberger*, 140 Cal. 16, 73 Pac. 625; *Jones v. Evans*, 6 Cal. App. 88, 92, 91 Pac.

532; Sav. Bank of St. Helena v. Middlekauff, 113 Cal. 463, 467, 45 Pac. 840."

For the reasons hereinabove stated the judgment is affirmed.

We concur: FINCH, P. J., BURNETT, J.

63 Cal. App. 209

FROHLIGER v. RICHARDSON, State Treasurer, et al. (Civ. 4526.)

(District Court of Appeal, First District, Division 1, California. July 26, 1923. Hearing Denied by Supreme Court Sept. 24, 1923.)

1. Constitutional law $\S$ 47—In determining constitutionality of statute, court confined to matters appearing on face thereof and to facts of which it can take judicial notice.

In passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the statute, and those facts of which it can take judicial notice.

2. Evidence $\S$ 22(1)—Judicial notice taken of sectarian character of Roman Catholic Church, and of character and ownership of San Diego Mission.

The court will take judicial notice that the San Diego Mission is not a state institution, that it is owned by the Roman Catholic Church, the title being in the Archbishop of San Francisco, a corporation sole, and that the Roman Catholic Church is a sectarian institution.

3. States $\S$ 119—Legislative act appropriating money for restoration of church-owned mission held invalid.

St. 1921, p. 1722, appropriating \$10,000 for the restoration of the San Diego Mission, which is not a state institution, but owned by the Roman Catholic Church, title being in the Archbishop, held unconstitutional under Const. art. 4, § 22, forbidding appropriations for the benefit of any institution not under state management and control, section 30 forbidding appropriations in aid of any religious sect, church, creed or sectarian purpose, and section 31 forbidding gifts of public money to any individual, association, municipal, or other corporation whatever.

4. States $\S$ 114—Appropriation for restoration of mission not sustainable as public purpose.

St. 1921, p. 1722, appropriating money for the restoration of the San Diego Mission, cannot be sustained on the ground that the appropriation is for a public purpose on the ground of the historical and educational interest of the mission.

5. Costs $\S$ 96—Costs may be allowed against state officials acting in violation of law outside of official duties.

Where the state treasurer and state comptroller have acted outside the scope of their official duties and in violation of law in proceeding to make payments of an appropriation un-

der an invalid statute, costs may be allowed in an injunction suit against them, under Code Civ. Proc. § 1025, the state not being a party.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Suit by John C. Frohlinger against F. W. Richardson, State Treasurer, and others, to enjoin the expenditure of money appropriated by the Legislature for the restoration of San Diego Mission. Judgment for plaintiff and defendants appeal. Affirmed.

U. S. Webb, Atty. Gen., and Frank English, Deputy Atty. Gen., for appellants.

E. H. Christian and James H. Boyer, both of Oakland (Boyer & Havens, of Oakland, of counsel), for respondent.

ST. SURE. This appeal calls for an opinion upon the constitutionality of an act of the Legislature appropriating \$10,000 for the restoration of the San Diego Mission.

The Legislature, at its session in 1921, passed the following act (Stats. 1921, p. 1722):

"An act to provide for the restoration of the San Diego Mission, appointing a committee therefor, and providing an appropriation to carry this act into effect.

"The people of the state of California do enact as follows:

"Section 1. The Governor of this state is hereby empowered to appoint a committee of three citizens of the state of California to act with a committee of like number appointed by the San Diego Parlor of the order of Native Sons and Daughters of the Golden West, who shall restore the Mission of San Diego.

"Sec. 2. There is hereby appropriated out of the moneys in the state treasury not otherwise appropriated the sum of ten thousand dollars to be expended in accordance with law for the purposes of this act."

The plaintiff in this proceeding for injunction sued as a taxpayer of the county of Alameda to enjoin the expenditure of money appropriated by said act. Under the terms of this act the Governor appointed George W. Marston, John Brady, and Samuel S. Porter as commissioners to constitute a board of commissioners to carry out the provisions of the act, and to spend and dispose of the sum of \$10,000 so appropriated. F. W. Richardson as state treasurer and Ray L. Riley as state controller were joined as defendants.

The complaint for injunction alleges that the money was to be expended in the alteration of the Roman Catholic church building known as the Mission of San Diego, referred to in the said act of the Legislature; that at all times mentioned therein the said Mission of San Diego has consisted, and does now consist, of land and a church building thereon in the county of San Diego, state of California; that at all times therein mentioned said Mission San Diego has been and now is used for religious purposes by the Roman

Catholic Church, a religious and sectarian institution, and by the members and parishioners thereof; that at all times therein mentioned said Mission San Diego has been and now is owned and controlled by a Roman Catholic bishop of California, and held by him in trust for the Roman Catholic Church, and the members and parishioners thereof; that at no time therein mentioned has the said Mission San Diego, or any part thereof, been under the exclusive or any management or control of the state of California, as a state institution or otherwise, or at all; that the said San Diego Mission is not now, and at no time mentioned has been, conducted for the support or maintenance of minor orphans or half orphans, or abandoned children, or aged persons in indigent circumstances.

The defendants filed a general demurrer to this complaint. The demurrer was overruled.

Defendants refused to answer within the ten days' time allowed by the court, and thereupon the court rendered judgment in favor of plaintiff, and in said judgment declared the said act of the Legislature to be unconstitutional and void, and restrained and enjoined defendants from expending any of the state money so appropriated by the Legislature.

The judgment included an order awarding costs to the plaintiff. The transcript includes a bill of exceptions on an order of the court denying defendants' motion to strike the cost bill of plaintiff from the files.

The defendants appeal from the whole and every part of the said judgment and urge on their appeal: First, that the court erred in declaring the said act of the legislature unconstitutional; and, second, the court erred in denying the motion of defendants to strike the cost bill of the plaintiff from the files.

Respondent contends that the act of the Legislature in question is in violation of sections 22, 30, and 31 of article 4 of the state Constitution.

Section 22 states that:

"No money shall ever be appropriated or drawn from the state treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the state as a state institution nor shall any grant or donation of property ever be made thereto by the state."

Section 30 provides that:

"Neither the Legislature, nor any county, city and county, township, school district or other municipal corporation shall ever make an appropriation or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant * * * of personal property or real es-

tate ever be made by the state or any city, city and county, town, or other municipal corporation, for any religious creed, church, or sectarian purpose, whatever; * * *"

Section 31 provides that the Legislature shall have no power—

"to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; * * *"

Learned counsel for appellants argue that the act does not on its face indicate that the appropriation is made for the benefit of any sectarian institution, or for any other purpose prohibited by the Constitution; that the rule has been clearly established by the Supreme Court of this state that unless a statute on its face shows that money is appropriated in a manner prohibited by the Constitution of the state its constitutionality cannot be questioned in judicial proceedings.

In support of their contention counsel cite *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230; *Rankin v. Colgan*, 92 Cal. 605, 28 Pac. 673, and *County of Alameda v. Chambers*, 35 Cal. App. 537, 170 Pac. 650.

Stevenson v. Colgan was a case where a statute had been passed appropriating the sum of \$125 per month, payable monthly for the period of 21 months, for the relief of Col. Jonathan Stevenson. The statute provided that said corporation should cease upon the death of Stevenson. The sums paid under the provisions of the act were to be accepted by Stevenson in full payment and satisfaction of all claims of every kind and nature that he might have or claim to have against the state for services or otherwise. In passing upon the constitutionality of the act the court held that inasmuch as the appropriation act was valid on its face, the court had no jurisdiction to go into the question of the real purpose of the appropriation.

In the case of *Rankin v. Colgan* there was an appropriation by the Legislature of the sum of \$250 to pay James W. Rankin for services in the state treasurer's office, under appointment by Governor George Stoneman, on account of the delinquency of Arthur January, deputy state treasurer. It was claimed that the act was unconstitutional and void, in that it violated the provisions of subdivision 29 of section 25 and sections 31 and 32 of article 4 of the Constitution, because it attempted to award extra compensation to an officer after the service had been rendered, or was a gift of public money. The court referred to *Stevenson v. Colgan*, supra, and held that the act was not void on its face.

In *County of Alameda v. Chambers* the court held an appropriation act invalid which appropriated the sum of \$300,000 "to pay the claims of various persons and counties against the state of California for losses sus-

tained by fire in the State Agricultural Society's pavilion at Sacramento, Cal." It was contended that the act was constitutional on its face and therefore must be upheld; that the court was not allowed to examine into extraneous questions of fact, and that the act did not make a gift within the constitutional inhibition, but was an appropriation for a public purpose. *Stevenson v. Colgan*, supra, and *Rankin v. Colgan*, supra, were cited as being in point. The court held that the act was invalid as a gift in view of section 31, article 4 of the Constitution, and further held that the appropriation was not for a public purpose.

It is not claimed that the appropriation, in the act before us, is based upon a legal liability. Counsel for appellants tell us in their brief that the act "was in no way promoted by the Roman Catholic Church or any other sectarian institution. It was no more than the latest step of a well organized movement started by the Native Sons and Daughters of the Golden West." It is said in *County of Alameda v. Chambers*, supra, 35 Cal. App. 545, 170 Pac. 650, that where the appropriation is not based upon any legal liability it constitutes a gift within the contemplation of the constitutional provision, and cannot be maintained.

[1] It is settled that in passing upon the constitutionality of a statute the court must confine itself to a consideration of those matters which appear upon the face of the law and those facts of which it can take judicial notice. *Stevenson v. Colgan*, 91 Cal. 652, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230; *Bourn v. Hart*, 93 Cal. 321, 28 Pac. 951, 15 L. R. A. 431, 27 Am. St. Rep. 203; *Conlin v. Board of Supervisors*, 99 Cal. 17, 20, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17. (Italics ours.)

[2] It appears upon the face of the act of 1921 that the Legislature has appropriated \$10,000 for the restoration of the San Diego Mission. As matter of common knowledge, we take judicial notice of these facts: The San Diego Mission is owned by the Roman Catholic Church. The title to the property is in the Archbishop of San Francisco, a corporation sole. The Roman Catholic Church is a sectarian institution. The San Diego Mission is not a state institution.

[3] Section 22 of article 4 of the Constitution provides that:

"No money shall ever be appropriated or drawn from the state treasury for the purpose or benefit of any corporation * * * or any other institution not under the exclusive management and control of the state as a state institution, nor shall any grant or donation of property ever be made thereto by the state."

Section 30 of article 4 provides that the Legislature shall never "make any appropriation, or pay from any public fund whatever, or grant anything to or in aid of any relig-

ious sect, church, creed, or sectarian purpose.
* * *

Section 31 of article 4 provides that the Legislature shall have no power "to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever * * *." It would seem that a mere statement of the proposition is its own answer.

In graceful diction counsel for appellants further urge upon us that the restoration of the California missions is of such historical and educational interest to the state as to constitute a public purpose well within the power of the Legislature to provide for by appropriation of public funds. We quote from their brief:

"The court, of course, will take judicial notice of the history of the Franciscan missions. It is one of the most important phases of the history of this state. There is included within the history of these missions the first Christian civilization of the state of California. Nothing can be of greater interest to the student of California history than the story of the Franciscan missions. * * *

"On July 16, 1769, Father Junipero Serra founded the Mission of San Diego at the port of that name. This, which is the mission referred to in our statute, was the first mission founded in upper California, 153 years ago, under the direction of Charles III of Spain.

"These Franciscan missions finally extended from San Diego in the south to Sonoma in the north, where in 1823, or 54 years later than the San Diego mission, the last of these Franciscan missions was established. These Franciscan missionaries were the original pioneers of California, and they established in all 21 missions, extending from San Diego in the south to Sonoma in the north, and all so located that on a march from San Diego to Sonoma the traveler could avail himself of the hospitality of each of these missions on each day of his travel."

We are familiar with the history of California. We fully appreciate that the missions are reminders of a past filled with poesy and romance. The good gray poet, Edwin Markham, tells us in his book "California the Wonderful," "the old missions—court and arcade and tower and garden—were planted on shores or valleys each a day's journey from another. And these mission ruins mark no doubt the most distinctive and harmonious architecture of the nation. Wrought of the clay of the earth, they repeat in wall and tile the lines of hill and mesa from which they sprang." Many of the present cities in California arose about these early missions, and Spain's chime of seraphic and apostolic names still sound on mountain and mesa, on coast and canyon.

We know that Monterey was of old the capital of the state, a center of Spanish charm and courtesy. Bret Harte, Stevenson, and Gertrude Atherton have celebrated it. San

Carlos Mission stands near by. When we read the poems of Bret Harte we hear the angelus as he heard it at the Mission Dolores in 1868:

"Bells of the Past, whose long forgotten music
Still fills the wide expanse,
Tinging the sober twilight of the Present
With color of romance."

Standing upon the top of Tamalpais through the poet's eyes we see the city of St. Francis shrouded in fleecy fog "in gown and hood of her Franciscan brotherhood," sitting "by the Western Gate serene, indifferent of Fate."

Indeed, California has a literature and tradition all her own. It is beautiful, inspiring, wonderful. And, although we are keenly sensitive to its spell, we may not permit thought of it to influence us while examining the proposition before us in the light of the solemn enactments of our Constitution. We must not close our eyes to the positive constitutional inhibitions against appropriation of public funds for other than lawful purposes.

[4] In support of their contention that the restoration of the mission is a public purpose, counsel cite *Daggett v. Colgan*, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474, 27 Am. St. Rep. 95. In that case the Supreme Court dealt with the subject-matter of a general public purpose being served in an appropriation act of 1891, appropriating \$300,000 to meet the expenses of erecting buildings and maintaining an exhibit of the products of the state of California at the World's Fair Columbian Exposition held at Chicago in 1893. It was held that the appropriation was for a public purpose and for the promotion of public welfare, the court, among other things, saying:

"There is no difference, except in degree, between the appropriation contained in this act and those which for years have been made without any question as to their validity, for the support of the State Agricultural Fair, and the various district agricultural societies throughout the state."

The justification for such expenditure was based upon the proposition that the state has the general power to provide for the public welfare. That it was not an appropriation for a public purpose can hardly be successfully asserted. Obviously, the purpose of the legislation was wholly different from that in question here, which has for its purpose the restoration of mission ruins privately owned by a sectarian institution, at the public expense.

Our attention is called to the fact that 21 missions were established in California by the Franciscan padres. Restoration of one of them, at public expense, would open the door to the restoration of others, in the same manner. Then, probably, would follow the expense of maintaining such property at pub-

lic cost. Disregard of the constitutional bar would render the public treasury easy of access for the levying of tribute, under cover of appropriation acts, by sects of every denomination, and other organizations, seeking money for the restoration of old buildings, upon the ground that they were of historical and educational interest, and therefore of public concern.

We concede that the California missions are of historical and educational interest from a cultural and literary standpoint, but they approach no such classification as would make them the basis of the state's bounty or the subject of legislative appropriation in the guise of the public interest, public good, or public welfare.

We are further told by counsel for appellants that "the fact of ownership by the Catholic Church, if such ownership is to be considered, is merely an incident." It is a matter, however, we cannot overlook. The incident is in itself sufficient to raise the bar of section 30 of article 4 of the Constitution. We may well say that when the people adopted the state Constitution, containing the inhibitive provisions herein quoted and invoked, it was to meet situations similar to the one now presented to us for decision.

We have endeavored to make it clear that we are in sympathy with the meritorious movement having for its object the restoration and preservation of the missions, but no matter how praiseworthy we may believe such efforts to be, we must say that, in our opinion, the state Constitution forbids that such work be done at the expense of the taxpayers. We believe that the act of the Legislature under consideration is in manifest violation of sections 22, 30, and 31 of article 4 of the state Constitution, and that it is our duty to so declare.

[5] Appellants' second assignment is that the court erred in denying the motion to strike the cost bill of plaintiff from the files. Counsel for appellants say that the only point they wish to urge in this connection is that the state is not liable for costs. It appears from the record that the state is not a party. True, certain individuals (appellants herein) have been sued in their official capacity, but that does not make the state a party to the action so that cost can be assessed against it. The appellants were acting without the scope of their official duties and clearly in violation of law; it was therefore within the discretion of the trial court to allow costs. Section 1025, Code Civ. Proc.; *Lamberson v. Jefferds*, 116 Cal. 492, 48 Pac. 485; *Power v. May*, 123 Cal. 147, 55 Pac. 796.

It follows from the foregoing that the judgment from which this appeal is taken must be affirmed; and it is so ordered.

We concur: TYLER, P. J.; RICHARDS, J.

191 Cal. 763

ALASKA PACKERS' ASS'N v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 10583.)(Supreme Court of California, Sept. 11, 1923.
Rehearing Denied Oct. 10, 1923.)**Admiralty — 20—Maritime law governs right of employee injured in his work of rigger on ship in navigable water.**

The maritime law, and not the Workmen's Compensation Act, governs right of recovery for injury, on a ship in navigable water, of one who was employed on it during trips as a seaman and fisherman, and at the time of the accident, between annual trips, was working on it as a rigger in making it ready again for sea.

In Bank.

Certiorari by the Alaska Packers' Association to review an award of the Industrial Accident Commission of California, to J. Hansen. Award annulled.

Chickering & Gregory, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

WASTE, J. This is a proceeding in certiorari to review an award of the Industrial Accident Commission. An employee of the petitioner, working on board a vessel in navigable waters, sustained personal injuries for which he sought and was awarded compensation in a proceeding before the Industrial Accident Commission. It is the contention of the petitioner that at the time of the injury the employee was performing maritime service on a completed vessel afloat, and that the respondent was without jurisdiction in the matter.

The facts involved in this proceeding are substantially as follows: The employee, J. Hansen, was, for a number of years, employed by the petitioner as a seaman and fisherman on the annual voyages made by the fleet of the petitioner engaged in salmon fishing in Alaskan waters. One of the vessels of the fleet was a three-masted bark *Star of England*. This vessel, with the others of the fleet and the different crews, returned from an Alaskan voyage at the end of the fishing season in September, 1921. It was the intention of the petitioner to send the *Star of England* and other vessels back to Alaska in May, 1922, and the bark did, in fact, sail for Alaska on the latter date. During the interim between the return of the fleet and its sailing for Alaska in May, the *Star of England* lay afloat in the navigable waters of the yard of the petitioner at Alameda, on the Oakland estuary, a continuation of, and a part of, the bay of San Francisco. On or about the 23d day of February, 1922, and while the bark was so lying afloat in navigable waters alongside the wharf of the petitioner, Hansen, who had been a member of

the crew of that particular vessel upon her recent voyage to Alaska, was engaged in working upon the bark as a rigger to make the ship ready again for sea. His duties at the time consisted in going over the ropes attached to the yards of the vessel, looking for defective equipment. When a defective rope was found, he removed it and took it ashore to the warehouse on the wharf, to be repaired. While removing a rotten footrope from a yardarm of the vessel, he twisted or wrenched himself, and suffered a hernia. It was for this injury that he received the compensation which is sought to be reviewed by the petitioner in this proceeding.

The proceeding involves a question whether the California State Workmen's Compensation Act (St. 1917, p. 831) can consistently, in view of the United States Constitution and the jurisdiction of the United States government in maritime affairs, be made applicable to maritime or semimaritime injuries. The respondent seeks to narrow the question and make it apply only to injuries "sustained by caretakers, repairmen, or other persons overhauling and refitting a vessel during a time when it is tied up in its own port and out of commission, and not engaged in commerce or navigation." Its contention, in brief, is that even though the subject-matter of the action be otherwise cognizable in admiralty, where the subject-matter is local in its nature and the application of the state law does not materially interfere with interstate and foreign commerce by water, a state workmen's compensation act or other state statute may constitutionally be applied.

On the other hand, it is the contention of the petitioner that the work about which Hansen was engaged is maritime in its nature, his employment was a maritime contract, and his injuries were in their nature maritime, and the respective rights of petitioner and the employee were matters purely within the admiralty jurisdiction. In brief, their contention is that to permit the application of the California Workmen's Compensation Act to the facts of this case would be invoking a conflict between the maritime jurisdiction of the United States and state laws, and would necessarily work material prejudice to the characteristic feature of the general maritime law, and interfere with the proper harmony and uniformity of that law in its international and interstate relations.

If there could be any doubt as to the proper answer to the question presented by the divergent contentions of the parties here, in view of the decision of this court in *Sudden & Christenson v. I. A. C.*, 182 Cal. 437, 188 Pac. 803, it has been settled by what seem to be the most recent utterances of the Supreme Court of the United States on the subject. The whole question of the jurisdiction

over injuries suffered by employees engaged in maritime and quasi maritime employments was discussed by that court in *State Industrial Commission of New York v. Nordenholt Corp'n. et al.*, 259 U. S. 263, 42 Sup. Ct. 473, 66 L. Ed. 933. This case differentiates the contentions made by the parties here, and points out very clearly the line of demarcation between those cases which fall strictly within the maritime jurisdiction and those which, because of their nature, are cognizable under state statutes. The facts of that case were that an employee, in the course of his employment as a longshoreman by the Nordenholt Corporation, then unloading a vessel lying in navigable waters, sustained an injury. The cargo consisted of bags of cement. These were hoisted to the dock, and there tiered up by the employee and other longshoremen. While thus engaged on the dock, the employee slipped and fell, sustaining the injury for which he sought and was awarded compensation by the New York State Industrial Commission. In sustaining the award, the Supreme Court pointed out that the employee was injured upon the dock, an extension of the land, and that prior to the Workmen's Compensation Act of New York the employer's liability for damages would have depended upon the common-law and state statutes. "Consequently," said the court, "when the Compensation Act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law." In order to make clear its position in that case, the court referred to and explained a number of its earlier decisions, notably *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; *Clyde S. S. Co. v. Walker*, 244 U. S. 255, 37 Sup. Ct. 545, 61 L. Ed. 1116; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145. Declaring that the court below had made deductions from these cases which were unwarranted, and had proceeded upon an erroneous view of the federal law, the court said:

"When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is a matter within the admiralty jurisdiction; but not so when the accident occurs on land.

"The injuries out of which *Southern Pacific Co. v. Jensen* arose occurred on navigable waters, and the consequent rights and liabilities of the parties were prescribed by the maritime

law. The question there was whether these rules could be superseded by the workmen's compensation statute of the state, and this court held they could not. In the opinion, citing *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59, 60, we said, 'The work of a stevedore in which the deceased [Jensen] was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction.' The doctrine that locality is the exclusive test of admiralty jurisdiction in matters of tort had been questioned in the *Imbrovek* Case, and to show beyond any doubt that the maritime rules applied as to Jensen's injuries, we used the quoted language. Later, in *Grant Smith-Porter Ship Co. v. Rohde* [January 3, 1922] 257 U. S. 469, we said, 'The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled.'"

The same question was again before the Supreme Court of the United States within the year, in *Great Lakes Dredge & Dock Co. v. Kierejewski* (April 9, 1923) 43 Sup. Ct. 418, 67 L. Ed. —. In that case the plaintiff in error, a corporation engaged in dredging, pile driving, etc., maintained a yard wherein it kept scows and tugs. Leo Kierejewski, a master boiler maker, was employed by it to perform services as called upon. Acting upon this employment, he began to make repairs upon a scow moored in the navigable waters of Buffalo river. He stood upon a scaffold resting upon a float alongside. One of the company's tugs came near, negligently swamped the float, and precipitated him into the stream, and he was drowned. The United States District Court assumed jurisdiction of the libel by which Kierejewski's administratrix sought to recover damages for the death of her husband. This action was sustained by the Supreme Court, which said:

"While performing maritime service to a completed vessel afloat, he came to his death upon navigable waters as the result of a tort there committed. The rules of the maritime law, supplemented by the local death statute, applied and fixed the rights and liabilities of the parties. *Western Fuel Co. v. Garcia*, 257 U. S. 233.

"The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled.' *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, 476.

"In the cause last cited neither Rohde's general employment nor his activities had any direct relation to navigation or commerce—the matter was purely local—and we were of opinion that application of the State statute, as between the parties, would not work material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity.

"Here the circumstances are very different. Not only was the tort committed and effective on navigable waters, but the rights and liabilities of the parties are matters which have direct relation to navigation and commerce. *Southern Pacific Co. v. Jensen*, 244 U. S. 205; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255; *State Industrial Commission of New York v. Nordenholt Corporation*, 259 U. S. 263."

Since this matter was submitted our attention has been called, by counsel for parties interested in some matters now pending in this court, to two decisions which have a material bearing upon the facts here: *State v. W. C. Dawson* (Wash.) 212 Pac. 1059, and *Farrel v. Waterman S. S. Co.* (D. C.) 286 Fed. 284. In the former it was held, on the authority of *State Industrial Comm. of N. Y. v. Nordenholt Corp.*, supra, that a stevedore working on a boat or on water has no common-law right of action for injuries which may be withdrawn and he required to take under the Workmen's Compensation Act as in the case of a stevedore working on the dock. His work being maritime, the rights and liabilities connected therewith are in the admiralty jurisdiction of the United States. In the federal case just cited, it was likewise held that the work of a stevedore unloading a steamship is of a maritime character, and an action for his injury is within the maritime jurisdiction. The federal case is also cited in connection with the contention made in other litigation pending here to the effect that the act of Congress of June 10, 1922, amending sections 24 and 256 of the federal Judicial Code (42 Stat. 634), purporting to give jurisdiction to Industrial Accident Commissions of the states over certain admiralty and maritime claims is unconstitutional and void. As this point was not raised in the present case, it is not necessary to decide it here; and in view of our conclusion on the jurisdictional question involved, we are satisfied that the liability of the petitioner in the instant case must be determined under the maritime law.

The award is annulled.

We concur: WILBUR, C. J.; MYERS, J.; SEAWELL, J.; LENNON, J.; RICHARDS, Justice pro tem.; LAWLOR, J.

191 Cal. 770

ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited, v. INDUSTRIAL ACC. COMMISSION et al. (S. F. 10584.)

(Supreme Court of California. Sept. 11, 1923. Rehearing Denied Oct. 10, 1923.)

1. Admiralty ⚓20—Has jurisdiction for death from drowning in operating launch on navigable waters.

Where one with principal occupation of deck hand on a dredge in navigable waters, en-

gaged in deepening such waters, was drowned while operating, on such waters, a launch from the dredge to shore, on an errand in connection with his employment, rights and liabilities for his death are governed by the maritime law, supplemented by the local death statute, to the exclusion of the state Workmen's Compensation Act.

2. Courts ⚓489(9½)—Jurisdiction of matter exclusively in admiralty not conferable on Industrial Accident Commission by taking out policy.

Even though, under Workmen's Compensation Act, § 70, the act of the employer, in taking out a policy insuring against liability for compensation under the act, ordinarily may bring the employer under the compensation features of the act, it cannot, of itself, confer jurisdiction on the commission, where exclusive jurisdiction of the matter in controversy is vested in admiralty.

3. Courts ⚓24—Jurisdiction not conferable on Industrial Accident Commission by the parties.

Contention that, both by contract and estoppel, an insurer is bound to pay workmen's compensation benefits for death of an employee of insured while operating a launch on navigable waters, is not available in a proceeding before the Industrial Accident Commission, as the parties cannot vest the commission with a constitutional jurisdiction to which it is otherwise a stranger.

4. Constitutional law ⚓56—Legislature cannot give Industrial Accident Commission jurisdiction of matter vested exclusively in courts.

To contention that Workmen's Compensation Act vests authority in the Industrial Accident Commission in case of death of employee in operating launch on navigable waters, if in terms covered by policy issued to the employer, it is sufficient answer that the Legislature cannot confer jurisdiction on the Commission over a matter which is exclusively vested in the courts.

5. Admiralty ⚓20—Congress cannot permit application of state compensation laws to injuries in maritime work.

Attempt of Congress by Act Oct. 6, 1917, amending Judicial Code, §§ 24, 256 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 991, 1233), to permit application by the states of their Workmen's Compensation Acts to injuries suffered by employees engaged in maritime work, is beyond the power of Congress.

In Bank.

Proceeding in review by the Zurich General Accident & Liability Insurance Company, Limited, to annul an award of the Industrial Accident Commission of California to Jennie A. Denny. Award annulled.

J. Hampton Hoge, of San Francisco, and Joe Crider, Jr., of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

WASTE, J. This proceeding in review to annul an award of the Industrial Accident Commission, upon the ground that it acted in excess of its jurisdiction, presents much the same question as that considered in *Alaska Packers' Association v. Industrial Accident Commission of the State of California and J. Hansen* (S. F. No. 10583) 218 Pac. 561, the opinion in which was filed this day.

Elza A. Denny was employed as a dredger deck hand and launch operator by the Los Angeles Dredging Company. His work was performed mainly upon a dredger operating on navigable waters at Newport harbor, in this state. He was drowned on the night of April 15, 1921, in attempting to proceed from the dredger to the shore in a motor launch, while engaged upon an errand in connection with his employment. The launch was afloat at the time upon, and the accident occurred in, navigable waters. The employer, Los Angeles Dredging Company, was protected by workmen's compensation insurance at the time of Denny's death; the insurance carrier being this petitioner. The policy of insurance specifically covered all occupations of the assured in connection with its dredging work, both afloat and on shore, under the provisions of the California Workmen's Compensation Act (St. 1917, p. 831). It also provided insurance against liability of the employer under employers' liability laws for damages or negligence where the Compensation Act was not applicable, including any liability accruing under the law maritime. At the time the insurance policy was executed and delivered by petitioner to the dredging company, there was attached thereto an indorsement in writing which provided that, in consideration of the special rate at which the policy was issued, it was agreed that, when claims were made for bodily injuries or for death accidentally suffered by employees of the assured covered by the policy, the Insurance Company, subject to the limitations of its stipulated liability, would pay such injured employees, or, if deceased, the dependents of such employees, such benefits as they would be entitled to under the Workmen's Compensation and Safety Act of California, if said claim came under the jurisdiction of the Industrial Accident Commission of California, provided that such benefits should be so paid only when the employees or dependents accepted said sums in full settlement of their respective claims and should sign releases in favor of the dredging company and the insurer.

After the death of Denny, his surviving widow, who was his sole dependent, duly executed and tendered a release of all causes of action against petitioner and the insurance carrier, "arising under the law mari-

time or any other law, other than for the benefits prescribed by the California Workmen's Compensation Act," upon condition that she be paid the benefits to which she would be entitled under the Compensation Act if its provisions were applicable to the matter, and agreed to accept any award that might be made by the Industrial Accident Commission, without any contest of such award upon the ground that the alleged maritime nature of the employment of her deceased husband rendered the Workmen's Compensation Act inapplicable. This tender being refused, she filed her application with the respondent commission for an adjustment of her claim for death benefits and damages. Answering, the employer and its insurance carrier, who is the petitioner here, took the position that at the time the employee was drowned he fell from a boat which was afloat on navigable waters, and for that reason the subject-matter of the application was not within the jurisdiction of the Industrial Accident Commission, and the applicant was not entitled to any of the benefits covered and provided by the Workmen's Compensation Act. It is also alleged that the rider or indorsement on the policy, by which it purported to agree to pay workmen's compensation benefits under the Workmen's Compensation Act, was inserted in the policy by mistake. As to the second contention, the commission found there was no mistake in the issuance of the policy, and that the indorsement or rider was not attached to it by reason of any inadvertence, but was intentionally made a part of the insurance contract. This finding is amply supported by the evidence, from which it is clear that the dredging company desired and obtained the exact policy issued by petitioner, including the provisions covered by the indorsement. After due proceedings had before the commission, findings and award were entered in favor of the surviving wife of the employee, allowing her a death benefit in the sum of \$4,900.

The only contention raised by the petition for writ of review is that the respondent Industrial Accident Commission was without jurisdiction, for the reason that the injury resulting in the death of the employee occurred upon navigable waters, and that the respective rights of the parties were governed solely by the general law maritime, barring any recovery under the state compensation law. In support of its position the respondent contends that the California Workmen's Compensation Act can constitutionally be applied to dredgers afloat upon navigable inland waters of the state for the reason that the state law in such case does not materially contravene the application and characteristic harmony and uniformity of the general maritime law in its interstate and international aspects. Respondent also advances the contention that in the instant case the employer elected, under section 70 of the state

Workmen's Compensation Act, to have its liability determined under the provisions of that statute by taking out the policy of workmen's compensation insurance issued by the petitioner, and also that, regardless of the liability or nonliability of the employer personally, the petitioning insurance carrier is liable directly to the employee's widow upon its policy of contract, for which it has received full premium, and is estopped to repudiate its agreement of insurance. The final contention of the respondent commission is that the application of the provisions of the California Workmen's Compensation Act in this proceeding is sustained by an act of Congress, effective October 6, 1917, amending sections 24 and 256 of the Judicial Code, purporting to extend to maritime workers the protection of the state Workmen's Compensation Acts.

[1] It has been the generally accepted view, since the decision of this court in *Sudden & Christenson v. I. A. C.*, 182 Cal. 437, 188 Pac. 803, which was almost immediately followed by the decisions of the United States Supreme Court in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, reaffirming *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, that the position of the Industrial Accident Commission, assumed in this proceeding, is untenable. The respondent, anticipating that this court will be guided by those decisions in the present action, frankly admits that, as to certain of its contentions, it is laying the foundation for an opportunity to endeavor to persuade the Supreme Court of the United States to reverse certain portions of its decisions in the cases just cited, in the event this matter shall ultimately reach that tribunal. In support of its contention that the Workmen's Compensation Act may be applied to the operation of and employment on the dredger in this proceeding, notwithstanding the rule laid down in those earlier cases, the respondent relies upon the more recent decisions of the Supreme Court of the United States. In *Western Fuel Co. v. Garcia*, 257 U. S. 233, 42 Sup. Ct. 89, 66 L. Ed. 210, a death from a maritime tort occurred on the navigable waters of the San Francisco Bay. No action to recover damages for the death of a human being caused by negligence can be maintained in the admiralty courts of the United States under the general maritime law, since such law applies the same rule for the sea which applies on land, and at the common law no civil action lies for an injury resulting in death. The statutes of this state give a right of action for death by wrongful act, and the question before the court was whether or not the admiralty court would entertain a libel in personam for the damages sustained by those to whom the right of action was given by the state statute. The court held that the Fed-

eral District Court rightly assumed jurisdiction of the proceedings. It said:

"In *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, *Chelentis v. Luckenback Steamship Co.*, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, *Union Fish Co. v. Erickson*, 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261, and *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, we have recently discussed the theory under which the general maritime law became a part of our national law and pointed out the inability of the states to change its general features so as to defeat uniformity, but the power of a state to make some modifications or supplements was affirmed, and we further held that rights and liabilities in respect of torts upon the sea ordinarily depend upon the rules accepted and applied in admiralty courts which are controlling wherever suit may be instituted. Under this view, *American Steamboat Co. v. Chace* and *Sherlock v. Alling* support the right to recover under a local statute in an admiralty court for death occurring on navigable waters within the state when caused by tort there committed. As the logical result of prior decisions we think it follows that, where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Southern Pacific Co. v. Jensen*, supra."

In *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, 42 Sup. Ct. 157, 66 L. Ed. 321, a more recent case, an employee, a carpenter and joiner, was injured through the negligence of the employer, while at work on a partially completed vessel lying at a dock in navigable waters, and which was being constructed by the employer for the United States government under contract with the United States Shipping Board of the Emergency Fleet Corporation. Both the employer and the employee were subject to the provisions of the Workmen's Compensation Law of the state of Oregon. The injured employee brought a libel in admiralty against the employer for damages for the injury sustained and recovered in the sum of \$10,000. On appeal two questions were certified to the Supreme Court of the United States: (1) Was there jurisdiction in admiralty, because the alleged tort occurred on navigable waters? (2) Was the employee, because of his injury, to proceed in admiralty against the employer for the damages suffered? The court said:

"The contract for constructing The Ahala was nonmaritime, and although the incomplete structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment, nor his activities at the time, had any direct relation to navigation or commerce. *Thames Towboat Co. v. Schooner Francis McDonald*, 254 U. S. 242, 41 Sup. Ct. 65, 65 L. Ed. 245. The injury was suffered within a state whose positive enactment prescribed an exclusive remedy therefor, and as both parties had accepted and proceeded under the statute by making payments to the Industrial Accident Fund it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law. *Union Fish Co. v. Erickson*, 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261. Under such circumstances, regulation of the rights, obligations, and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations [citing cases]. The general doctrine, that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled [citing cases]. The Workmen's Compensation Law of Oregon declares that, when a workman subject to its terms is accidentally injured in the course of his employment, he 'shall be entitled to receive from the Industrial Accident Fund hereby created the sum or sums hereinafter specified and the right to receive such sum or sums shall be in lieu of all claims against his employer on account of such injury or death.' * * * In *Western Fuel Co. v. Garcia* we recently pointed out that, as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by state statutes. The present case is controlled by that principle. The statute of the state applied, and defines the rights and liabilities of the parties. The employee may assert his claim against the Industrial Accident Fund, to which both he and the employer have contributed as provided by the statute, but he cannot recover damages in an admiralty court. This conclusion accords with *Southern Pacific Co. v. Jensen*" and other cases cited. "In each of them the employment or contract was maritime in nature, and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute, their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential."

The two cases we have just quoted, and many others relating to the application of state laws to maritime contracts and torts, are reviewed and explained in *State Industrial Commission of New York v. Nordenholt Corp'n et al.*, 259 U. S. 263, 42 Sup. Ct. 473,

66 L. Ed. 933. That was a case in which a longshoreman, in unloading a ship in the port of New York, slipped and fell while he was working on the dock, thereby receiving injuries which resulted in his death. An award of compensation was made to the widow of the deceased employee by the Industrial Commission under the New York Workmen's Compensation Law. The award was reversed by the state courts, upon the ground that the commission had no jurisdiction in the matter. Upon certiorari to the Supreme Court of the United States the lower courts were reversed. After stating, in substance, what we have already quoted from its earlier decisions, the court said:

"*Insana* [the employee] was injured upon the dock, an extension of the land (*Cleveland, etc., R. R. Co. v. Cleveland S. S. Co.*, 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215), and certainly prior to the Workmen's Compensation Act the employer's liability for damages would have depended upon the common law and the state statutes. Consequently, when the Compensation Act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law; and this is true, whether awards under the act are made as upon implied agreements or otherwise. The stevedore's contract of employment did not contemplate any dominant federal rule concerning the master's liability for personal injuries received on land. In *Jensen's Case*, rights and liabilities were definitely fixed by maritime rules, whose uniformity was essential. With these the local law came into conflict. Here no such antagonism exists. There is no pertinent federal statute, and application of the local law will not work material prejudice to any characteristic feature of the general maritime law. Compare *New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, *L. R. A.* 1918C, 439, *Ann. Cas.* 1917D, 1139."

From this survey of the cases principally relied upon by the respondent commission it at once becomes apparent that they do not deal with the exact situation presented by the facts in this proceeding under review. In *Western Fuel Co. v. Garcia* the court merely held that, there being no right of action in admiralty to recover damages for the death of a person, one claiming to be injured by such death might avail himself of a supplemental cause of action provided by state law, and *proceeding in admiralty on such cause of action may recover*. In *Grant Smith-Porter Co. v. Rohde* the effect of the decision is that an employee of a shipbuilding company at work upon a vessel in course of construction, but which has been launched, so as to be within the admiralty jurisdiction, who has contracted with his employer with reference to the Workmen's Compensation Law of the state, the contract for constructing the ship not being maritime, is entitled to compensation for injuries under the state

statute, and that remedy is exclusive. The Nordenholt Case relates to *an injury received upon the land*, and holds that under such circumstances, when a Compensation Act merely supersedes the common law and state statutes touching liability for injuries occurring on land, it does not come into conflict with any superior maritime law. None of these decisions, therefore, has strict application to the case of one who suffers an injury causing death while operating a launch on navigable waters, and whose other principal occupation is that of a deck hand on a dredger, also afloat and operating in navigable waters. The dredger in this case, being engaged in deepening navigable waters, was "a vessel," within the meaning of title 1, section 3, of the Revised Statutes of the United States. She came within the maritime jurisdiction, and the persons engaged upon her and on the launch in such work were "seamen." *Saylor v. Taylor*, 77 Fed. 476, 23 C. C. A. 343; *U. S. v. Holmes* (C. C.) 104 Fed. 884.

It was stipulated in open court at the time of the oral argument in this case that the employment of Denny at the time he met his death was of a maritime nature, he being then employed in driving the launch to the mainland for the purpose of taking on as passengers the firemen who were to relieve those then working on the dredger. These facts distinguish this case from *Grant Smith-Porter Co. v. Rohde*, in which neither the workman's general employment nor his activities at the time of the injury had any direct relation to navigation or commerce. They bring the proceeding squarely within the application of the principles of law laid down in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145. While employed by the ice company as bargeman, and doing work of a maritime nature, Stewart fell into the Hudson river and was drowned. His widow claimed under the Workmen's Compensation Law of New York. The Industrial Commission granted an award against the company to her and her minor children. Both the Appellate Division and the Court of Appeals of New York approved the action of the commission. In *re Stewart v. Knickerbocker Ice Co.*, 226 N. Y. 302, 123 N. E. 382. When the case reached the Supreme Court of the United States, it disposed of two of the contentions made by the respondent here. It held, in effect, that the federal Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect to them and other matters within the admiralty and maritime jurisdiction, taking from the states all power, by legislation or judicial decisions, to contravene the essential purposes of, or work material injury to, characteristic features of that law, or to interfere with its proper harmony and uniformity in its international

and interstate relations. The Workmen's Compensation Law of New York, it said, prescribed exclusive rights and liabilities, undertook to secure their observance by heavy penalties and onerous conditions, and provided novel remedies incapable of enforcement by an admiralty court. It therefore destroyed the harmony and uniformity which the Constitution not only contemplated, but actually established. To the same effect is the decision of this court in *Sudden & Christenson v. I. A. C.*, 182 Cal. 437, 188 Pac. 803. We are of opinion that it still remains the law, as stated in the Nordenholt Case, *supra*, that:

"The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is a matter within the admiralty jurisdiction."

[2] The respondent contends that the employer in the present case elected, under section 70 of the Workmen's Compensation Act, to have its liability determined by that statute when it took out a policy of workmen's compensation insurance with the petitioner. The section provides that the employer may elect to come under the compensation provisions of the act by filing with the Industrial Accident Commission a written statement to that effect. The section also provides that, in case any employer is insured against liability for compensation under the act, he shall be deemed to have so elected during the period that such policy shall remain in force, "without filing such written notice with the commission," as to all classes of employees covered by such policy of insurance, anything in the act to the contrary notwithstanding. Assuming that the act of taking out such a policy of insurance ordinarily may have the effect of bringing the employer under the compensation provisions of the act, as provided, it cannot of itself confer jurisdiction on the commission, where, as in this case, exclusive jurisdiction of the matter in controversy is vested in the admiralty court. *Employers' Liability Assur. Corp'n v. I. A. C.*, 187 Cal. 615, 619, 620, 203 Pac. 95.

[3, 4] The respondent also contends that petitioner has by its contract of insurance, for which it has received full consideration, bound itself to pay the benefits due under the Workmen's Compensation Act to any employee of the dredging company injured about the dredger, or any dependent of a deceased employee killed in the course of its operation, and cannot now refuse to carry out its engagement, both on the principle of a contract for the benefit of a third party, and on the principle of estoppel. Such contention would be worthy of serious consideration, if made in a court of law having jurisdiction of the subject-matter; but it cannot be made an issue where, as in this case, jurisdiction does not exist. Neither a party, nor both parties, can vest the commission with a constitutional jurisdiction to which it

is otherwise a stranger. *King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67, 67 Pac. 10. If it be contended that any of the provisions of the Workmen's Compensation Act vest such authority, a sufficient answer is that the Legislature cannot confer jurisdiction upon the Industrial Accident Commission over a matter which is vested exclusively in the courts. See *Yosemite Lumber Co. v. I. A. C.*, 187 Cal. 774, 204 Pac. 226, 20 A. L. R. 994.

[5] The final contention of the respondent commission, that the provisions of the Workmen's Compensation Act of this state were made applicable to employees engaged in maritime work by the act of Congress amending sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the federal district courts, saving to claimants the rights and remedies under the Workmen's Compensation Law of any state, approved October 6, 1917 (chapter 97, 40 U. S. Stats. 395 [U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 991, 1233]), was considered in *Sudden & Christenson v. I. A. C.*, supra, and in *Knickerbocker Ice Co. v. Stewart*, supra. In the latter case, after a comprehensive statement of the effect of the provisions of the federal Constitution referred to, the court said (253 U. S. 163, 164, 40 Sup. Ct. 441, 64 L. Ed. 834, 11 A. L. R. 1145):

"Having regard to all these things, we conclude that Congress undertook to permit application of Workmen's Compensation Laws of the several states to injuries within the admiralty and maritime jurisdiction, and to save such statutes from the objections pointed out by *Southern Pacific Co. v. Jensen*. It sought to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work. And, so construed, we think the enactment is beyond the power of Congress."

The award is annulled.

We concur: WILBUR, C. J.; MYERS, J.; RICHARDS, Justice pro tem.; LENNON, J.; SEAWELL, J.; LAWLOR, J.

192 Cal. 95

KNOOB v. KNOOB. (S. F. 10311.)

(Supreme Court of California. Sept. 20, 1923.)

Contempt — §80—Wife who keeps child out of state in violation of modified interlocutory decree cannot appeal from order modifying the decree.

A wife who has taken and keeps a child out of the state without the permission of the husband or of the court, in violation of a modified interlocutory divorce decree, will not be allowed to appeal from the order modifying the decree.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Earl F. Knoob against Catherine Stark Knoob. From an order modifying an interlocutory divorce decree, defendant appeals. Appeal dismissed.

Boyer & Havens and James H. Boyer, all of Oakland, for appellant.

Frank L. Guereña, of San Francisco, for respondent.

WASTE, J. This is a motion to dismiss an appeal. In an action for divorce pending in the city and county of San Francisco, the defendant wife was awarded an interlocutory decree of divorce, and was given the custody of the minor child of the parties, a little girl, then of the age of 12 months, subject to the right of the father to see and visit with the child at all reasonable times, and upon the further condition that the defendant should not take the child out of the state of California for a period exceeding two weeks at any one time without a written order of the trial court. Subsequently the court modified the decree, and the custody of the child was awarded to the plaintiff, subject to the right of the mother to see and visit the child at all reasonable times, and subject to the condition that neither of the parties should take the child out of the state of California without a written order of the trial court. Since the modification of the decree, the plaintiff has exhausted all means to procure the presence of the defendant and the minor child within the jurisdiction of the California courts. He obtained writs of habeas corpus, orders to show cause, and orders directing the arrest of the defendant for contempt of court. The efforts of the plaintiff were strenuously resisted by defendant through counsel, who at all times appeared for her, although she herself remained outside the jurisdiction of the court. The defendant appealed from the order of modification, and when the matter came on for hearing in this court the respondent moved to dismiss the appeal upon the ground that the appellant was a fugitive from justice and in contempt of court, and for that reason not entitled to invoke the aid of the court.

It was shown that the appellant, in violation of the terms of the modified decree, has taken and kept the child out of the state of California without the consent of the respondent, and without permission of the trial court. The child at the time the case was called here was out of the state, but in the custody of the appellant, who, it was shown by affidavit, has remarried, and is living in the republic of Guatemala. One continuance was granted in order that the appellant and the child might be produced in the jurisdiction of the

court. When the case was next called, counsel for appellant admitted in open court that he did not know the whereabouts of his client.

But one conclusion can be reached from the foregoing facts. It is very clear that the appellant has determined to set at naught the due process and orders of the courts of California, and does not intend to obey their mandate respecting the custody of the minor child. Under such circumstances she is not entitled to press her appeal in this court. By her appeal she is seeking the court's aid, and it is manifestly just and proper that in invoking that aid she should submit herself to all legitimate orders and processes. She cannot, with right or reason, ask the aid or assistance of this court in hearing her demands, while she stands in an attitude of contempt to the legal orders and processes of the courts of this state, which she seeks to avoid through the intervention of an appeal to this tribunal. *O'Neill v. Thomas Day Co.*, 152 Cal. 357, 362, 92 Pac. 856, 14 Ann. Cas. 970.

A situation somewhat analogous to that presented on this motion to dismiss was considered in *Weeks v. Superior Court*, 187 Cal. 620, 203 Pac. 93, where, after reviewing the authorities, the court said:

"No rule of law seems more widely prevalent or better established than that a court whose authority has been put to naught will extend no favors or privileges to the party in contempt until he has acknowledged its authority by purging the offense."

Appellant has had ample opportunity to place herself in position to submit to the lawful order of the superior court in relation to the custody of the child. Her past actions indicate that not only is she determined to set at naught the authority of the trial court, but that her attitude will be the same toward any judgment or order made by this court in disposing of her appeal.

The appeal is dismissed.

We concur: WILBUR, C. J.; RICHARDS, Justice pro tem.; LAWLOR, J.; LENNON, J.; SEAWELL, J.; KERRIGAN, J.

192 Cal. 19

Ex parte BRAMBINI et al., and three other cases. (Cr. 2558, 2559; S. F. 10623, 10624.)

(Supreme Court of California. Sept. 13, 1923.
Rehearing Denied Oct. 10, 1923.)

1. Courts ⚡107—Decision as to means of abating liquor nuisance not one as to procedure.

Decision that the superior court had jurisdiction to abate the nuisance of an illegal liquor selling place either by the "means" provided in the Volstead Act, or by any other means which it saw fit, in the exercise of its jurisdiction in equity, to adopt, did not relate

to the "procedure" in arriving at the judgment of abatement.

2. Intoxicating liquors ⚡259—Procedure features of Volstead Act not controlling in state court.

The procedural features of the Volstead Act, the federal prohibition statute, are not controlling in California of their own force.

3. Intoxicating liquors ⚡259—Procedural features of Volstead Act not adopted by Wright Act.

The Wright Act adopting the "penal provisions" of the Volstead Act, and prohibiting and declaring unlawful all acts prohibited and declared unlawful by the Eighteenth Amendment or the federal statute, and providing that all such acts are subject to the same penalties provided by the Volstead Act, does not adopt for the state courts the procedural features of the federal statute; so that authority for issuance of preliminary injunction in actions in state court to abate illegal liquor-selling places as nuisances must be found in state law.

4. Intoxicating liquors ⚡273—Special proceedings provided for abatement of liquor nuisance control over general provisions for issuance of injunction.

The special proceedings provided by St. 1915, p. 236, for abatement of illegal liquor-selling places as nuisances, wherein issuance of a temporary injunction to abate and prevent continuance or recurrence of such nuisance is provided for whenever the existence of the nuisance is shown to the satisfaction of the judge by a verified complaint or affidavit, without any requirement of preliminary notice of application, being at variance with control over the general provisions of law (Code Civ. Proc. § 527), for issuance of injunction.

5. Statutes ⚡85(1)—Statute as to procedure in abatement of liquor nuisance "general law"; "special law."

The liquor traffic being a separate subject of legislation, St. 1915, p. 236, regulating the proceedings for abatement of liquor nuisances, though requiring a different sort of procedure than that obtaining in other cases, is a general law, as distinguished from a "local or special" law, which under Const. art. 4, § 25, subd. 3, may not be enacted regulating the proceedings of courts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Law; Special Law.]

6. Intoxicating liquors ⚡271—State abatement law supplemented by Volstead Act as to title of action to abate nuisance.

The state law for abatement of liquor nuisances (St. 1915, p. 236), providing that when there is reason to believe that such a nuisance exists, the district attorney of the county, in the name of the people of the state, must maintain an action in equity to abate it, is supplemented by the Volstead Act, providing that such action may be brought by such attorney in the name of the United States; so that he may sue in either name.

7. Intoxicating liquors ⚡273—Though abatement proceeding is in name of United States, procedure laid down in state law controls in issuance of injunction.

Though the proceeding by the county district attorney for abatement of illegal liquor-selling place nuisance is brought in the name of the United States, as authorized by the Volstead Act, instead of in the name of the people of the state, as provided by the state law, the procedure laid down in the state law controls in the issuance of injunction for such abatement.

8. Intoxicating liquors ⚡279—Notice before action to abate nuisance not jurisdictional, as regards contempt for disobeying temporary injunction.

Though St. 1915, p. 237, § 3, requires written notice to be given the owner of the premises before the bringing of action to abate an illegal liquor-selling place as a nuisance, such notice is not jurisdictional in the sense that the court would not have jurisdiction to issue preliminary injunction without it, but failure to give it merely goes to the sufficiency of the complaint; so that, notwithstanding its absence, temporary injunction order is not void, so that it may be disobeyed without contempt, but merely erroneous, to be obeyed till dissolved or reversed.

9. Criminal law ⚡178—Prosecution not barred by dismissal of proceeding, though not for express purpose of amendment.

Pen. Code, § 1387, providing that a dismissal of a misdemeanor charge bars further prosecution, unless the order is expressly made for the purpose of amending the "complaint" does not apply to a contempt, which under Code Civ. Proc. § 211, is prosecuted by "affidavit."

10. Contempt ⚡67—Habeas corpus ⚡31—Ineffective to review ruling that dismissal was not bar to further prosecution for contempt.

Even if dismissal of a prosecution for contempt were a bar to further prosecution, it would be but a defense on the further prosecution, adverse ruling on which would not be reviewable on habeas corpus or writ of review.

11. Intoxicating liquors ⚡279—Punishment provided by Volstead Act for violation of preliminary injunction in abatement proceeding adopted by Wright Act; "penal provisions."

The penalty for the violation of a preliminary injunction in a proceeding to abate a liquor nuisance being fixed by the Volstead Act, is one of the penalties of that act, and so adopted by the Wright Act, § 1, expressly providing that the "penal provisions" of the Volstead Act are adopted as the law of the state.

12. Intoxicating liquors ⚡279—Affidavit in contempt proceedings held sufficient to give jurisdiction.

Affidavit is sufficient to give jurisdiction to punish defendant for contempt for sale of liquor, in violation of a preliminary injunction in action to abate a liquor nuisance, it alleging that he was present and knew of the violation

by sales in the regular course of business of the partnership of which he was a member.

13. Intoxicating liquors ⚡279—Evidence held sufficient to justify conclusion that partner knew of and profited by illegal transactions in violation of preliminary injunction in abatement action.

Evidence in contempt proceeding for violation of preliminary injunction in action to abate a liquor nuisance, held sufficient to justify conclusion that a partner in the business knew of the illegal sales and profited thereby, giving the court jurisdiction to punish for contempt.

14. Contempt ⚡67—On certiorari the evidence cannot be inquired into further than to find whether it was sufficiently substantial to give jurisdiction.

There being evidence sufficiently substantial to give the court jurisdiction to punish for contempt, the evidence cannot be further inquired into on writ of review.

15. Intoxicating liquors ⚡279—Variance in abatement action held immaterial as regards order of contempt.

That the temporary injunction in action to abate a liquor nuisance at 110 Second street, inadvertently misdescribed the premises as 101 Second street, held immaterial, as regards validity of the order of contempt, in view of description other than by number in the pleadings and injunction, and the fact that there was no building at 101.

16. Injunction ⚡221—Violation with knowledge contempt, though service was void.

Though service of injunction order was void, defendant knowing the injunction was issued was guilty of contempt in violating it.

On Petition for Rehearing.

17. Constitutional law ⚡56—Jurisdiction to abate nuisance vested in superior court by Constitution.

Jurisdiction to abate a nuisance is vested in the superior court by the Constitution, and so could not be taken away by statute.

In Bank.

Two applications for habeas corpus, one by A. Brambini and another, the other by Alfred Volpi and others, and two petitions for writ of review, one by A. Brambini and another, the other by Alfred Volpi and others, attacking orders of contempt by the superior court of Humboldt county; Denver Sevier, Judge. Petitioners remanded, and orders affirmed.

Pierce H. Ryan, of Eureka, and R. P. Henshall, of San Francisco, for petitioners.

Arthur W. Hill, Dist. Atty., and J. J. Cairns, Deputy Dist. Atty., both of Eureka, for respondents.

WILBUR, C. J. The above-entitled matters, which for convenience may be considered together, involve an attack by writ of review and by habeas corpus upon a judgment

for contempt for violating preliminary injunctions or restraining orders of the superior court of Humboldt county issued in proceedings to abate nuisances consisting of places maintained by the petitioners for the keeping and sale of intoxicating liquors. The abatement proceedings were begun December 12, 1922, after the election of 1922, whereat the people of the state upon referendum ratified the Wright Act of California (Stats. 1921, p. 79), which in turn adopted as the law of California certain features of the Volstead Act, the National Prohibition Enforcement Act (41 Stat. 305). The Wright Act did not become effective until December 21, 1922, five days after the official declaration of the vote (Const. art. 4, § 1), and was not in force therefore when these abatement actions were commenced. It was in effect, however, on January 12, 1923, when the injunction order herein involved was issued by the superior court. It should here be said, however, that the district attorney, representing respondents, places his whole reliance for the validity of the injunction order and for the contempt proceedings and judgments upon the provisions of the Volstead Act, the United States statute, and does not rely at all upon the Wright Act, a California statute, which was adopted after the action was commenced; or upon the state act for the abatement of illegal liquor-selling places as nuisances (Stats. 1915, p. 236), while the petitioners, on the other hand, contend that the procedural features of the Volstead Act do not apply to actions in the state courts; that the Wright Act has no application to these cases, because they were commenced before the Wright Act became effective; that even if the Wright Act be considered as the basis of the preliminary injunctions or restraining orders, such act does not adopt either the procedural features of the abatement proceedings provided for by the Volstead Act, or the penalties provided for the violation of a restraining order, and that the state law for the abatement of such nuisances (Stats. 1915, p. 236) does not apply for reasons hereinafter to be stated.

The several questions thus presented, and others subsequently to be noted, arise out of the following facts:

The abatement proceedings were begun December 12, 1922, by the district attorney of Humboldt county, one against the petitioners Volpi, Pera and Perrone, and one Quilici, alleged to be conducting an illegal liquor-selling establishment at 101 D street, Eureka, Cal., and the other against Brambini and Mafia, conducting a hotel known as Flor d'Italia Hotel at 110 Second street, Eureka. The same course of proceedings was followed in each case, and for that reason we will not distinguish the cases until later in this opinion, where some points not common to each case will be considered. Preliminary injunc-

tions were issued in each case without notice, upon the verified complaint, and a supporting affidavit. It is contended that although this procedure was proper under the Volstead Act, that under the California Code (Code Civ. Proc. § 527), notice of the application for the preliminary injunction was essential to the validity of the temporary injunction, and that if the order be regarded as a restraining order which can be issued ex parte, under the terms of section 527, Code of Civil Procedure, it only remains in force under that section for the period of 10 days and therefore the alleged violations of the injunctive order occurred after the restraining order, if it be regarded as such, had expired. It is contended that as a temporary injunction the order was void ab initio, and considered as a restraining order it had expired. Petitioners were found guilty of contempt of court in selling intoxicating liquors upon their respective premises in violation of the injunctive orders of the court, and a judgment was entered to the effect that each be imprisoned for one year in the county jail, and pay a fine of \$1,000.

[1] We have already determined that the Volstead Act of its own force constituted any place in this state where intoxicating liquor is illegally sold a public nuisance, subject to abatement by appropriate proceedings in the superior court, and that such proceedings could be maintained by a district attorney of a county in the name of the United States. *Carse v. Marsh* (Cal. Sup.) 210 Pac. 257. We did not determine in that case whether such proceedings were to be conducted in accordance with the general law of California concerning the abatement of nuisances (Code Civ. Proc. § 731; Stats. 1899, p. 103), or under the Statutes of 1915 (Stats. 1915, p. 236), or under the terms of the Volstead Act. That case was one to prohibit the superior court from hearing an alleged contempt arising out of the violation of a preliminary injunction issued in proceedings to abate such nuisance. We held that the superior court had jurisdiction to proceed with the contempt matter for the reason that it had jurisdiction to abate the nuisance "either by the means provided in said act [the Volstead Act] or by any other means it sees fit in the exercise of its jurisdiction in equity to adopt." This conclusion does not relate to the procedure in arriving at the judgment of abatement, but only to the means of abatement, by injunction, or by closing the place, or other appropriate means. Since that case was decided, the Wright Act has been adopted.

[2] We think it so clear, under the authorities, that the procedural features of the Volstead Act, a federal statute, are not controlling in California of their own force, that we deem it unnecessary to do more than cite a few cases in support of that statement, for the question is not novel, having been acted

upon by the various state courts in applying the federal Employers' Liability Bill, each state enforcing the substantive rights thereunder according to its own course of procedure: Employers' Liability Cases, 223 U. S. 1, 56, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Carse v. Marsh*, supra; 12 C. J. 447, 483; 1 C. J. 984; *Russell v. Pacific Ry. Co.*, 113 Cal. 258, 261, 45 Pac. 323, 34 L. R. A. 747; *Symmes v. Sierra Nevada Mining Co.*, 171 Cal. 427, 430, 153 Pac. 710; *Miller v. Lane*, 160 Cal. 90, 94, 116 Pac. 58.

[3] Nor do we think that the Wright Act adopted the procedural features of the Volstead Act. The Wright Act adopts the "penal provisions" of the Volstead Act, and prohibits and declares unlawful all acts prohibited and declared unlawful by the Eighteenth Amendment or by the Volstead Act, and provides that all such acts are subject to the same penalties provided by the Volstead Act. Stats. 1921, p. 79. There is nothing in these provisions, however, to indicate an intention to adopt the federal procedure in our courts. We agree with the petitioners that the authority for the issuance of preliminary injunctions in such abatement actions must be found in the law of the state.

[4] The petitioners rely upon the proposition that the orders for the violation of which the petitioners have been adjudged guilty of contempt were void under the terms of section 527 of the Code of Civil Procedure, because issued without notice required by that section of the code.

The procedure laid down by our Legislature for the abatement of illegal liquor-selling places as nuisances is found in the statute of 1915, at page 236. The petitioners dismiss this statute from consideration, for the reason that it requires that before the abatement action is commenced a written notice must be served upon the owner of the premises notifying him of the existence of a nuisance upon the premises. This statute also provides that abatement proceedings shall be prosecuted by the district attorney in the name of the people of the state of California. Inasmuch as there is no allegation in the complaint to abate the nuisance to the effect that the property owner had been given the necessary notice, and inasmuch as the proceedings were instituted in the name of the United States, instead of in the name of the people of the state as herein provided, it is contended that this state law for the abatement of such nuisances does not apply to these proceedings.

It is clear that if the procedure for the abatement of such a nuisance provided by the law of the state is that contained in the Statutes of 1915, for the abatement of such nuisances, then the general procedure for the issuance of an injunction laid down in section 527, Code of Civil Procedure, does not apply. The two proceedings are at variance

with one another in the very matter involved on this appeal. The Statute of 1915 (Stats. 1915, p. 237, § 3), provides for the issuance of a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance whenever the existence of the nuisance is shown to the satisfaction of the judge by a verified complaint or affidavit. No preliminary notice of the application for the writ is required. The notice required by the state statute for the abatement of such nuisances is the one before the commencement of the suit notifying the owner of the property of the existence of the nuisance referred to above. It is clear that the special proceedings provided by the Legislature for the abatement of nuisances of this type control over the general provisions of the law with relation to the issuance of writs of injunction (see *State v. Finlayson*, 41 N. D. 494, 170 N. W. 910; *U. S. v. Auto City Brewing Co.* [D. C.] 279 Fed. 132), unless the fact that this particular proceeding is brought in the name of the United States relieves it of the requirements of the state statute concerning this type of abatement proceedings.

[5] Before taking up the consequences resulting from the bringing of the action in the name of the United States, it may be well to dispose of the contention of the petitioners that the state statute with reference to the abatement of such nuisances is a law attempting to lay down a special procedure in violation of the Constitution of the state of California (Const. art. 4, § 25, subd. 3), and therefore is unconstitutional. We have already upheld a similar statute with reference to the abatement of houses of ill fame. *Selowsky v. Superior Court*, 180 Cal. 404, 410, 181 Pac. 652. The liquor traffic has always been considered a separate subject of legislation, and statutes pertaining to that subject are therefore necessarily general laws, as distinguished from "local and special" laws, which may not be enacted, regulating the proceedings of court. Const. art. 4, § 25. It follows that a law regulating the proceedings for the abatement of this type of a nuisance is a general law, although it may require a different sort of procedure than that obtaining in other cases. An extended discussion of this point we think is unnecessary, because, under principles already laid down, it is clear that this special procedure does not violate the provisions of the Constitution here involved.

[6] Assuming then that the procedure laid down in our own abatement law controls in the issuance of injunctions for the abatement of such nuisances, we are immediately met by the contention that the proceedings should be instituted by the district attorney in the name of the people of the state of California, as required by the state statute. This particular provision of the statute, however, is

supplemented by the act of Congress giving the district attorney power to bring abatement proceedings to abate illegal liquor-selling places as a nuisance in the name of the United States. The statute, as we have held in *Carse v. Marsh*, supra, is applicable in the state of California, and thus supplements the legislation of the state. Places for the illegal sale of intoxicating liquor are declared to be nuisances by the Volstead Act, and declared to be nuisances by section 1 of the state act for their abatement. Stats. 1915, p. 236, supra. Section 2 of the state act for the abatement of such nuisances reads:

"Whenever there is reason to believe that such nuisance is kept, maintained or exists in any county or city and county, the district attorney of said county or city and county, in the name of the people of the state of California, must * * * [and to this the Volstead Act adds "or in the name of the United States may"] maintain an action in equity to abate and prevent such nuisance," etc.

The conclusion that the district attorney may sue in either name results from the fact that the federal statute is just as authoritative in the state of California (*Carse v. Marsh*, supra) as the state statute with reference to the power of the district attorney to bring suits to abate nuisances. In the conduct of such litigation, the procedure outlined in the state statute must be followed, as we have said above.

[7, 8] So far we have only disposed of the petitioners' contention that, because this proceeding is brought in the name of the United States, the state statute does not apply. What we hold is that, whether the proceeding is brought in the name of the United States, or in the name of the people of the state of California, the procedure outlined in the state statute for the issuance of such injunction controls. The next question presented is that arising from the fact that the state law requires that a written notice be given to the owner of the premises before the suit is instituted (Stats. 1915, p. 237, § 3, supra), while the Volstead Act does not require such notice. It is only necessary in the matters at bar to determine whether or not such notice is jurisdictional. If it is jurisdictional in the sense that the superior court would not have authority to issue the preliminary injunction without this notice, then the injunction in this case having been issued without such notice, is void, and the petitioners are entitled to discharge. On the other hand, if the failure to give such notice merely goes to the sufficiency of the complaint as a foundation for the temporary and permanent abatement of the nuisance, and if the error of the court in issuing the temporary injunction is an error committed in the exercise of its jurisdiction, the preliminary injunction in this case comes under the head of

an injunction improvidently issued, as distinguished from one utterly void, and petitioners' remedy was not to violate the injunction, but to apply to the court for its dissolution, and in default of such dissolution to appeal to the higher court for a reversal of the order of the superior court in issuing, or in failing to dissolve, the injunction. The authorities fully support the view that such a defect in the complaint is not jurisdictional, because it goes merely to the sufficiency of the facts alleged as a basis for the injunctive relief asked for, and not to the power of the court to issue the injunction.

An injunction thus erroneously issued cannot be disobeyed with impunity. "If the bill upon which an injunction is granted is defective, it must be tested by demurrer in court, and not by disobedience." *Court Rose No. 12, F. of A., v. Corna*, 279 Ill. 605, 117 N. E. 144. The same rule has been applied even when a temporary injunction has been issued without the required notice. In such a case (*People v. Mussatto*, 216 Ill. App. 519, 523, 524, 525) it was said:

"Appellant misconstrues the law as laid down by the supreme and appellate courts of this state when he states that a court is without jurisdiction to punish a party for contempt or violation of a temporary injunction issued without notice and without the respondent having been served with summons, but where the respondent has been served with the injunction writ.

"In *Court Rose No. 12, F. of A., v. Corna*, 279 Ill. 605, the court at page 607 says: 'Where an injunction, order, mandate, or decree of a court has been disobeyed or disregarded, and there is a proceeding for contempt of the court for such disobedience or disregard, the only question to be considered is whether the court had jurisdiction to make the order or decree. Jurisdiction is the power to hear and determine a matter in controversy, and if the power existed, the question whether the court erred or the power was improperly exercised is not involved, and errors of the court constitute no defense whatever. An injunction void because of want of jurisdiction in the judge who entered it may be disregarded, and the person disregarding it is not guilty of contempt (*People v. McWeeney*, 259 Ill. 161, Ann. Cas. 1916B, 34), but a party enjoined cannot refuse to obey the injunction upon the ground that it is erroneous or improvidently granted. If the bill upon which an injunction is granted is defective, it must be tested by demurrer in court, and not by disobedience to the writ. The jurisdiction of a court of equity does not depend upon the correctness of the decision made, but an order made in the exercise of jurisdiction must be obeyed until the order is modified, or set aside by the court making it, or reversed in a direct proceeding by appeal or on error. *Leopold v. People*, 140 Ill. 552; *Clark v. Burke*, 163 Ill. 334; *People v. Weigley*, 155 Ill. 491; *O'Brien v. People*, 216 Ill. 354; *Franklin Union v. People*, 220 Ill. 355; *Christian Hospital v. People*, 223 Ill. 244. The power of the courts to enforce their or-

ders and judgments is a necessary incident to the administration of justice, and if they were without power to compel obedience or to prevent unwarranted interference with the administration of justice they could not perform their functions or secure the rights of litigants, however important. The only questions, therefore, in this case, are whether the city court of Spring Valley had jurisdiction to make the order in question and whether it was violated by the defendants.'

"Courts of equity have jurisdiction of proceedings to enjoin the maintenance of a nuisance. Section 38, c. 43, Hurd's Rev. St. (J. & A. par 4650) provides that 'all places where intoxicating liquor is sold in violation of any of the provisions of this act shall be taken and held and are declared to be common nuisances and may be abated as such.'"

In that case the adjudication of contempt was affirmed. To the same effect the Supreme Court of Tennessee in a contempt matter for the violation of a preliminary injunction in an abatement case (*State v. Raggianti*, 129 Tenn. 562, 167 S. W. 690), said:

"If it be conceded that, under a proper construction of the Nuisance Act, a defendant is entitled to notice of an application for temporary injunction, nevertheless the failure to give him such notice is merely an error in procedure on the part of the court. Such an error is procedural only and not jurisdictional. By the act in question, the chancery court is clothed with authority to deal with nuisances, such as plaintiff's business is declared by the act to be, and of course the court had jurisdiction of the defendant. That is to say, the court below had jurisdiction of the subject-matter and of the person of defendant, and although the action of the court in issuing the temporary injunction may have been erroneous, as a matter of practice, it was by no means a void order which the defendant was at liberty to disregard, but was an order which the statute empowered the court to make. See note to *McHenry v. State*, 16 L. R. A. (N. S.) 1063.

"Speaking of the issuance of temporary injunctions, after discussing the rules with reference to same, the Supreme Court of Appeals of West Virginia said: 'Violation of these rules regulating the exercise of the jurisdiction does not, any more than any other case of erroneous decision, make the action of the court *coram non jure*. To grant such an injunction when the state of the case, tested by the rules established for the exercise of jurisdiction, does not warrant it is nothing more than judicial error. It is not an act in excess of jurisdiction.' *Powhatan Coal & Coke Co. v. Ritz*, 60 W. Va. 395, 402, 56 S. E. 257, 260, 9 L. R. A. (N. S.) 1225-1229.

"Mr. High lays down the rule as follows: 'With whatever irregularities the proceedings may be affected, or however erroneously the court may have acted in granting the injunction in the first instance, it must be implicitly obeyed, so long as it remains in existence, and the fact that it has been granted erroneously affords no justification or excuse for its violation before it has been properly dissolved. * * * Upon proceedings for contempt in this class of

cases, the only legitimate inquiry is whether the court granting the injunction had jurisdiction of the parties and of the subject-matter, and whether it made the order which has been violated, and the court will not, in such proceedings consider whether the order was erroneous.' 2 High on Injunctions (4th Ed.) § 1416.

"Mr. Joyce says: 'Unless an injunction order is void upon its face for lack of jurisdiction on the part of the judge who granted it, it must be obeyed, however erroneous the granting of it may have been, until it is dissolved on motion or appeal, or some other method of direct review in the action in which it was granted.' 1 Joyce on Injunctions, § 247.

"So at most the action of the court in granting this temporary injunction, without notice, was a mere violation of a rule of procedure. The temporary injunction was not with respect to a matter and parties beyond the court's jurisdiction, and it was therefore not an order which the defendant was at liberty to disregard."

The adjudication of contempt was affirmed.

The case of *Weaver v. Toney*, 107 Ky. 419, 54 S. W. 732, 50 L. R. A. 165, cited by petitioners, is inapplicable, because it relates to an election matter in which the mandatory preliminary injunction issued without notice practically determined the whole litigation without a hearing. The case of *Burns v. Huffman*, 181 Ind. 591, was on an appeal from a preliminary injunction issued to the chief of police and other officials to restrain them from exercising the duties of their office. *Smith v. People*, 2 Colo. App. 99, 29 Pac. 924, also cited by petitioners, was a case where the court issuing the injunction did not have jurisdiction of the subject-matter of the action, which was land in another county. The decision of the District Court of Appeal, First Division, Second District, in *Maier v. Superior Court*, 215 Pac. 399, is also relied upon by petitioners. That case held that a restraining order issued without a bond is void, and its violation not a contempt of court. Assuming that the question was correctly decided it has no application to the cases at bar.

We think it clear, then, that the injunctive orders in the matters at bar were not void because the complaints on which they were issued failed to allege previous notice to the owner; and that, therefore, such orders were not to be entirely disregarded, but although improvidently and erroneously issued were to be obeyed until set aside or reversed.

[9, 10] This being true, the petitioners were guilty of contempt of court in violating the temporary restraining orders. They were adjudged guilty under appropriate proceedings. Two points are made with reference to the validity of the judgments in the contempt proceedings, if it be conceded, as we have held, that the orders violated by the petitioners were not void. The first arises

from the fact that affidavits charging such contempt were filed, and upon motion of the district attorney the contempt proceedings so initiated were dismissed without prejudice to further action by the district attorney. Subsequently, the district attorney filed amended affidavits charging the same contempt, and it is claimed that the dismissal of the first proceeding was a bar to the second proceeding, because section 1387, Penal Code, declares that a dismissal of a misdemeanor charge bars further prosecution, unless made for the express purpose of amending the complaint in the action. It is sufficient in response to this claim to say that a contempt is prosecuted by an "affidavit" under section 1209 et seq. of the Code of Civil Procedure, and that the sections of the Penal Code relating to the amendment of complaints, indictments, and informations contained in section 1387, Penal Code, do not apply to such prosecutions. While the "affidavit" may come within the definition of the Penal Code (section 806) defining a "complaint," and partakes of the character of a "complaint" (*Selowsky v. Superior Court*, 180 Cal. 404, 407, 181 Pac. 652; *Frowley v. Superior Court*, 158 Cal. 220, 222, 110 Pac. 817; *Hotaling v. Superior Court* [Cal. Sup.] 217 Pac. 73), is not referred to in the statute outlining the summary method of procedure used here for punishing the offense as a "complaint," but as "an affidavit" (Code Civ. Proc. § 1211), and we hold that section 1386 of the Penal Code does not apply to the summary proceedings for the prosecution of contempt provided for in the Code of Civil Procedure, but relates to prosecutions in the mode and manner provided in the Penal Code. See *Ex parte Karlson*, 160 Cal. 378, 117 Pac. 447, Ann. Cas. 1912D, 1334. If, however, it be conceded, as the petitioners contend, that the dismissal is a bar, it was but a defense to be interposed in the trial court, and the ruling of the trial court adverse to the petitioners cannot be reviewed on habeas corpus (*Ex parte Harron* [Cal. Sup.] 217 Pac. 728), and it would follow cannot be considered on a writ of review.

[11] The second question presented by the petitioners herein upon the assumption that the temporary restraining orders were valid is with reference to the extent of the punishment for the contempt. The power of the court to punish for contempt under the general law is limited to a fine of \$500, and five days' imprisonment in the county jail. Under the state law for the abatement of such nuisances a violation or disobedience of an injunction is punished as a contempt of court by a fine not less than \$200, or more than \$1,000, or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment. Stats. 1915, p. 237, § 6. It will be observed that this provision differs from

that of the Volstead Act in that a fine cannot be less than \$200, and the imprisonment cannot be less than one month, while under the Volstead Act no minimum is provided. The maximum also differs in that the imprisonment under the state law cannot be more than six months, and under the Volstead Act may be one year. The question then is as to the effect of the Wright Act, which provides in section 1, after reciting the requirements of the federal Constitution:

"To that end, the penal provisions of the Volstead Act are hereby adopted as the law of this state; and the courts of this state are hereby vested with the jurisdiction, and the duty is hereby imposed upon all prosecuting attorneys, sheriffs, grand juries, magistrates and peace officers in the state, to enforce the same."

That the provisions for the punishment for a contempt of court in the violation of a preliminary injunction in an abatement proceeding are penal provisions must be admitted. Indeed, the petitioners here base their claim that the proceedings here are barred under the provision of section 1387, Penal Code, largely upon the fact that the provisions for the punishment of a contempt are in the nature of provisions for the punishment of a crime, and they are in effect provisions defining and punishing misdemeanors. It seems clear, then, that these penal provisions of the federal law were adopted by the Wright Act as a part of the law of California, and, if that is true, the Wright Act to that extent modifies the statute of 1915 fixing the punishment at a less maximum and a higher minimum for the same offense. The two penalties cannot well stand together as they are inconsistent, and the latter statute will therefore control.

The petitioners urge that section 2 of the Wright Act does not purport to authorize the punishment for contempt of court provided in the Volstead Act. That section is as follows:

"All acts or omissions prohibited or declared unlawful by the eighteenth amendment to the Constitution of the United States or by the Volstead Act are hereby prohibited and declared unlawful; and violations thereof are subject to the penalties provided in the Volstead Act."

It is claimed that the contempt of the California court is not made punishable by the Volstead Act, and it might with equal force be claimed that the act or omission constituting the contempt is not denounced as such in the Volstead Act, but rather the Volstead Act recognizes the general law that disobedience of an order of court is a contempt of court and fixes the punishment. It might be well doubted, therefore, whether under section 2 of the Wright Act the provisions for the punishment of contempt were adopted by the state of California, although it might

well be argued that where a penalty is fixed for an act, as in this case in the Volstead Act, that the act itself, the contempt, is necessarily thereby denounced, or, to use the terms of the Wright Act, "prohibited or declared unlawful." However that may be, it is clear that the penalty for the violation of a preliminary injunction in an abatement proceeding is fixed by the Volstead Act, and is one of the penalties of that act, and is adopted as the law of this state by reference in section 1 of the Wright Act which, as already stated, expressly provides that the "penal provisions" of the Volstead Act are adopted as the law of this state.

In opposition to this conclusion counsel for petitioners urge that we ought not to construe the Wright Act as adopting the severe penalties of the Volstead Act, without recognizing the fact that under the federal procedure there is an appeal from an adjudication of contempt and the contempt is prosecuted by information, while under our state law there is no appeal in a contempt matter. It is urged that if we adopt the penalties of the Volstead Act without also adopting the procedure indicated, that the California provisions will be more drastic than those of the Volstead Act. It is a sufficient reply to this suggestion to state that under petitioners' own argument the procedure in the federal court is not and cannot be adopted in the state court. We conclude that the penalties imposed in these cases at bar, although of the utmost severity, were within the jurisdiction of the trial court.

[12] We have now to determine whether or not the special points made in favor of certain petitioners which depend upon the evidence are well founded. With reference to Alfred Volpi, it is claimed that the affidavit charging the contempt is insufficient to give the court jurisdiction to punish him for that offense. It was alleged in the affidavit that Alfred Volpi, Louis Pera, and Joseph Perrone were copartners in the business transacted in the building on the premises, and that they were the owners in fee of the premises; that on March 3d, March 5th, and March 6th Louis Pera and Joseph Perrone sold the complaining witnesses intoxicating liquors upon the premises in question; that defendant Alfred Volpi was present in the premises on the dates and occasions mentioned, and knew that the defendants Louis Pera and Joseph Perrone were selling the aforesaid intoxicating liquor in said building and on said premises, and that the sales were made in the regular course of business of the copartners, and after notice of the preliminary injunction. We have here the allegation that this petitioner knew of the violation, and that it was in the regular course of business of the copartnership of which he was a member. These allegations were sufficient to give the court jurisdiction.

The testimony supported the allegation as to petitioner Volpi.

[13, 14] It is claimed that the evidence is insufficient to justify the adjudication of contempt in the case of Joseph Perrone. It appears from an examination of the entire record that the prosecuting witnesses were of the impression at the time they filed the affidavits alleging contempt that Joseph Perrone was one of the persons who sold liquor to them. Upon the trial they freely admitted that they were mistaken in the identity of Joseph Perrone. There is, however, other evidence in the record from which the trial court could hold that the petitioner Joseph Perrone was guilty of contempt. It was admitted that he was one of the three partners owning the hotel in which the liquor was purchased by the complaining witnesses. It appears from the evidence that the room in which the liquor was sold was so arranged that no one could enter except upon signal, and that the door was opened by a string passing from the bar around the side of the room to a catch lock on the door through which admittance was obtained, which string was operated from behind the bar. It is also to be inferred from the testimony of the complaining witnesses that a regular business of selling intoxicating liquors was carried on in that place, and that the receipts from such business were deposited in the cash register. It is admitted by the petitioner, Joseph Perrone, that he was around the premises daily, and one of the complaining witnesses testified that he was there upon the premises on March 3d, when he purchased intoxicating liquor, but it is not claimed that he was present at the time of the purchase and sale of such liquor. The district attorney in his argument relies wholly upon the proposition that the petitioner, Joseph Perrone, was one of the partners, and that the sales of liquor were made by the copartnership. If the evidence went no further than this, it might be wholly insufficient to justify the judgment of contempt, but, as already stated, it appears not only that this petitioner was a partner, but that he was actively engaged in the conduct of the business, and daily present upon the premises, and that the preparations for the illegal sale of liquor by the establishing of a lookout, secret signals and spring lock could not well have escaped his attention if he was a man of ordinary perception. In addition to this, although neither party calls attention to the statement in the record, it is testified that on March 7, 1923, the petitioner Perrone sold liquor to one of the complaining witnesses. The fact that the date was not identical with the date stated in the affidavit was immaterial, because such testimony would show a violation of the preliminary injunction by Perrone, which was the basis of the judgment for contempt. The testimony was sufficient, if believed by the trial judge, to

justify its conclusion that the petitioner, Joseph Perrone, knew of the illegal transactions, and profited thereby. This evidence being sufficiently substantial to give the court jurisdiction to punish Joseph Perrone for contempt, we cannot inquire further into the matter upon a writ of review.

[15] It is claimed that the orders adjudging Brambini and Maffia guilty of contempt were void, because of some confusion in the number of the building at which it is claimed the offense occurred. It is sufficient to say that the description of the property was given in the complaint and in the preliminary injunction, and it was further identified by the name of the hotel in which it was alleged the nuisance was maintained. The fact is that the affidavit for the temporary injunction alleges that the defendants had in their possession liquor at 110 Second street. The temporary injunction inadvertently described the premises as 101 Second street. Inasmuch as there is no building at 101 Second street and the premises actually intended were further described by the name of the hotel, with a description of the lot and the ownership of the same by the defendant, the variance was immaterial.

[16] It is claimed that the service of the injunctive orders was void because not accompanied with an affidavit. This is entirely immaterial, because if the defendants knew the injunctions were issued, they were guilty of contempt in violating such orders.

The petitioners will be remanded to the sheriff of Humboldt county, and the orders under review are affirmed.

We concur: WASTE, J.; MYERS, J.; SEAWELL, J.; LENNON, J.; LAWLOR, J.; KERRIGAN, J.

On Petition for Rehearing.

PER CURIAM. The petitioners have applied for a rehearing, and have urged as a ground for the rehearing the fact that the opinion of this court did not follow the argument of either of the parties, and for that reason the petitioners had not had the opportunity or occasion to present the considerations opposed to the view announced by this court in its opinion. If the contentions advanced by the petitioners in their attack upon the opinion were sufficient to create a doubt in the mind of this court as to the correctness of its conclusion, we would, of course, under the circumstances grant a rehearing. Most of the reasons advanced by the petition for a rehearing were given due consideration in arriving at the conclusion announced in our decision.

In their petition for a rehearing the decision rendered by this court in October, 1922 (*Carse v. Marsh* [Cal. Sup.] 210 Pac. 257), is not discussed nor is it mentioned, except in a quotation from our opinion in which that

case is cited. In that case we held that the trial court had jurisdiction to punish for contempt for a violation of an injunction issued in an abatement proceeding brought in this state by the district attorney in the superior court of San Diego county in the name of the United States of America to abate an illegal liquor-selling place. This decision was based upon the proposition that the state Constitution vested jurisdiction in the superior court to abate nuisances, and that, the Congress of the United States having declared places for the illegal sale of liquor to be nuisances, the jurisdiction to abate the same was vested in the superior court without regard to any local legislation expressly conferring jurisdiction on such court or fixing the procedure therein. We did not in that case overlook the state statute (Stats. 1915, p. 236) expressly conferring such jurisdiction, nor did we there deal with the procedure in such cases, for the reason that the sole question presented by the petitioner in that case was as to the jurisdiction of the superior court to entertain an action to abate such illegal liquor-selling place.

[17] Due consideration of the decision in the case of *Carse v. Marsh*, supra, will answer some of the points advanced by the petitioners as a ground for a rehearing in this case. For instance, the jurisdiction to abate a nuisance is not derived from the state statute, but from the Constitution. This jurisdiction, we held in the case of *Carse v. Marsh*, supra, was vested in the superior court without any state legislation whatever. Such jurisdiction being thus vested by the Constitution itself, could not be taken away even by an express statutory provision attempting so to do. We are satisfied with the discussion in our opinion upon the subject of the effect of the failure to give notice to the property holder that his property was being used as an illegal liquor-selling place.

The petitioners insist that the effect of our decision is to determine that Congress can amend a state statute. Of course, we announced no such conclusion. We merely called attention to the fact that it was held in the case of *Carse v. Marsh*, supra, that the district attorney could bring an abatement proceeding in the name of the United States of America, and that under our own statute he was authorized to bring such a proceeding in the name of the people of the state of California. Stats. 1915, p. 236, supra. We then held, as contended by the petitioners, that the procedure in the action to abate the nuisance was determined by the state law instead of being governed by the Volstead Act, thus in effect agreeing with the petitioners that whether the proceeding was instituted in the name of the United States of America, or in the name of the people of the state of California, the procedure in the action was

controlled by the state law, we differed with petitioners only in finding that procedure in the act of 1915 (Stats. 1915, p. 236, *supra*) instead of in the Code of Civil Procedure (section 527, Code Civ. Proc.).

The petition for a rehearing is denied.

192 Cal. 125

JAMME v. RILEY, State Controller.
(L. A. 7825.)

(Supreme Court of California. Sept. 21, 1923.)

States 127—Fund for examination and registration of nurses held not abolished by budget amendment to Constitution and budget bill.

The special fund for examination and registration of nurses provided by act on the better "Education of Nurses," as amended by Act of May 31, 1921 (St. 1921, p. 980), was not abolished by the budget amendment to the Constitution, and the budget bill, they not having either expressly or impliedly repealed such statute of 1921.

In Bank.

Application by Anna C. Jamme, for writ of mandate, against Ray L. Riley, Controller of the State of California. Writ granted.

Albert A. Rosenshine, of San Francisco (J. H. Hoffman, of San Francisco, of counsel, and Allen G. Wright, of San Francisco, *amicus curiæ*), for petitioner.

H. C. Lucas, of San Francisco, James L. Atteridge, of Sacramento, and Dion R. Holm, of San Francisco, for respondent.

RICHARDS, Judge pro tem. The petitioner herein applies for the issuance of a writ of mandate directing the respondent, as state controller, to draw his warrant upon the state treasury for the payment to the petitioner of the sum of \$250, the same being her salary as director of the department of examination and certification of nurses, a department position and salary created under and by virtue of the act of the Legislature approved May 31, 1921, entitled "An act to amend sections one, two, four, six, eight and eleven of an act entitled 'An act to promote the better education of nurses,'" etc. St. 1921, p. 980. The petitioner also seeks said writ to compel said respondent to draw a warrant on the state treasury for the payment of a certain claim of the petitioner for the sum of \$6.96, covering her traveling expenses incurred in the performance of her duty as prescribed in said act. The respondent has filed an answer to said application admitting the averments of fact set forth therein, but averring that his refusal to draw said warrant is based upon the adoption by the people of the state of California of the so-called budget amendment to the state Constitution, and upon the ac-

tion of the Governor of the state, in conformity therewith, in submitting to the Legislature of 1923 his "budget recommendations and estimated revenues"; and upon the action of the State Legislature taken thereafter in the adoption of the so-called "budget bill"; and upon the action of the Governor of the state in the approval of said act, by reason whereof the respondent avers that being without information or knowledge as to the legal effect of these several legislative and executive acts upon the funds or appropriations in the state treasury upon which these warrants are sought to be drawn, he has refused to comply with the petitioner's demand for such warrants. The respondent, by reference, makes a part of his answer the provisions of these documents, in so far as they purport to deal with the matter of the appropriation for the expenditures of the state board of health; and it appears therefrom that in the budget recommendations submitted by the Governor to the state Legislature there is included an item of \$3,000 for the salary of director of registration of nurses, but we find no recommendation therein as to the traveling expenses of said director. In the budget bill accompanying said document appears the general item "for salaries of employees state board of health \$360,663.42," and also the general item "for support state board of health \$308,536.58."

The facts upon which the application for this writ is based are these: The petitioner is the duly appointed, qualified, and acting director of the department of examination and certification of graduate nurses, holding her position as such under appointment by the state board of health acting in accordance with the provisions of the act of 1921 above referred to, and with her salary fixed at the sum of \$250 per month by said board, pursuant to the terms of said act. The statute further provides, in section 11 thereof, as follows:

"Within ten days after the beginning of each month the secretary of the state board of health shall report to the controller the amount and source of all collections made under the provisions of this act, and at the same time all such amounts shall be paid into the state treasury and shall be placed to the credit of the special fund to be known as the fund for examination and registration of nurses; provided, that, whenever and as often as there is in the state treasury to the credit of the fund for the examination and registration of nurses, funds in excess of ten thousand dollars the same to be invested by the state board of control in the same manner that the funds of the state school land fund are invested and the interest upon such investment when collected shall be placed to the credit of the fund for the examination and registration of nurses. All amounts paid into this fund shall be held subject to the order of the state board of health, to be used only for the purpose of meeting necessary expenses in the performance of the purposes of

and the duties imposed by this act. Claims against the fund shall be audited by the state board of health and by the board of control and shall be paid by the state treasurer upon warrants drawn by the state controller."

The sources from which the revenues are derived which are thus to be placed to the credit of the fund in the state treasury to be known as "the fund for examination and registration of nurses" are two: (1) An examination fee of \$15 charged each applicant for a certificate as registered nurses; (2) a renewal fee of \$1 per annum charged to registered nurses. It is averred and admitted that there is in the state treasury to the credit of said fund ample money for the payment of said warrants, the drawing of which is sought to be compelled by this proceeding.

The only question necessary to a decision of this matter is that raised by the answer of respondent herein as to whether the adoption of the constitutional amendment known as the "budget amendment" or the subsequent action of the Governor taken in accordance therewith in submitting to the state Legislature his budget recommendations, and in presenting to that body an appropriation bill based thereon and known as the "budget bill," and the action of the state Legislature in the enactment into a law of said budget bill, or any or all of said acts, have had the effect of so far, expressly or by implication, repealing the said statute of 1921 as to abolish the special fund provided for therein and entitled as above stated, so as to prevent the further drawing of warrants by the state controller upon such fund. This precise question has been determined adversely to the respondent's contention herein by this court in its recent decision in the case of Railroad Commission v. Riley (Cal. Sup.) 218 Pac. 415, wherein it was decided that neither the constitutional provision nor said budget amendment (Const. art. 4, § 34), nor the provisions of the budget bill (Stats. 1923, c. 121) operated expressly or by necessary implication to repeal previous statutes directing the collection of revenue and specifying the fund into which such revenue was to be paid, nor to provide that the revenue so collected should be transferred to the general fund of the state treasury. The reasoning and conclusions of that decision have exact application to the instant case, and it follows therefrom that the provisions of the act of 1921 relating to the salary of the petitioner herein and also to her traveling expenses, when engaged in performing the duties of her position, are still in full force and effect, and that the salary and traveling expenses of the petitioner herein are still payable out of the special fund in the state treasury collected and set apart for such purposes under said act, and that claims therefor, when duly approved by the state board of health, shall be audited by the board of control, and shall be paid by the state

treasurer upon warrants drawn by the state controller out of said fund, provided such claims are within the limit of the appropriation providing for such expenditures as contained in the budget bill. Such, we think, is the effect of our decision in the case of Railroad Commission v. Riley, supra, and it is therefore ordered that a writ issue directing the respondent herein as state controller to draw his warrants upon the treasurer in favor of the petitioner for the several amounts set forth in her petition, and payable out of the special fund in the state treasury provided by the act of 1921 as applicable to the payment of such claims.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.

192 Cal. 97

**CALIFORNIA HIGHWAY COMMISSION
et al. v. RILEY, State Controller.
(S. F. 10678.)**

(Supreme Court of California. Sept. 20, 1923.)

1. States ⇐106—Highway commission not authorized to cancel contract to construct highway.

Under highway law, Const. art. 16, §§ 2, 3 (see St. 1921, p. 1x), adopting by reference various provisions of State Highways Act of 1915, providing inter alia, that "the department of engineering in accordance with law shall have power * * * to purchase, sell, * * * lease or otherwise acquire * * * and do all other things necessary or proper in the construction" of state highways, etc., the highway commission created by Pol. Code, § 363f, adopted in 1921 (St. 1921, p. 1042), to succeed to the powers of the subdivision of the department of engineering designated the state highway commission, which under St. 1907, p. 218, § 8, and St. 1917, p. 692, § 9, was given control of the construction of state highways and all expenditures therefor, with the right to do all things necessary to properly care for and manage the roads under its supervision, is not authorized to cancel by agreement a valid and subsisting contract for the construction of a state highway, and it cannot use state highway funds to compensate the contractor for relinquishing his rights under the contract, in view of the previous highway acts, St. 1909, p. 647, as amended by St. 1915, p. 686, and St. 1915, p. 650, and Const. art. 4, § 32, providing that all contracts to pay extra compensation to contractors for claims against the state, made without express authority of law, shall be void.

2. Principal and agent ⇐101(1)—Agent's authority to break contract not implied from authority to execute contract.

A grant of authority to an agent to execute a contract in behalf of his principal contemplates the performance of such contract, not its breach, and authority to break the contract

is not implied from the mere grant of authority to execute such contract.

3. States ☞106—Rights or liabilities of state under contract cannot be increased or diminished by state officer or board without authority, express or implied.

Where a state officer or board has made a contract for the state by which it is to have certain rights and liabilities, no officer or board can diminish or increase the rights or liabilities of the state thereunder, unless invested with authority, express or implied, to do so.

4. States ☞94—Constitutional provision held not to remove restrictions and limitations on highway commission.

Const. art. 16, §§ 2, 3 (see St. 1921, p. 1x), relating to highways, providing that "nothing in this Constitution contained * * * shall be a limitation upon the provisions of this section," was intended to dispel any doubt as to the validity of highway bonds and does not wipe out all other constitutional limitation and restrictions on the powers of the highway commission.

5. States ☞127—Highway commission cannot use federal aid to compensate contractor for relinquishing contract to construct state highway.

Legislation authorizing the highway commission to designate the fund into which federal aid shall be paid contemplates that it shall be paid into funds which are under the control of the commission for the creation, repair, and maintenance of state highways, and the commission cannot use it to compensate a contractor for relinquishing a valid subsisting contract to construct a highway.

6. Mandamus ☞10—Will not issue to compel auditor to draw warrant for illegal claim.

Relief by mandamus is largely in the discretion of the court and will not be granted where its enforcement would work an injustice or accomplish a legal wrong, and it will not issue to compel an auditor to draw his warrant for an illegal claim, even though it has been audited and allowed by the board which is charged with that duty and responsibility.

In Bank.

Application for writ of mandate by the California Highway Commission and others to compel Ray L. Riley, as State Controller, to audit and draw a warrant for payment of claim accruing under an agreement canceling a contract for highway construction. Writ denied.

Paul F. Fratessa, of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., and R. W. Harrison, Deputy Atty. Gen., for respondent.

W. H. Devlin, of Sacramento, for Claimant Pollock.

MYERS, J. This is an application by the highway commission for a writ of mandate to compel the respondent, as state controller, to audit and draw his warrant for the payment of a claim presented to him for such

audit and warrant. It is alleged in the petition that on or about August 31, 1922, the California highway commission, as then constituted, entered into a written contract with one Pollock (hereinafter referred to, for convenience, as the "first contract") for the construction of a portion of a state highway in Monterey county between Anderson canyon and Sur river; that in and by said contract said highway commission agreed to pay said Pollock at the unit prices therein specified for the grading and other work therein provided for, no total sum being specified therein, but the total cost thereof will aggregate not less than \$2,500,000; that thereafter petitioners, the successors to the former members of the highway commission, believing that it would be better for the state of California and the people thereof to cancel said contract with Pollock and to suspend the work on said highway and to devote the moneys which otherwise would be used upon said contract to the construction of other highways which are more urgently needed, and which would serve a greater useful purpose, did, on April 24, 1923, enter into an agreement in writing with said Pollock (hereinafter referred to, for convenience, as the "second contract"), a copy of which is attached to the petition; that in and by said last-mentioned agreement petitioners agreed to pay Pollock the sums therein specified, and Pollock agreed, upon the payment thereof, to cancel and terminate said first contract, but unless and until said sums were so paid said first contract was to remain in full force and effect; that in accordance with said second contract petitioners approved a claim which had theretofore been presented by Pollock upon the treasury of the state of California for the sum of \$125,000, being the first payment specified in said second contract, which claim was duly approved and the payment thereof ordered by the state board of control and the department of finance thereof, and then presented to respondent as controller, and respondent refused to draw his warrant upon the treasurer for the payment of the same. In said second contract, after reciting execution of the first contract and that Pollock had entered into the performance thereof and that the highway commission desired to terminate the same, it is agreed that Pollock consents to the termination of said first contract upon the payment of the sum of \$132,944.37, to be paid to him, \$125,000 thereof within five days and the balance within ten days, together with such further sum as shall be due him as thereafter mentioned. It is then provided that the parties thereto shall continue in the performance of the obligations of said first contract in the manner therein provided until full payment shall have been made to

Pollock of said sum of \$132,944.37, and in addition thereto of such unpaid sums as shall be or become due to him according to the unit rates provided therein by reason of the performance thereof from the first day of April, 1923, to the date of the termination thereof. Said second contract then continues with the following statement:

"It being the intention of the parties hereto to pay said party of the second part [Pollock] the reasonable value of all work performed and materials furnished by him under and by virtue of said agreement [first contract] in accordance with the terms thereof, it being agreed that the reasonable value of said work and materials furnished and supplied up to April 1, 1923, aggregate the sum of \$132,944.37, after allowing all credits and offsets, and that the unit rates provided in said agreement for such work and materials as have been and shall be actually performed and supplied since the first day of April, 1923, to the date of the termination of said agreement, constitute the reasonable value thereof."

The respondent filed a general demurrer to the petition and also an answer thereto. The answer alleges that the first contract was duly entered into as required by law and was and is a valid subsisting contract; that work had been partly performed under the same prior to the 24th day of April, 1923; that any cancellation thereof sought to be made by the second contract was not, and was not intended, as an amendment of or change in the terms of said first contract, or as a change of the route therein specified, but, on the contrary, was, and was intended to be, an abandonment of the construction of said highway between Carmel and San Simeon; that said sum of \$132,944.37 proposed to be paid was not in payment for work done or materials furnished under the first contract, but that at least \$123,000 thereof was and is, and was and is intended to be, payment to Pollock as a consideration for his relinquishment of his rights under said first contract; that said sum of \$123,000 was not, nor was any part thereof, due to Pollock on account of any work done or any materials furnished or any services rendered by him to the state of California, but that the same was, and was intended to be, a gift, gratuity, bonus, or extra compensation or allowance, to Pollock for the purpose of inducing him to surrender and relinquish his rights under the first contract after the same had been partly performed; that there was, on April 1, 1923, due Pollock, for work done and materials furnished theretofore under said first contract, a sum not in excess of \$10,000, for which respondent is and has been ready and willing to issue his warrant as controller upon the presentation to him of a claim therefor prepared as required by law, but that no such claim has been presented.

When this case came on for hearing an effort was made to frame a stipulation which

would dispose of the questions of fact tendered by the answer. This was not entirely successful, but it was conceded by petitioners that the amount due to Pollock for work and materials done and furnished up to April 1, 1923, under the first contract, amounts to but a small portion of the \$132,944.37 proposed to be paid to him under the second contract. The respondent contends that the sum of \$132,944.37 now proposed to be paid to Pollock is made up, roughly speaking, of \$9,000 which has been actually earned by and is due to Pollock under the first contract, and \$123,000 which is proposed to be paid to him as a bonus or extra compensation or as a consideration for his relinquishment of his rights under said first contract. The petitioners, on the other hand, while conceding that the sum is not due to Pollock under the terms of the first contract, take the position that it does represent the sum which the highway commission has deemed reasonable for the work done, under all the circumstances, taking into consideration the fact that the contractor has expended large sums of money in providing equipment and supplies and preparing himself for the performance of the entire contract, in the reasonable expectation that the amounts thus expended by him would eventually be absorbed and compensated by the aggregate amounts to be paid him at the unit prices for the performance of the entire contract. To illustrate: If the contractor expended \$150,000 in "overhead" expenditures under a contract for the construction of 50 miles of highway, his overhead charges therefor would amount to \$3,000 per mile, and would be taken into consideration on that basis in arriving at the unit prices to be paid him for the work. But if, after entering into such a contract and incurring such expenditures, the contract were to be terminated when he had constructed but one mile of highway, the "overhead" chargeable thereto would be \$150,000 per mile.

[1] After a vain effort to arrive at a definite and satisfactory stipulation, which should eliminate all issues of fact herein, it was suggested by the chief justice, and acquiesced in by the parties, that the case should be argued and submitted as if upon demurrer to the answer; in other words, upon the assumption that the facts stated in the answer are true. Further consideration of the allegations and denials of the petition and answer, in the light of the respective assertions and admissions of counsel at the hearing, convinces us that there are no material issues of fact standing in the way of a solution of the present controversy. The parties are in substantial agreement as to the essential facts, and their differences relate rather to the interpretation to be placed upon those facts and the conclusions of law to be drawn therefrom. We shall therefore con-

sider the case as upon the demurrer to the petition, which admits the truth of the facts there alleged, interpreting those allegations in the light of the explanations and concessions made by counsel at the hearing. It is thus apparent that a large portion of the sum now proposed to be paid to the contractor has not been earned by him and is not due to him under the terms of the first contract. It is wholly immaterial, for present purposes, whether this portion amounts to \$123,000, as claimed, or a less sum. We may, for convenience, assume that there is due him for work done and materials furnished up to April 1, 1923, according to the terms of the first contract, the sum of \$12,944.37, and that the petitioners are now proposing to pay him \$120,000 in addition thereto. This \$120,000 is claimed by respondent to be in legal effect a bonus, gratuity, or extra compensation, and is contended by petitioners to represent, when added to that which is due under the first contract, the reasonable value of the work already done, estimating that value in the light of the fact that the termination of the contract will require the contractor, in effect, to charge the "overhead" for the entire job against the small amount of work which was done thereon prior to April 1st. It is clear that the \$120,000 is not due or owing to the contractor from the state of California unless it is by virtue of the second contract. The question of the validity of the second contract involves a consideration of two questions; has the highway commission authority and power to cancel by agreement a valid and subsisting contract for the construction of a state highway? and is it authorized to expend state highway funds for such purpose?

The provisions of law relating to the powers and duties of the highway commission are to be found in various places. The first State Highways Act was adopted in 1909 (Stats. 1909, p. 647) and amended in 1915 (Stats. 1915, p. 686). The second State Highways Act was adopted in 1915 (Stats. 1915, p. 650), and it, among other things, adopted by reference various provisions of the first State Highways Act. The third state highways measure was adopted in 1919 and 1920 in the form of amendments to the Constitution (Const., art. 16, §§ 2 and 3; see St. 1921, p. lx), and it, in turn, adopted by specific reference certain provisions of the State Highways Act of 1915, and by general reference various other provisions thereof. It provided specifically for the construction, among others, of the state highway from Carmel to San Simeon, which includes the portion here under consideration. Section 363f of the Political Code, adopted in 1921 (St. 1921, p. 1042), created the present California highway commission, as the successor to the duties, powers, purposes, responsibilities, and jurisdiction there-

fore vested in the appointed members of the advisory board to the department of engineering, who formerly composed a subdivision of the department of engineering designated as the California state highway commission. The statutory provisions prescribing the powers, duties, and responsibilities of the department of engineering are to be found in the Statutes of 1907, page 215; Statutes of 1909, page 558; Statutes of 1911, p. 823; Statutes of 1915, pp. 630 and 898, and Statutes of 1917, pages 541 and 690. By section 8 thereof it is provided that "all public work done by the state, except as otherwise provided for by law, shall be under the full control of the said department." By section 9 thereof it is provided that—

"The department of engineering shall take and have full possession and control of all roads and highways which have been declared and adopted state roads and state highways and all state roads and state highways which may hereafter be acquired and constructed. All expenditures by the state for highway purposes, except as otherwise hereafter provided by law, shall be under the full charge of the department of engineering, and all moneys appropriated for such purpose shall be made payable upon the proper demand of said department when approved and audited by the state board of control. * * * It shall have power to * * * do all things necessary * * * to properly care for and manage the roads under the charge of the department. * * * Said California highway commission shall have the supervision and direction of all state roads and state highways now existing and the improvement, maintenance, repair and protection thereof, and have charge of and perform all other duties relating to state roads and state highways which may be imposed upon said commission by said advisory board."

The statutory provisions prescribing the contract law governing the state department of public works (formerly the state department of engineering) are to be found in the Statutes of 1909, p. 656, and Statutes of 1915, p. 1306. Section 1 thereof requires the preparation of full, complete, and accurate plans, specifications and estimates of cost prior to the commencement of any public work (including state highway construction). Sections 2 and 3 thereof prescribe the manner and mode of procuring bids and letting contract for such work. It is therein provided that—

"All contracts shall provide that such department of engineering may, as hereinafter provided, and on the conditions stated, make any change in the plans and specifications."

Section 4 provides that—

"After the contract or contracts are let no change shall be made to increase or diminish the cost of any contract in excess of \$500 except upon the approval of the advisory board of the department of engineering, and then only upon additional plans and specifications and estimates of cost being filed and approved,

and amended contracts entered into and filed with the original contract; * * * provided, that the bidders shall have had equal opportunity of knowing what the terms proposed by the department of engineering for the performance of such extra work shall be."

Section 6 provides for the making of progress payments under contracts upon estimates made and approved by the department and audited by the board of examiners—

"but no payment shall be made in excess of ninety per cent. of the percentage of the actual work completed, to which has been added one-half of the value of material delivered on the ground and unused. The department of engineering shall withhold not less than ten per cent. of the contract price until final completion and acceptance of the work."

Section 8 prescribes the terms and conditions upon which the department may take over and itself complete the work under a contract which is being neglected by the contractor, charging the cost thereof against such contractor. Section 2 of the third highway measure (Const. art. 16, § 2) provides that—

"All provisions of section 8 of said 'State Highways Act of 1915,' and of any amendment thereof, and any provisions of said act or of any amendment thereof, relating to the selection of routes, character of construction of highways, manner of conducting work thereon, powers and duties of officers in connection therewith * * * shall, so far as applicable, apply to the bonds herein authorized and all highways constructed hereunder."

Sections 2 and 3 contain the provision that—

"All provisions of this section shall be self-executing and shall not require any legislative action in furtherance thereof, but this shall not prevent such legislative action. * * * Nothing in this Constitution contained shall be a limitation upon the provisions of this section."

Said section 2 also provides that—

"The moneys in said 'third state highway fund' shall be used by the state department of engineering for the acquisition of rights of way for and the acquisition, construction and improvement of uncompleted portions [of the state highways theretofore provided for] and also for the acquisition of the rights of way for and the acquisition, construction and improvement" of certain state highways therein enumerated, including the one here under consideration.

Section 8 of the State Highways Act of 1915 provides that—

"The state department of engineering in the name of the people of the state of California, may purchase, or receive by donation or dedication from counties, or from public or private persons, or it may lease, any right of way, rock quarry or land necessary or proper for the construction, use, improvement or maintenance of said state highway. * * * The depart-

ment of engineering, *in accordance with law*, shall have power and authority to purchase, sell, exchange, lease or otherwise acquire * * * and *do all other things necessary or proper* in the construction, improvement or maintenance of said state highway. The department of engineering *in accordance with law* shall have power and authority to purchase, lease, or erect plants for manufacture of cement, crushed rock and other materials used in road or highway work, and also the power to dispose of said plants when no longer required for such purposes." (Italics added.)

[2] Petitioners argue, in effect, that the state in its contracts with private individuals is governed by the same rules as to its rights and liabilities thereunder as are private individuals (citing *Chapman v. State of California*, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158); that the state has the same power which the private individual possesses to breach its contract, and upon such breach becomes liable to render compensation as does an individual (citing *Lord v. Thomas*, 64 N. Y. 109; *People v. Stephens*, 71 N. Y. 549, and *Chapman v. State*, supra); that upon breach by the owner of a construction contract, such as the first contract herein, the contractor may choose between two remedies: He may sue to recover the amount due him for work performed up to the time of the breach, together with damages for the breach, or he may elect to treat the contract as abandoned and recover the reasonable value of the services performed by him without regard to the contract price (citing *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769; *Donnelly on Law of Public Contracts*, p. 358). They argue that this last situation is, in effect, anticipated and provided for by their second contract herein; that, in effect, they have undertaken to breach their contract and to pay to the contractor the reasonable value of the services performed by him, independent of the contract price, without compelling him to sue therefor. All of these propositions may be conceded, but it does not follow therefrom that petitioners have power or authority to cancel or terminate their contract with Pollock after the same has been legally executed and before it was performed. A private individual may grant authority to an agent to execute in his behalf a contract for a certain improvement, but it does not follow therefrom that the agent has authority to commit his principal to a breach of such contract and thus subject the principal to liability for damages.

"In general it may be said that an agent employed to buy has no authority to sell, and vice versa; that an agency for accepting or indorsing bills or notes does not authorize the agent to purchase or sell goods for his principal; that an agent authorized to sell and convey the property of his principal cannot, as against the principal, convey it in trust for the payment of his own debts; and that an authority to collect or secure a claim of the prin-

principal, however general in its terms, is not an authority to make a purchase for the principal of the property of the debtor for the security of the claim. An agent authorized to sell the property of his principal when manufactured has no authority to sell it before it is manufactured, and by a parity of reason an agent who has authority to sell new pattern goods to be manufactured has no authority to sell old pattern goods which are not being manufactured and cannot be made except at a loss." 1 Cal. Jur. p. 718, and cases cited.

A grant of authority to an agent to execute a contract in behalf of his principal contemplates the performance of such contract, not its breach, and authority to breach a contract is not implied from a mere grant of authority to execute such contract.

[3] The rule that a state in its contract with individuals is subject to the same rules and liabilities as individuals is itself subject to certain limitations. When an individual enters into a contract he is a free agent and may determine for himself whether he will continue therewith or stand the damages for a breach thereof, or he may by agreement with the other party modify or abrogate the same. After a performance in full or in part, he may pay the other party merely what he is entitled to, or may pay him more by way of extra compensation or as a gratuity. When, however, the state empowers an officer or board to enter into a contract on its behalf, whereby it is to have certain rights and liabilities, and the officer or board has entered into such contract, no officer or board may thereafter act or speak for the state in the matter of such contract, either for the enforcement or termination thereof, unless expressly or impliedly authorized by the state so to do. By the execution of such an authorized contract the state acquires certain legal rights and incurs certain liabilities which are fixed and ascertained, or ascertainable. Thereafter no one can either increase or diminish the rights of the state or increase or reduce its liabilities thereunder unless he has been vested with authority so to do by express grant or clear implication. The state having directed or authorized the making of the contract contemplates its performance, and, as in the case of private individuals, the authority to breach such a contract is not to be implied from the mere grant of authority to execute the same. When, as here, the contract has been lawfully executed and has been performed in part, the amount which the contractor is entitled to receive for the work done is fixed by the terms of the contract. For the commission to pay him more than the contract calls for would, therefore, be to make to him a gift of public moneys, unless the commission has the power and authority to first breach the contract.

[4] That the highway commission is vested with broad general powers over state high-

ways and the expenditures of money provided therefor must be conceded. By the department of engineering law it is given "full possession and control" over all state highways and "all expenditures by the state for highway purposes * * * shall be under the full charge of the department." The contract law of the department of public works, on the other hand, prescribes specifically and in detail the manner in which a contract for road construction may be let, prescribes the terms and conditions upon which it may be modified, and imposes express limitations upon the authority of the commission to make payments for work done under such a contract. Great reliance is placed by petitioners upon the provisions found in sections 2 and 3 of article 16 of the Constitution (the third state highway bond measure) that "nothing in this constitution contained * * * shall be a limitation upon the provisions of this section." We are unable to subscribe to the view that this provision was intended to wipe out all other constitutional limitations and restrictions upon the powers and authority of the highway commission, or that it can fairly be construed to have that effect. These two sections are primarily concerned with and almost wholly devoted to provisions for the issuance and sale of state highway bonds and the payment of principal and interest thereon. A consideration of all the provisions of these two sections, in the light of the surrounding circumstances attendant upon their adoption, which were and are matters of common knowledge, leads to the conclusion that the quoted provision was inserted therein for the primary purpose of rendering the bonds to be issued thereunder more salable by dispelling doubts as to their validity. This conclusion is strengthened by a reference to the arguments for and against the adoption of section 3 in the official pamphlet which was distributed to voters at the general election of 1920. It is apparent therefrom that both the proponents and the opponents of this measure assumed that the whole purpose and effect thereof was to authorize the payment of a higher rate of interest upon the bonds and to shift the burden of interest payments from the counties to the state. We are convinced that the quoted provision is not to be construed as if it read: "Nothing in this Constitution contained shall be a limitation upon the powers of the highway commission." Such a construction would give rise to an anomalous situation which would be without parallel or precedent, so far as we are advised, in the entire structure of our government. The difference is obvious between the situation herein and that under consideration in *Pacific Tel., etc., Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, where the

powers claimed by the railroad commission were definitely described and delimited and had been expressly granted to it by the Legislature pursuant to the constitutional provision that—

"The authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution." (Italics added.)

Article 4, § 32, of the Constitution provides:

"The Legislature shall have no power to grant, or authorize any county or municipal authority to grant, any extra compensation or allowance to any public officer, agent, servant, or contractor, after service has been rendered, or a contract has been entered into and performed, in whole or in part, nor to pay, or to authorize the payment of, any claim hereafter created against the state, or any county or municipality of the state, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

This section has remained unchanged in the Constitution since the adoption thereof, and it is not to be lightly inferred that the highway commission has been vested by implication with a power which is thus expressly denied to the Legislature itself.

With respect to the question of the right of petitioners to use state highway funds for the purpose here proposed, we note that the first state highway measure provides that—

"The moneys placed in the state highway fund * * * shall be used exclusively for the acquisition of rights of way for and the acquisition and construction of said system of state highways."

The second state highway measure provides that—

"Of the moneys placed in the second state highway fund * * * the sum of twelve million dollars * * * shall be used exclusively for the acquisition of rights of way for and the acquisition, construction and improvement of the uncompleted portions of the system of state highways prescribed by said 'State Highway Act.' And * * * the sum of three million dollars * * * shall be used exclusively for the acquisition of rights of way for and the acquisition, construction and improvement of certain extensions from said system of state highways" therein enumerated.

The third state highway measure provides that—

"The moneys in said 'third state highway fund' shall be used * * * for the acquisition of rights of way for and the acquisition, construction and improvement of uncompleted portions of the system of state highways * * * [theretofore provided for and certain extensions thereof] provided, however, that twenty million dollars of the moneys in said 'third state highway fund' * * * shall be used for the completion of all the system of state highways" provided for in the former acts.

The petitioners contend that the money here proposed to be paid to the contractor may be regarded as used for the construction of a state highway for the reason that it represents the reasonable value of the work done by the contractor, estimated in view of the termination of his contract. But concededly it does not represent the reasonable value of the work done, except upon the assumed premise that the state shall have first breached the contract and thus conferred upon the contractor a cause of action which he would not otherwise possess. We are unable to escape from the conclusion that of the money here proposed to be paid to the contractor the major portion represents not compensation for construction work heretofore performed or hereafter to be performed by him, but compensation for the relinquishment by him of his rights under the subsisting contract, and cannot therefore be regarded as used for the acquisition, construction, or improvement of a state highway.

There is no suggestion herein that the petitioners are actuated by any motives other than the sincere desire to obtain the greatest possible benefit to the people of the state of California from the expenditure of the highway funds. But in contemplation of law it is wholly immaterial that the present highway commissioners had nothing to do with the letting of the contract which they are now seeking to terminate. In legal contemplation the highway commission now seeking to terminate that contract is the same highway commission which executed it. The policy of the state does not contemplate that its agents shall enter into improvident contracts in its behalf and then use its funds to purchase release therefrom.

[5] Petitioners' next contention is that if it be held that the proposed payment cannot lawfully be made out of the state highway funds, nevertheless "the highway commission still has at its disposal the federal aid fund that it may spend practically as it wishes." This contention was resolved adversely to petitioners in the case of *Ellis v. Stephens*, 185 Cal. 720, 198 Pac. 403. Petitioners assert that what was there said upon this point is obiter dictum. Without pausing to determine whether or not it was obiter, it will suffice to say that we are satisfied with the reasoning of that opinion upon this point (185 Cal. 725, 727, 198 Pac. 407) and with the validity of the conclusion there reached and summarized in the following language:

"It is also clear that the legislation authorizing the respondent board [highway commission] to designate the fund into which this money should be paid contemplated that it should be paid into funds which under the statute organizing said board, are under the control of that board for the creation, maintenance and repair of state highways." (Italics added.)

[6] Finally, it is suggested that the controller has no discretion or authority to question the validity of the proposed payment to the contractor. The second state highway act contains a provision, adopted by reference in the third state highway measure, to the effect that the controller shall draw warrants "upon demands made by the department of engineering [highway commission] and allowed and audited by the state board of control." The demand here under consideration having been so made, allowed, and audited, it is said to be the plain mandatory duty of the respondent not to question the same, but to draw his warrant therefor. The various provisions of section 433 of the Political Code seem to indicate that the controller's duties and responsibilities are not so narrowly restricted, but it is not necessary to here determine their precise nature and extent. The writ of mandate is, in a measure at least, a discretionary writ, and it will not be granted where its enforcement would work an injustice or accomplish a legal wrong. *People v. Murphy*, 20 Cal. App. 398, 129 Pac. 603; *Devlin v. Donnelly*, 20 Cal. App. 495, 129 Pac. 607. It will not issue to compel an auditor to draw his warrant for an illegal claim even though it has been audited and allowed by the board which is charged with that duty and responsibility. *Walton v. McPhetridge*, 120 Cal. 440, 52 Pac. 731.

We are of the opinion that the demurrer of respondent to the petition herein should be and it is hereby sustained, and the order to show cause discharged.

We concur: WILBUR, C. J.; LENNON, J.; KERRIGAN, J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.

192 Cal. 113

BANKERS' LIFE CO. v. RICHARDSON,
State Treasurer. (Sac. 3348-3351.)

(Supreme Court of California. Sept. 20, 1923.
Rehearing Denied Oct. 18, 1923.)

1. Taxation ⚡168—Foreign insurance company held subject to tax on gross premiums on business done in state, including both assessments and level premiums.

Under Const. art. 13, § 14, subd. (b), providing for a tax upon the gross premiums of insurance companies and authorizing the Legislature to impose upon foreign insurance companies, doing business in the state, the same obligations and prohibitions as are imposed on insurance companies of the state by the states of the foreign companies, and Pol. Code, § 3664b, requiring the Legislature to impose such retaliatory obligations on foreign insurance companies, an Iowa insurance company doing business in the state, which had changed from an assessment life company to a legal reserve

or level premium mutual insurance company, was liable to a tax on gross premiums received on its business done in the state, including both premiums and assessments, it being the intent of the constitutional amendment to impose a gross earnings tax upon insurance companies.

2. Taxation ⚡397—Tax upon gross premiums of foreign life insurance company held excessive under retaliatory constitutional provisions.

Where an Iowa assessment life insurance company had amended its articles of incorporation so as to transform itself into a legal reserve or level premium company, but still continued to collect assessments on the previous contracts of insurance, a state tax of 2½ per cent. upon its gross premiums, including both assessments and level premiums imposed under Const. art. 13, § 14, subd. (b), and Pol. Code, § 3664b, enacted thereunder, was excessive under the retaliatory clauses of the constitutional provision authorizing the Legislature to impose upon foreign insurance companies the same obligations as the states wherein such companies were incorporated imposed upon domestic insurance companies of this state, the state of Iowa exacting a tax of 2½ per cent. upon level premiums only of nonresident insurance companies, and the state having no right to segregate the assessments from the premiums.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Separate actions by the Bankers' Life Company against Friend William Richardson, as State Treasurer, to recover excess taxes paid under protest. Judgment for defendant in each case, and plaintiff appeals. Reversed and remanded.

W. S. Ayres and R. B. Alberson, both of Des Moines, Iowa, and Raymond Perry, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and E. B. Power, Asst. Atty. Gen., for respondent.

WASTE, J. The plaintiff, Bankers' Life Company, brought four actions to recover excess taxes alleged to have been illegally levied and collected by the state of California. It appeals from a judgment of the lower court in favor of Friend William Richardson, as state treasurer, defendant, and against it, as plaintiff. The primary question presented is whether or not, under the constitutional amendment relating to taxation, which was adopted November 8, 1910, and the acts passed by the Legislature to carry its provisions into effect, assessments collected by plaintiff from its members under its assessment contracts may be included in the term "gross premiums" received on its business done in this state, and taxed as such.

The plaintiff is incorporated under the laws of the state of Iowa, and authorized to do business in the state of California as an

assessment life insurance company or association. It amended its articles of incorporation in 1911, under the provisions of section 1798b, Code Supplement 1907 of the Statutes of Iowa, in such manner as to transform itself into a legal reserve or level premium company. It also amended its charter to read:

"Article III. The purpose and intent of this amendment is to transform this corporation into a legal reserve or level premium, mutual insurance company, * * * and its business shall be that of life insurance on the mutual plan, as a legal reserve or level premium company, * * *

—retaining all its original rights, powers, privileges, and franchises, so far as might be necessary to carry out all its contracts theretofore made with its members. By amendments to its by-laws, it provided that the rights, liabilities, and entire method of procedure with reference to its outstanding assessment contracts should be governed by the original articles and by-laws forming a part of such assessment contracts.

Prior to these amendments, the plaintiff had written many contracts of insurance upon the assessment plan in this state. Since the adoption of the amendments, its business has included the writing of level premium insurance and the making of assessments in carrying out its contracts with its original assessment members. In the year 1916 plaintiff received on its business in force on the level premium plan in the state of California premiums amounting to \$351,033.38, and collected assessments from its assessment members, under its original assessment contracts in the state, in the sum of \$212,051.35, making its gross receipts for business done in the state during the year \$563,084.73. Pursuant to the terms of the act carrying into effect the provisions of the Constitution relating to the taxation of insurance companies (Stats. 1915, pp. 3, 4), there was imposed upon plaintiff, and it paid under protest, a state tax on this aggregate amount, at the rate of 2½ per cent. upon its gross premiums for business written on the level premium plan, and at the rate of 2 per cent. upon its receipts from its assessment members, the total tax amounting to \$13,016.86. Alleviating that a large part of this tax was illegally imposed and collected plaintiff brought this action to recover such excess. Separate actions were also begun by it to recover the alleged overpayment of taxes levied and collected for business done during the years 1917, 1918, and 1919. Demurrer to the complaint was sustained in each case, without leave to amend. Judgment was thereupon entered for the defendant, and these appeals were taken.

It must be determined, first, whether or not, under the Constitution and laws of this state, assessments collected by the Bankers'

Life Company from its members on contracts of insurance issued on the assessment plan are subject to a state tax of 2 per cent., or any tax. Whether they are, or are not, depends upon the construction of subdivision (b), section 14, of article 13 of the Constitution of California, which was adopted November 8, 1910, as part of the general scheme for the separation of state and local taxation. The provision of the Constitution is as follows:

"Every insurance company or association doing business in this state shall annually pay to the state a tax of one and one-half per cent. upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state; provided, that there shall be deducted from said one and one-half per cent. upon the gross premiums the amount of any county and municipal taxes paid by such companies on real estate owned by them in this state. This tax shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property of such companies, except county and municipal taxes on real estate, and except as otherwise in this section provided."

Then follows the retaliatory clause of the section which authorizes the imposition by the Legislature, upon foreign insurance companies doing business in this state, of the same obligations and prohibitions as are imposed on insurance companies of this state by the states of such foreign companies. It was provided by subdivision (f) of the same section of the Constitution that all the provisions of the section should be self-executing, and the Legislature was directed to pass all laws necessary to carry the section into effect. It was further provided that the rates of taxation fixed in the section should remain in force until changed by legislative enactment. The Legislature enacted general laws (Stats. 1911, p. 530; Stats. 1913, pp. 3, 4; Stats. 1915, pp. 3, 4; Stats. 1917, p. 338) to carry the constitutional provision into effect. The last enactment germane to this case, the statute of 1917, is now section 3664b of the Political Code, the language of which is identical with the constitutional provision, except that the rate of taxation is fixed at 2 per cent., and instead of reading that the Legislature "may" impose retaliatory obligations and prohibitions on foreign insurance companies, it declared that the insurance commissioner "must" do so. It was under the authority conferred by the Constitution and these legislative enactments that the tax was imposed upon the entire business done in this state by the plaintiff during the years 1916-1919, inclusive.

It is the contention of the appellant that the construction so placed by the taxing power of the state upon the language of the Constitution and the code section is an er-

roneous one, and that it was not the intention of the framers of the amendment and of the laws enacted pursuant thereto that the words "gross premiums" should cover or refer to assessment receipts of such an organization as appellant. It first cites many authorities which hold that in general insurance parlance the word "assessment," when used with reference to such organizations, generally applies to the contributions or payments by the members, sometimes made after the death of a member, as distinguished and differentiated from the word "premium," which is as generally applied to the consideration paid by policyholders of level premium companies. We do not deem it necessary to further discuss the authorities cited by the appellant, beyond saying that they establish the general usage of the words "assessments" and "premiums" in the connection in which they were used in the cases cited, for it is equally well established that—

"In a broad sense an assessment pays the price of a policy in a company of that sort [an assessment company], just as a fixed premium affords the consideration of a policy in a legal reserve or level premium company, and in common speech the terms are often interchangeably used." *Bankers Life Co. v. Chorn* (Mo. Sup.) 186 S. W. 681; *Hill v. Farmers' Mut. Fire Ins. Co.*, 129 Mich. 141, 88 N. W. 392; *Northwestern Life Ass'n v. Stout*, 32 Ill. App. 31, 38.

Prior to the adoption of the constitutional amendment of 1910, and the enactment of the legislative measures to carry it into effect, the law relating to the taxation of insurance companies was to be found in various provisions of article 16, chapter 3, title 1, part 3, of the Political Code, relating to the office of insurance commissioner and the government of insurance companies in this state. The respondent takes the position that, from a reading of those provisions, and particularly in view of the fact that the foundation for the present tax is based on a self-executing constitutional provision, it is clear that the tax imposed upon insurance companies by the constitutional amendment was intended to be, and is, in lieu of that formerly imposed by the provisions of the Code. Section 622, the original "retaliatory clause," enacted in 1872, and frequently amended, provided (Stats. 1907, p. 162), at the time of the adoption of the amendment, that:

"When by the laws of any other state or country, any taxes, fines, penalties, licenses, fees, deposits of money or of securities, or other obligations or prohibitions, are imposed on insurance companies of this state doing business in such other state or country, or upon their agents therein, in excess of such taxes, fines, penalties, licenses, fees, deposits of securities, or other obligations or prohibitions, imposed upon insurance companies of such other state or country, so long as such laws con-

tinue in force, the same obligations and prohibitions of whatsoever kind must be imposed upon insurance companies of such other state or country doing business in this state. * * *

By section 622a, enacted in 1903, a tax was levied on insurance companies not organized under the laws of this state. As finally amended (Stats. 1907, p. 162) it provided:

"Every insurance company other than life, not organized or incorporated under the laws of California, and doing business in this state, and every other insurance company other than life, whose charter may be owned, or a majority of whose stock may be controlled, or whose business may be carried on in the interest, or for the benefit of any insurance company or association not organized or incorporated under the laws of California, shall annually pay to the insurance commissioner, for the state, a tax of two (2) per cent. upon the amount of the gross premiums received upon its business done in the state, during the year ending on the preceding thirty-first day of December, less return premiums, reinsurance in companies authorized to do business in this state, and losses actually paid on its business in this state, and every life insurance company not organized or incorporated under the laws of California, which does business or collects premiums or assessments in the state, shall annually pay to the insurance commissioner, for the state, a tax of one per cent. upon the amount of gross premiums received upon its business done in this state during the year ending on the preceding thirty-first day of December.

"This section shall not be held or construed so as to relieve any company or organization from any tax, fee, or other obligation or charge imposed upon it by the provisions of section six hundred and twenty-two of this Code, and whenever the taxes imposed by the application of section six hundred and twenty-two exceed those imposed by the application of this section the provisions of the former section shall prevail."

Respondent argues that from a consideration of these sections it is evident that the Legislature, as early as 1907, intended to include "assessments" as "premiums" in computing the amount of "gross premiums" received by any life insurance company during any given year. The state bases its construction on the language of section 622a, supra, which declares that:

"Every life insurance company * * * which does business or collects premiums or assessments in the state, shall annually pay * * * a tax * * * upon the amount of the gross premiums received upon its business."

Such intention, it contends, was reflected in the constitutional amendment and the subsequent legislative enactments. The appellant seeks to escape this construction of the present law by invoking section 634a of the Political Code, which purports to except from the provisions of the act relating to the insurance commissioner and the government of insurance corporations in the state, cor-

porations doing or transacting the business of mutual insurance on the assessment plan, as defined in the Civil Code. Section 453d. If it be true that section 634a of the Political Code had the effect contended for by appellant, mutual insurance companies would still be subject to the retaliatory provisions of section 453i of the Civil Code, which prescribe the conditions upon which mutual assessment corporations organized under the laws of any other state or country may transact business in this state, and which, in part, provides that:

"When any other state or country imposes any additional license, fees, taxes, or penalties upon any corporation organized or doing business under this chapter, like license, fees, taxes, or penalties are imposed upon corporations of the same kind and their agents of such state or country doing business in this state." Stats. 1905, pp. 419, 420.

We are of the opinion that the contention of the state, and not that of the appellant, is the correct one. Section 622a very clearly indicates to our minds that the phrase "gross premiums" was intended to, and did, include both premiums and assessments. No other reasonable construction can be placed upon its language.

But, whether our view of what the law was before the adoption of the constitutional amendment of 1910 is correct or not, does not concern us at the present time. Pursuant to the act of the Legislature of March 20, 1905 (Stats. 1905, p. 390) a joint committee of the senate and assembly was appointed to investigate the system of revenue and taxation in force in this state, and to recommend a plan for the revision and reform thereof. That commission made two reports—one in 1906 and the other in 1910—which are official publications of this state. Appendix to Journals of Senate and Assembly, 37th Session, 1907, vol. 2, and 39th Session, 1911, vol. 1. They are also to be found in separate publications issued by the state printing office. They are particularly instructive in connection with the question presented by this appeal. It is not necessary for us to go into the reasons for the change in the system of state taxation, some of which have already been considered by this court in *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 Pac. 700, and which may be more fully appreciated by a reading of the reports of the commission. The Legislature, in the regular sessions of 1903, 1905, and again in the special session of 1906, had made several important changes in the revenue laws of the state. These resulted in new or increased revenues from several sources, among them being the taxation of insurance companies. Every insurance company, including life, not incorporated under the laws of California, was required to pay annually a tax of two per cent. upon the amount of gross premiums re-

ceived by it on business done in the state, less certain deductions. All foreign insurance companies doing business in this state were subject to the so-called "retaliatory law." Section 622, Pol. Code. These taxes on insurance companies, it will be recalled, were the only special corporation taxes then imposed in this state. It was pointed out in the first report of the commission that the existing laws relating to the taxation of insurance companies discriminated in favor of the companies of certain states and countries, and against those of other states, and also discriminated between the different classes of insurance companies. The commission was concerned, primarily, to find a method which should remove these discriminations. It believed, it stated "that the taxes on all insurance companies of whatever class, or state, or country, should be as nearly uniform as possible." It recommended absolute separation of state from local taxation as to sources of revenue; and in specifying the "old sources" from which the state might derive its revenue, it listed, among others:

"(3) The Tax on Insurance Premiums. (Modified to remove existing discriminations.)"

Among the "new sources" for such purpose, it included: A gross earnings tax on railroads; street railroads; express companies; car companies; light, heat, and power companies; telegraph and telephone companies, at fixed rates, for a period of years, by constitutional amendment, and subject to future amendment by the Legislature. Report 1906, pp. 11, 12, 254. After a summary of the situation which confronted it, and the various arguments presented in favor of and against any taxation on life insurance companies, the commission says (page 258):

"The only real point at issue is to determine the method and the rate. If a gross earnings tax is appropriate for a railroad, it is equally appropriate for an insurance company. All the more so, in the latter case, as there is not likely to be any property within the jurisdiction of the state to tax. A tax on gross premiums falls on the company, or the stockholders therein—not, as some agents and company advocates would have us believe, on the policyholder. In mutual insurance companies the policyholder occupies at the same time the place of stockholder and of policyholder. In such cases he will bear his share of the tax, as he should, for he gets his share of the profits."

The commission recommended that all insurance companies, fire as well as life, foreign and domestic alike, should pay 2 per cent. per annum on gross premiums, without deductions for losses, such taxes to be in lieu of all other taxes and licenses, except taxes on real estate held in and taxable in the state. It also recommended the continuance of the retaliatory law, "not only for the protection of domestic companies, but be-

cause it is believed to exercise a powerful influence in the direction of bringing about uniformity in methods of taxation by the different states." Report of 1906, p. 259. The subject was again under consideration by the commission prior to the submission of the amendment to the popular vote. In the discussion of the effect of the proposed amendment on corporations, and in explanation, it said (Report of 1910, p. 37):

"As to the insurance companies, they are not now subject to the ad valorem tax, and the amendment does not change the present system except in so far as it proposes to extend the same method and the same rate to all."

The constitutional amendment, hereinbefore quoted, provided that every insurance company or association doing business in this state should annually pay a tax of $1\frac{1}{2}$ per cent. upon the amount of the gross premiums received upon its business done in the state, less the enumerated deductions. An act of the state of Illinois provided that all insurance companies, other than life should "pay to the insurance superintendent as taxes 2 per cent. of the gross amount of premiums received by it for business done in the state" during the preceding calendar year. The Supreme Court of Illinois said:

"In the construction of the act effect is to be given to the intention of the Legislature, and that intention appears to be to levy a tax on the gross income of foreign fire insurance companies. The object is to require such companies to pay, at designated times, a tax of 2 per cent. on the gross receipts of their business for the previous calendar year." *German Alliance Ins. Co. v. Van Cleave*, 191 Ill. 410, 61 N. E. 94.

[1] We think it is clear, therefore, that the first contention of the appellant must fall, and that the constitutional amendment should be construed as providing that it was a "gross earnings tax" which the framers of the amendment intended, and which the people levied by the adoption of this amendment. To so hold, of course, implies that all earnings, either by way of premiums or assessments, must be included in the term "gross premiums received upon its business done in this state." This court has already held that the amendment to the Constitution applies equally to all insurance companies, whether fire or life, and whether doing business as stock concerns, dividing profits periodically among its members, or as mutual concerns. *Northwestern Mutual Life Ins. Co. v. Roberts*, 177 Cal. 540, 542, 171 Pac. 313.

[2] Appellant's second contention is that if it be held that the words "gross premiums" include assessment receipts of the Bankers' Life Company, the tax should, in no event, exceed 2 per cent. upon the entire receipts of the company for business done in the state during any given period. As previously noted, there was imposed upon appellant a tax

at the rate of $2\frac{1}{2}$ per cent. upon the amount of premiums received by it for business written on the level premium plan during the year 1916, and at the rate of 2 per cent. upon its receipts from its assessment members during the same time. Of the $2\frac{1}{2}$ per cent. tax on the amount of level premium business, one-half of 1 per cent. was imposed under the retaliatory clauses of the Constitution and statute of 1915, *supra*. Respondent justifies the imposition of this additional one-half per cent. upon the ground that the statute of the state of Iowa (section 1333, Code of 1913), while expressly exempting nonresident assessment associations operating in Iowa from the payment of any tax whatever upon its receipts for business done in that state, requires a tax of $2\frac{1}{2}$ per cent. upon the amount of level premium business of any nonresident life insurance company operating in that jurisdiction. Appellant contends that there is no basis for such application of the retaliatory provisions, and that, in no event, should the state assess it at a greater rate than 2 per cent. on its gross receipts from both level premium and assessment business. It alleges that, pursuant to a ruling of the insurance department of the state of Iowa, nonresident former assessment associations which have amended their articles in order to write level premium insurance are only required to pay a tax of $2\frac{1}{2}$ per cent. upon the gross amount of their level premiums, and are not required to pay any tax upon their assessment receipts. The further allegation, which, in substance, is the basis of its contention in this regard, is that a California corporation similar to appellant, and doing a like business in the state of Iowa, would be taxed $2\frac{1}{2}$ per cent. upon the amount of its gross level premiums, but nothing whatever upon its assessment receipts, the result being that such California corporation doing the like business in Iowa would be taxed only \$8,775.83, instead of \$13,016.86, the amount of the tax exacted by the state of California from appellant for its business done during the year 1916.

Appellant's argument is that if the state of California treats all receipts for business done as "gross premiums," then the state confesses it had no right to segregate the "assessments" from the "premiums," and charge 2 per cent. on assessments under the California tax, and $2\frac{1}{2}$ per cent. on the premiums under the Iowa tax. In other words, it is its contention that it is the treatment of the entire business of the California company by the other state which must control, and, as no claim is made that any tax imposed under the Iowa law would be greater than the normal tax provided by the laws of California, the contingency provided against by the retaliatory provision of the Constitution of this state did not arise. There is merit in this contention. The aggregate amount of the tax levied by the state

of California upon the gross premiums collected and received by the appellant for business done in this state during the year 1916, including assessments, computed at the established rate of 2 per cent., is greater than any tax a similar California corporation, doing the same amount of business in the state of Iowa during that year, would have been compelled to pay. It would have paid in Iowa at the rate of 2½ per cent. upon the amount of its gross level premiums only, not including the amount of assessments received. It follows, therefore, that during the given year, 1916, no greater burden was imposed by the laws of Iowa upon a California corporation doing the same amount and kind of business in that state than was imposed upon appellant, as an Iowa corporation doing business in California. Consequently, it became unnecessary for the state to impose the additional one-half per cent. upon the gross amount of level premiums collected by appellant in this state during that period, in order to equalize the burden of taxation between appellant, as a foreign corporation, and domestic corporations doing a like business.

The so-called retaliatory laws are also reciprocal in nature. Their ultimate object is to secure reciprocity. *State of Ohio v. Fidelity & Cas. Ins. Co.*, 49 Ohio St. 440, 31 N. E. 658, 16 L. R. A. 611, 613, 34 Am. St. Rep. 573. The tax commission recommended their continuance in this state at the time of the submission of the constitutional amendment, upon the ground that it would do away with all discrimination between domestic and foreign insurance companies, which, it said, was but fair, and, moreover, would give California companies a better chance to do business in other states under retaliatory and reciprocal laws. Report of 1906, p. 259. But, whether regarded as reciprocal or retaliatory, in so far as they are retaliatory in their nature, and involving the comity of states, they are to be strictly construed, executed with care, and not applied to any case that does not fall plainly within the letter of the law. *State v. Continental Ins. Co.*, 67 Ind. App. 536, 562, 116 N. E. 929; *Metropolitan Life Ins. Co. v. Boys*, 296 Ill. 166, 170, 129 N. E. 724; *Thompson on Corporations* (2d Ed.) § 6647. In discussing the reciprocal and retaliatory statute of Ohio, the court of that state held that the superintendent of insurance had performed his whole duty when he required companies organized out of Ohio to pay a sum sufficient to make the total equal to the amount that would be realized, were the rule of taxation of the foreign state, under whose laws the foreign company was organized, applied to such foreign company's business transacted in Ohio. *State v. Reinmund*, 45 Ohio St. 214, 217, 13 N. E. 30. In Massachusetts, it was held, under a statute requiring the same taxes, fees, penalties, and obligations of foreign companies doing business in Massachu-

setts, as were imposed on Massachusetts companies doing business in the other states, that the very plain object of the retaliatory law was to make the rate of taxation in Massachusetts no more burdensome upon foreign companies there than the like rate was upon companies of Massachusetts doing business in the foreign state. *Metropolitan Life Ins. Co. v. Commonwealth*, 198 Mass. 466, 470, 84 N. E. 863. See, also, *Phoenix Ins. Co. v. Welch*, 29 Kan. 672.

If, in any year, the amount of level premium business done in California by the foreign insurance company should so far exceed the amount of assessments received by it that the total of the California tax, at the established rate of 2 per cent. on the "gross premiums"—as that phrase is defined in this opinion—would be less than the Iowa tax at 2½ per cent. on the level premium business alone, the state of California would have the right to impose upon the foreign corporation, by way of a retaliatory tax, such additional sum as would make the total equal to the amount of the tax that would be realized, were the rule of taxation in Iowa relating to foreign insurance companies, applied to the Iowa company's business transacted in California. *State v. Reinmund*, supra.

The four appeals here consolidated relate to identical facts, except as to the years during which the taxes were levied, and the various amounts of such taxes.

Judgment in each of the cases is reversed, and the causes are remanded to the lower court for further proceedings in keeping with the views herein expressed.

We concur: WILBUR, C. J.; LENNON, J.; LAWLOR, J.; RICHARDS, Justice pro tem.; KERRIGAN, J.

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ASHE v. ZEMANSKY et al. (S. F. 10824.)

(Supreme Court of California. September 18, 1923.)

1. Elections § 27—Constitutional provision relating to voting machines, held not within determination of municipality under charter.

Under Const. art. 2, § 6, providing that in different parts of the state different methods may be employed for registering will of people, and that the Legislature may prescribe the different methods to be employed for registering the will of the people at elections, and may provide mechanical devices therefor at the option of the local authority, held that the use of voting machines in less than an entire subdivision, such as a city, is within the determination of the powers conferred by the charter of a municipality, as the prohibition relates only to the Legislature.

2. Elections § 27—Board of election commissioners of San Francisco empowered to use voting machines for municipal election.

Under San Francisco Charter, art. 11, c. 1, § 1, the board of election commissioners are au-

thorized to employ voting machines for use at municipal elections.

3. Elections ⚡162—Where board of election commissioners employ voting machines for municipal election, ballot must be printed according to law.

Under San Francisco Charter, art. 11, c. 1, § 1, authorizing the use of voting machines for municipal elections, where the board of election commissioners employ voting machines for municipal elections, the ballot must be printed in accordance with the state law.

4. Elections ⚡27—Board of election commissioners, acting in good faith, may within discretion adopt lesser number of voting machines than entire number necessary for every voting precinct.

In the absence of expressed provision requiring voting machines to be used in all precincts in a city, in order to change the method of conducting the election and counting the ballots and declaring the result, and in the absence of any contention that the board of election commissioners were moved by any improper motives in adopting the number of voting machines for such purpose, or of any suggestion that this plan is a mere subterfuge to change the method of conducting the elections, the board of election commissioners, may, in the exercise of their discretion, adopt a lesser number of voting machines than the entire number necessary to put a machine in each voting precinct.

In Bank.

Application for writ of mandate by Thomas A. F. Ashe against J. H. Zemansky, as Registrar of Voters of the City and County of San Francisco, and others, to require them to print the municipal election ballots, and to prevent the use of voting machines. Denied.

Cameron H. King, of San Francisco, for petitioner.

Robert W. Harrison, of San Francisco, for respondents.

George Lull and Charles S. Peery, both of San Francisco, amici curiæ.

WILBUR, C. J. The petitioner, a taxpayer of the city and county of San Francisco, prays for a writ of mandate directed to the respondent, who is the registrar of voters of the city and county of San Francisco, requiring the respondent to print the ballots for the coming municipal election to be held in November, in accordance with the charter provisions of the charter of the city and county of San Francisco (article 11, c. 2, § 19, of the charter of the city and county of San Francisco). He alleges that the board of election commissioners and the respondent have determined to conduct the election in accordance with the general laws of the state of California, purporting to act under and in pursuance of section 14 of chapter 2, article 11 of the charter of the city and county of San Francisco, amended by the people of San

Francisco in 1922, and approved by the Legislature in 1923. This section of the charter as thus amended reads as follows:

"In the event of the use of voting machines the arrangement of the ballot, the counting of the vote, the canvass of returns and the determination of the result shall be governed by the general laws of the state."

It is alleged that the board of election commissioners have adopted a resolution providing for the purchase and use of 52 voting machines within the city and county of San Francisco, which contains over 600 precincts.

The charter of the city and county of San Francisco nowhere expressly authorizes the use of voting machines, nor does it expressly confer jurisdiction upon the board of supervisors or the board of election commissioners to adopt voting machines. The respondent predicates the authority of the board of election commissioners to act in the adoption of the voting machines upon section 1 of article 11, chapter 1, which reads as follows:

"The conduct, management, and control of the registration of voters, and of the holding of elections, and of all matters pertaining to elections in the city and county, shall be vested exclusively in and exercised by a board of election commissioners, consisting of five members, who shall be appointed by the mayor, and shall hold office for four years. * * *"

Section 14 of this article, as originally adopted, was as follows:

"In the event of the use of voting machines, the ballot shall be arranged on the machines in the same form in each Assembly district as provided for the printed ballot."

Under this section of the charter as originally adopted, the use of the voting machines would not have interfered with the general system of voting established by the charter, namely, a system of preferential voting by which the voter indicated his first, second, and third choice for each office. It was provided that in the canvass of the votes of such an election the second and third choice should in certain events be counted in favor of the candidate for which said choice was expressed. This method of voting and of canvassing the returns is utterly at variance with the general system established in the state, by which each voter expresses his choice for an individual candidate without any expression of any second or third choice.

After the adoption of the preferential system of voting in the San Francisco charter it was found that only about 5 to 7 per cent. of the voters expressed a second or third choice for any candidate. It was the indifference of the voters to this method of expressing their second and third choice that led, no doubt, to the ready adoption of the amendment to section 14, by which it is provided that in the event of the use of voting

machines the general laws of the state should be followed in the determination of the result of the election, for it had been ascertained that no voting machine was manufactured whereon the voter could express a second and third choice.

[1] We may dismiss the first point made by the petitioner with merely a passing observation. The contention is that section 6 of article 2 of the Constitution would prevent the use of voting machines in less than an entire subdivision, such as a city, but this prohibition relates only to the Legislature, and not to the determination of powers conferred by a charter.

The most serious question presented, however, is as to the power of the board of election commissioners. It is urged that voting machines for use in municipal elections could only be adopted by the people by charter amendment. The most obvious difficulty with this contention is that it deprives section 14 of article 11 of the charter of all force whatever. If there was no authority in the city or any of its officials to use voting machines, there was no occasion whatever for providing for the consequences of the use of such machines, for if the machines could only be authorized by the amendment to the charter, at the time the charter was amended, it could equally well be provided what the effect of their use should be. It would seem clear that the people, in adopting the charter amendment in 1922, article 11, section 14, contemplated that either the board of supervisors, who constitute the legislative body of the city, or the board of election commissioners, either under the charter or when thereto authorized by the state Legislature, might adopt voting machines for use at municipal elections, and it is our duty to give some effect to this amendment to the charter if it is possible so to do.

[2] At first blush it would seem that the far-reaching consequences resulting from the use of voting machines as provided by article 11, section 14, should not come within the jurisdiction of an administrative body which merely controls the conduct of elections. But calling the board of election commissioners an administrative body does not solve the problem, because if they have legislative powers under the express provisions of the charter, the fact that their ordinary duties are those of an administrative character would not detract from the plain mandate of the charter, for the people in adopting a charter are not required to separate the judicial, legislative, and executive departments of the government, but may adjust the municipal affairs provided for by the charter in any way that is satisfactory to themselves. It is clear that the adoption of voting machines comes under the general authorization contained in section 1 of chapter 1, article 11, of the charter, giving the board of election commissioners control "of all matters pertaining

to elections in the city and county of San Francisco." The adoption of voting machines is clearly a "matter pertaining to elections" in the city and county of San Francisco, and for that reason it would seem to be clear that if there is anywhere in the charter authority for a municipal officer or body to adopt voting machines, such power would be vested in the board of election commissioners, and this notwithstanding the fact that the general legislative body of the city is the board of supervisors. See *People ex rel. Taylor v. Board of Election Commissioners*, 54 Cal. 404; *People v. Hoge*, 55 Cal. 612; *Gibbs v. Bartlett*, 63 Cal. 117; *San Francisco v. Broderick*, 111 Cal. 302, 43 Pac. 960.

In determining the power of the board of election commissioners it is well to note that they not only act in conducting elections under the charter of the city and county of San Francisco, which are purely municipal affairs, but also act in the conduct of all other elections held in the city and county of San Francisco. In 1923 the Legislature of the state adopted a law authorizing boards of election commissioners throughout the state, including the board of election commissioners of the city and county of San Francisco, to adopt voting machines for use at the general election. This statute also purports to authorize the use of voting machines at municipal elections, notwithstanding prohibitions contained in the charters of chartered cities. It is conceded, however, that this part of the legislation is void, as under the Constitution municipal elections are municipal affairs which can be conducted in accordance with the charter provisions, if there are such, regardless of statutory provisions to the contrary.

Notwithstanding the fact that the state Legislature could not directly authorize or require the municipal authorities of San Francisco to conduct a municipal election in a method violating the terms of their charter, it is nevertheless true that they had the authority to authorize the board of election commissioners of San Francisco to use voting machines at general elections. We may take judicial notice of the fact that these machines are complicated and expensive, and that if the city and county of San Francisco acquires voting machines in order to conduct general elections they would find themselves with these machines on hand when they desired to conduct municipal elections. Under such circumstances it would not seem unreasonable that voting machines should also be used at municipal elections.

[3] The difficulty arises from the extensive and fundamental changes in the system of voting due to the use of the voting machines, but the answer to this difficulty lies in the fact that the extensive changes resulting from the use of voting machines are provided for by the charter itself. The charter pro-

vides that its whole system of municipal voting shall be changed and the general system in use throughout the state shall be effective within the city and county of San Francisco, in the event that voting machines are used. The charter does not undertake to place the authority to use voting machines in any different municipal body than the one which would have exercised that power previous to the amendment and this it is clear was the board of election commissioners. While we would ordinarily look to the legislative authority of the city for determination of a question involving such extensive changes in the method of conducting municipal elections, we are met in the charter by the express provision that the board of election commissioners shall have exclusive jurisdiction over the subject of the conduct of elections, and of all matters pertaining to elections, and the fact that the adoption and use of voting machines clearly comes within this branch of municipal authority. It follows that the election commissioners having determined to use voting machines, we must look to the charter to ascertain the method of conducting the election under such circumstances. The charter in turn refers us to and adopts for such occasions the general laws of the state, and the respondent must follow such general laws under these circumstances.

We have not thus far disposed of the suggestion that the use of voting machines in only one-twelfth of the precincts of the city ought not to determine the character of the ballot and method of conducting elections in the entire city. It is conceded that if voting machines are used at all, they cannot be used to register second and third choice, and this fact must be considered in determining the intent of the people in adopting the amendment to the charter providing for the use of voting machines. It is clear, also, that the expense of voting machines is so great, and it is probable that the difficulty in procuring them in large numbers is also great, that we are justified in assuming that the voters of the city contemplated the use of voting machines in some number of precincts less than the entire number in the city and county. If this be true, of course, there is no question but what the registrar, in view of the determination of the board of election commissioners to use 52 machines, must print the ballot in accordance with the state law.

[4] In the absence of an express provision requiring voting machines to be used in all the precincts of the city in order to change the method of conducting the election, and counting the ballots and declaring the result, and in the absence of any contention that the board of election commissioners were moved by any improper motives in adopting the number of voting machines that they have

adopted, and in the absence of any suggestion that this plan is a mere subterfuge to change the method of conducting the elections, we think it clear that the board of election commissioners could exercise their discretion in adopting a lesser number of voting machines than the entire number necessary to put a machine in each voting precinct.

Petition denied.

We concur: LENNON, J.; SEAWELL, J.; KERRIGAN, J.

RICHARDS, Justice pro tem. I concur in the foregoing conclusions, but not in much of the reasoning which supports it. By the terms of the San Francisco charter prior to the amendment of section 14 of chapter 11, article 11 thereof, adopted by the people in 1922, and approved by the Legislature in 1923, the use of voting machines in municipal elections was permitted and might have been provided for by whatever municipal body had been invested by the charter with control over "all matters pertaining to elections." The board of election commissioners was that body according to the express terms of section 1, chapter 1, article 11 of the charter, and it seems to me beyond question that if the election commissioners prior to said charter amendment of 1922, could have found a model of voting machine which would have provided for preferential voting, or, in other words, had been so constructed that "the ballot shall be arranged on the machine in the same form in each assembly district as provided for the printed ballot" the election commissioners would have had power to install such voting machines, and their act in so doing would have been merely an administrative act. It was probably the fact that such voting machines were not obtainable, and it may be not possible of construction that led to the amendment of the charter in 1922, by that amendment the people of San Francisco did not purport, nor evidently intend, to take away or add to the powers already possessed by the board of election commissioners, nor did they do so; but they did decide by said amendment to the charter that, in the event of the use of voting machines, the preferential system of voting, theretofore provided for in said charter, should be abandoned, and that the general laws of the state should govern "the arrangement of the ballot, the counting of the votes, the canvass of returns, and the determination of the result." I have no doubt the people of the municipality had power to read into their charter this alternative system of voting, dependent upon the exercise of an administrative power already vested in their boards of election commissioners. Whatever of legislation was achieved in the way of abandoning the preferential system of voting was ac-

complished by the people in amending their charter, and not by the board of election commissioners in the exercise of an administrative power at all times both before and since said amendment possessed by said board; namely, that of determining to make use of voting machines in municipal elections.

WASTE, J. I concur in the conclusion reached by the Chief Justice in the majority opinion. There are two matters which I desire, so far as I am concerned, shall be left open for decision in the future should occasion arise.

First. My present view is that the powers conferred on the board of election commissioners by article 11, chapter 1, section 1, of the charter are but administrative in character and not legislative. I am of the opinion that the purpose and effect of article 2, chapter 1, section 1 of the charter was to vest the legislative power of the city and county of San Francisco in the board of supervisors. If there is a necessary and irreconcilable conflict between the two sections, the provisions relating to the power of the board of election commissioners must prevail under the rule respecting conflicts between general and special provisions. In determining whether or not there is such conflict we should construe each of the provisions, if they are reasonably susceptible of such construction, so as to maintain the integrity of each of them. This may be done, I believe, by giving full effect to article 2, chapter 1, section 1, vesting the legislative power of the city and county in the board of supervisors and by construing article 11, chapter 1, section 1, giving "the conduct, management and control of the registration of voters, and of the holding of elections, and of all matters pertaining to elections in * * * a board of election commissioners," as conferring upon that board only such powers and discretion as are ordinarily exercised by an administrative board.

Second. In the next instance I decline to be bound by anything said in the majority opinion, either directly or by implication, which may be construed to have a bearing upon future elections resulting from the adoption of the voting machines by the board of election commissioners on the preferential system of voting and tabulating the results provided for in the city charter. I reserve for future consideration the question of whether or not the adoption of the voting machines by the board of election commissioners works for all time a complete abandonment of the system of voting and tabulating the results of elections now in use.

I concur: LAWLOR, J.

63 Cal. App. 327

INVESTMENT REGISTRY OF AMERICA, Inc., v. MOORE. (Civ. 4598.)

(District Court of Appeal, First District, Division 1, California. July 31, 1923. Rehearing Denied Aug. 30, 1923. Hearing Denied by Supreme Court Sept. 27, 1923.)

1. Attachment $\S$ 249—Recital in plaintiff's affidavit not conclusive as to defendant's residence.

Recital in plaintiff's affidavit for attachment that the defendant was a nonresident did not establish such fact conclusively on motion for dissolution of attachment, but it was for the court to determine the fact.

2. Appeal and error $\S$ 1024(2)—Finding on conflicting evidence as to residence on motion for dissolution of attachment not disturbed on appeal.

Where the evidence as to defendant's residence on defendant's motion to dissolve attachment was conflicting, the finding of the court will not be disturbed on appeal.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Investment Registry of America, Inc., against George G. Moore, sometimes known as George Gordon Moore. From an order dissolving an attachment, plaintiff appeals. Affirmed.

Hearing denied; Lawlor, J., not participating.

Knight, Boland, Hutchinson & Christin, of San Francisco, for appellant.

Archibald M. Johnson, A. A. De Ligne, and R. P. Henshall, all of San Francisco, for respondent.

RICHARDS, J. Plaintiff commenced an action against defendant on May 12, 1922, in the superior court of the city and county of San Francisco, and contemporaneously filed an affidavit and undertaking for attachment. Shortly thereafter defendant gave notice of motion to dissolve the attachment on the ground that said attachment was wrongfully and irregularly issued, in that the defendant was at the commencement of the action, "ever since has been and now is a resident" of the state of California, and not a nonresident, as alleged in the affidavit in support of said attachment, and that the contract referred to in plaintiff's affidavit and upon which said action was brought, was not an express contract for the direct payment of money payable in the state of California. Upon the hearing of this motion the court ordered that the application to dissolve the attachment be granted. From this order plaintiff appeals.

From the affidavit for attachment in the instant case it appears that the basis for said

attachment is that the defendant is indebted, to plaintiff "upon an express contract for the direct payment of money * * * and that such contract is payable in this state." Also that the defendant is a nonresident of the state of California. As to the question of whether or not the contract was payable in this state there seems to be no dispute. Defendant in his affidavit stated that "this action is founded upon the same matters and things which are the subject of an action now pending between the parties hereto in the Supreme Court of the state of New York." This is conceded by plaintiff, and the only question, therefore, is as to whether or not defendant is, as charged by plaintiff, not a resident of the state of California.

The facts are these: George G. Moore, the defendant herein, was also engaged in litigation in New York county, N. Y. In that case a warrant of attachment was granted January 29, 1919. Under date of May 8, 1922, said George G. Moore made an affidavit in support of a motion to vacate said warrant of attachment, which reads in part as follows:

"I disposed of my holdings in Detroit, and moved to New York City, where I have continuously resided since that time, continuously maintaining an office at 52 Vanderbilt avenue, for the personal transaction of business; that shortly after coming to New York, I purchased a house at 44 East 53d street, and entirely rebuilt it and invested therein over \$94,000. It was my intention to make New York City my permanent home. In pursuance of that intention which I still have, I am still an actual resident of the city of New York; that I now reside at the Hotel St. Regis in the city of New York. When I came from Detroit in 1915 I severed my connection there, and have never since been a resident of that state."

The affidavit of defendant in the instant case, made just 14 days later, reads in part as follows:

"That this action is brought by the Investment Registry of America, a corporation organized under the laws of Pennsylvania, against this defendant, a resident of the state of California."

[1] This apparent variation, if taken alone, would show conclusively that either one or the other of said affidavits was erroneous. The filing of the affidavit by counsel for plaintiff stating that defendant was a nonresident of California did not establish that fact conclusively, and it became the duty of the court below to determine the residence of the defendant, upon hearing of the motion to dissolve the attachment. *Sparks v. Bell*, 137 Cal. 415, 70 Pac. 281. This was done. The defendant was examined as a witness for plaintiff, as a witness in his own behalf,

cross-examined by counsel for plaintiff, and interrogated by the court. In explanation of the evident discrepancy in the statements contained in the two affidavits, the defendant testified that the statement of residence in the New York affidavit was as to the date wholly unintentional; that the affidavit was directed to the only issue before the New York court, his residence in 1919, and that when attention of his counsel was called to the statement about continuously residing in New York, and—

"I asked him then if he did not know I was living in California. He said, 'The only thing that matters is where you lived in 1919.' He said, 'You are doing business here, as far as anything matters in this affidavit. The question is, where was your residence in 1919?'"

This testimony was supplemented by the statement of defendant that, upon his marriage, he abandoned his New York residence, and left on an extended trip to China, and upon his return to the United States took up his permanent residence in California, on or about January 2, 1922. He stayed with friends in San Francisco for a time, later leased a place in the same city and then moved to San Mateo, at which place he still lives.

[2] An examination of the record would indicate that there was but one issue before the court, the residence of defendant at the date of the issuance of said writ of attachment. If at said time the defendant was a resident of this state, and if the obligation sued upon was one which was not made or payable in this state, then it follows necessarily that said writ of attachment was wrongly issued and should be dissolved. At the conclusion of the hearing, it was conceded that the obligation was not made or payable in California, and the court below determined that defendant was a resident of California at the time of the institution of said action, and thereupon made and entered an order granting the motion to dissolve the attachment. We are satisfied that notwithstanding the apparent conflict in the defendant's two affidavits, they created, when accompanied by the latter's oral testimony as to the circumstances under which the New York affidavit was made, and as to the facts in detail regarding his residence in California, a conflict in evidence which it was the province of the trial court to consider and decide, and having, upon such conflict, decided that the residence of the defendant was the state of California at the date of the issuance of said writ of attachment, we will not disturb its conclusion in that regard.

The order is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

(63 Cal. App. 265)

In re BACKESTO'S ESTATE. (Civ. 4540.)

(District Court of Appeal, First District, Division 1, California. July 27, 1923, as amended Aug. 24, 1923. Hearing Denied by Supreme Court Sept. 24, 1923.)

1. Judicial sales ⚡1, 52—Essentials of "judicial sales" stated, and rule of caveat emptor held to apply.

A sale is not, properly speaking, a judicial one, unless it is made upon express order of the court having jurisdiction of the subject-matter of the sale, and which it directs to be sold for the purpose of carrying its judgment into effect, or of directing a disposition of its proceeds, and under such a sale the doctrine of caveat emptor applies.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Sale.]

2. Executors and administrators ⚡138(1)—Sale under directions of will not judicial one; "judicial sale."

A sale made under the mandatory directions contained in a will is not a judicial one, and the statutory requirement that no title shall pass until the sale be confirmed does not give to it the incidents of a judicial sale.

3. Executors and administrators ⚡148—General law of vendor and purchaser applicable to administrator's sale of realty under express direction of will.

Where a sale is made by an administrator under the mandatory directions of a will, the reciprocal obligations of the administrator to convey title, and the purchaser to pay the purchase price, are governed by the same rules that apply to vendor and purchaser, generally, including the implied condition that the title of the vendor is good, and that he will transfer an unincumbered title.

4. Executors and administrators ⚡148—Purchaser of realty at administrator's sale need not accept title incumbered with taxes or assessments.

Where an administrator, pursuant to the express direction of the will, sells testator's realty, the doctrine of caveat emptor does not apply as it does to judicial sales, and hence the purchaser is not compelled to accept title when burdened with taxes or assessments which, under Civ. Code, § 1114, constitute incumbrances thereon.

5. Executors and administrators ⚡145—Probate court may direct execution of conveyance by administrator upon compliance by purchaser with terms of contract.

Pending administration of estates, the probate court has full and plenary power to direct the execution of a conveyance upon compliance by the purchaser with the terms of his contract.

6. Executors and administrators ⚡138(1)—Statutory provisions held not to make administrator's sale a "judicial sale."

A sale by an administrator under the mandatory provisions of the will is not a judicial sale, notwithstanding the provisions of Code Civ. Proc. § 1561, providing for sales by ex-

ecutors, as modified in 1880, amended section 1356 by implication taking away the power of sales by any administrator cum testamento annexo.

7. Appeal and error ⚡77(1)—Order refusing to direct administrator to convey to purchaser held appealable.

An order denying the petition of a purchaser of realty sold by the administrator under the mandatory provisions of the will, that he might be allowed to deposit the purchase money in court, and that the administrator be directed to convey free from taxes, held appealable under the express provisions of Code Civ. Proc. § 963, subd. 3.

8. Appeal and error ⚡347(1)—Relative to time for appeal, entry in clerk's minute book held not to deprive court of jurisdiction to make formal order later.

Where a dispute arose between a purchaser of realty at an administrator's sale, and the administrator in regard to the payment of taxes, and the probate court at the hearing suggested that the matter be allowed to go over for two weeks so that it might be amicably arranged, and in the meantime requested that orders be prepared for signature, and the clerk in his rough minutes made an entry that the order of sale had been set aside, and two weeks thereafter the court signed the order setting aside the order confirming the sale, the first entry by the clerk did not deprive the court of jurisdiction to make the later orders, Code Civ. Proc. § 1704, as amended (St. 1921, c. 112), permitting orders to be either entered in the minute book, or to be signed and filed, it being manifest that the real order from which an appeal might be taken was made on the second hearing.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Proceedings to sell realty under the will of John P. Backesto, deceased. Petition by John Engebretson for leave to deposit the balance of the purchase price in court, and for an order directing the administrator to pay taxes and deliver a deed. Petition denied. An order setting aside the sale was granted, and petitioner appeals. Reversed.

Haines & Haines, of San Diego, and D. M. Burnett, of San Jose, for appellant.

Ralph C. McComish and D. T. Jenkins, both of San Jose, for respondent.

TYLER, P. J. This is an appeal from an order setting aside a sale of real property in the above-entitled estate.

The sale was made by the administrator with the will annexed under the mandatory directions contained in the will of John P. Backesto, deceased, which provided that within one year after the death of his wife his property should be sold, and the proceeds divided among certain heirs. Upon the happening of this event proceedings were instituted to carry out the testator's direction.

The sale of the property in question was made to appellant, John Engebretson, April 26, 1922, for the sum of \$64,000. A deposit of \$6,500 was made with the bid, leaving a balance of \$57,500 to be paid upon the approval of the sale and delivery of a deed. Thereafter on the 28th day of April, 1922, the administrator filed his return. Upon the day fixed for the hearing thereof it appeared that the sale was legally made and fairly conducted, and the same was confirmed. Thereafter a controversy arose between the purchaser and the administrator over the question whether certain taxes should be paid by the administrator out of the proceeds of the sale, or whether the purchaser should accept a conveyance subject to this charge. The parties being unable to settle their differences, the purchaser, appellant herein, filed in the estate a petition praying for leave to deposit the sum of \$57,500, the balance of the purchase price, in court, and for an order directing the administrator to deliver his deed, and that he be required to pay the taxes when due and payable out of the purchase price, and for such other and general relief as might be found just and equitable. To this petition the administrator filed an answer, and prayed that the petition be denied, and for an order that the sale be set aside. The purchaser filed his objections to this petition, and again offered to pay the balance of the purchase price in full, so that the estate might have the use of the same, and asked that the question as to the payment of taxes be reserved for future consideration and determination by the court.

Upon the hearing of these motions the petitions of the purchaser that he be permitted to pay the balance of the purchase price into court, and that the administrator deliver his conveyance and pay the taxes, were denied, and the petition of the administrator to set aside the order of sale was granted, and a resale of the property was ordered. In setting aside this order the court proceeded upon the theory that the sale was a judicial one, and that the purchaser took title to the property with its infirmities, and the administrator was not therefore required to give a warranty of title as the rule of caveat emptor applied.

Upon the question of taxes, it appears from the record that at the date of the sale there had accrued tax liens upon the property as follows: Taxes due the city of San Diego, which under its freeholders' charter became a lien on January 1, 1922, and would become due and payable on the first Monday of June following; and state and county taxes which became a lien on the first Monday in March, 1922, by virtue of section 3718 of the Political Code, and which would become due and payable on the third Monday in October, 1922.

[1, 2] The main question here presented is

whether or not the sale was judicial in character. A sale is not, properly speaking, a judicial one, unless it is made upon express order of the court having jurisdiction of the subject matter of the sale, and which it directs to be sold for the purpose of carrying its judgment into effect, or of directing a disposition of its proceeds. Freeman on Void Judicial Sales, § 1; Holleck v. Guy, 9 Cal. 181, 70 Am. Dec. 643; 24 Cyc. 6. Under such a sale the doctrine of caveat emptor requires the purchaser to avail himself of all the means of information at hand to ascertain the quality of the property and the character and extent of the title, and the deed of an administrator is in the nature of a mere quitclaim. Miller & Lux v. Gray, 136 Cal. 261, 68 Pac. 770. Here, however, the sale was not made under order of the court, but it was made under the express and mandatory directions contained in the will of the deceased. It has been expressly held in this state that a sale made under these circumstances is not a judicial one, and that the statutory requirement that no title shall pass until the sale be confirmed does not give to it the incidents of a judicial sale. While it is essential that the will shall have been admitted to probate before the power can have any validity, in all other respects the contract of purchase and sale between the executor and his vendee stands on the same basis or footing as an ordinary contract inter vivos and it is attended with the same incidents and subject to the same construction as similar contracts between any other vendor and vendee. In re Pearsons' Estate, 98 Cal. 603, 612, 33 Pac. 451; Id., 102 Cal. 569, 36 Pac. 934; Estate of Robinson, 142 Cal. 152, 75 Pac. 777. This being so, the reciprocal obligations of the administrator to convey title and the purchaser to pay the purchase price are governed by the same rules that apply to vendor and vendee generally.

[3, 4] In executory contracts of sale of land between such parties there is an implied condition that the title of the vendor is good, and that he will transfer to the vendee by his deed of conveyance one that is unincumbered. Crim v. Umbsen, 155 Cal. 697, 103 Pac. 178, 132 Am. St. Rep. 127; Wilcox v. Lattin, 93 Cal. 588, 29 Pac. 226. Until such a deed is tendered, the purchaser is not compelled to accept it or complete his purchase. Smiddy v. Grafton, 163 Cal. 16, 124 Pac. 433, Ann. Cas. 1913E, 921. A tax or assessment impressed by lawful authority constitutes an incumbrance upon the title to land. Civ. Code, § 1114. Primarily the duty of paying taxes rests upon the person who holds the legal title. A vendee, prior to conveyance, in the absence of an agreement to the contrary, is not responsible for them. The subject is usually made the matter of special stipulation in agreements for conveyances, but in the absence thereof it is a duty incumbent on

the vendor to pay them in order to keep good his covenant to convey a valid title. It is suggested by respondent that as the amount of the tax had not been ascertained or determined it could not form or create the basis of a lien. In this state the time when taxes shall attach as a lien upon property is fixed by statute as of a certain day in the year, and when the amount is ascertained it relates back to the time so fixed. The taxes were therefore a charge against the property. *Reeve v. Kennedy*, 43 Cal. 643. Since the vendee was under no obligation to pay the purchase money except upon the tender of a good and sufficient deed free from all incumbrances, it follows that the court below was without authority to adjudge the purchaser in default, and its action in setting aside the order confirming the sale was without authority. The evidence upon this subject shows without conflict that the unpaid purchase price was tendered in open court, and that the administrator refused to accept the same, and deliver a conveyance of the property, except upon the express condition that the deed should be subject to the taxes, and also upon the further condition that appellant would waive any appeal involving the question. The effort of the administrator to compel the purchaser to abandon his rights at the peril of having the sale set aside was upheld by the court, and wrongfully so. The vendee being at all times ready and willing to perform his contract he had the right to demand that the matter of the payment of the taxes be adjusted in such manner as would protect him against the liens incident thereto. *Grant v. Beronio*, 97 Cal. 498, 32 Pac. 556. This is all that appellant was demanding under his petitions.

[5] Respondent advances the argument that even assuming that the sale was not a judicial one, the court had no jurisdiction to compel performance, and that the purchaser therefore was relegated to his relief in a civil action. Pending administration of estates the probate court has full and plenary power to direct the execution of a conveyance upon compliance by a purchaser with the terms of his contract. *In re Walker*, 149 Cal. 214, 85 Pac. 310.

[6] The further argument is made in support of the contention that the sale was a judicial one, that under the statute an administrator with the will annexed has no power to carry out the imperative mandate to an executor named in the will to sell, for which reason it is claimed the sale must of necessity be a judicial one. In support of this position it is argued that section 1561 of the Code of Civil Procedure, providing for sales by executors, as modified in 1880, amended section 1356 of the same code by implication, so as to take away this power from any administrator cum testamento annexo. There is no merit in this position. As stated by counsel for ap-

pellant, the obvious reason for the elimination from that section of the express mention of an administrator with the will annexed was that such portion of the section was mere surplusage in view of the positive and express provisions of section 1356 clothing such an administrator with all the powers of an executor.

[7, 8] Equally without merit is the claim that the order denying appellant's petition is not appealable. The statute expressly authorizes appeals "from a judgment or order * * * against or in favor of directing the * * * sale or conveyance of real property" (Code Civ. Proc. § 963, subd. 3), and this in substance is the nature of the appeal in question. *Estate of Corwin*, 61 Cal. 160; *Estate of Cheda*, 187 Cal. 322, 202 Pac. 133; *Estate of Pearsons*, 102 Cal. 569, 36 Pac. 934. The same may be said of the contention that no valid appeal is here presented, for the reason that it is directed against an order which the court had no jurisdiction to make. In this connection it appears from the record that when the different petitions were presented to the court for hearing, the judge thereof indicated that he would set aside the sale unless the parties came to some agreement. This hearing was had on June 9, 1922, and the court, in its desire to see the matter amicably arranged, suggested that it go over for two weeks, and in the meantime requested that orders be prepared for signature. The clerk of the court entered in his rough minutes as of the 10th of June, 1922, that the order of sale had been set aside. Two weeks thereafter, and on June 23, 1922, the parties again appeared in court, and, having failed to settle their differences, the court then signed the order setting aside the order confirming the sale. Under these circumstances respondent claims that the entry by the clerk of June 10th deprived the court of jurisdiction to make the orders which his counsel prepared for signature. We are cited to the case of *Tracy v. Coffey*, 153 Cal. 356, 95 Pac. 150, as supporting this contention. It is there held that section 1704 of the Code of Civil Procedure requires orders in probate to be entered in the minute book of the court, and that it is the order there entered, and not a separate paper signed by the judge purporting to embody the terms of the order, that is the order of the court, and it is the date of the entry of this order which sets the time running for an appeal. Since that decision was rendered, section 1704 of the Code has been amended (Stat. 1921, chap. 112, p. 105). The amendment permits orders to be either entered in the minute book or to be signed and filed. It is perfectly manifest that while the judge expressed his opinion and his determination to set the order confirming the sale aside at the original hearing, that the real order was made on the day of the second hearing and when the order

was signed. Aside from this we are of the opinion that the objection is frivolous. The notices of appeal were filed and served on August 7, 1922. Whether the appeal was taken from the one entered on the 10th day of June or from the one signed on the 23d is of no consequence, for in either event the appeal was taken in time, and the notice of appeal is from all matters involved in the order setting aside the sale, and it refers to both orders.

We are asked to direct the court below to make certain directions following the reversal of the order vacating the sale. We do not deem it necessary to so direct the court.

The order vacating the sale is reversed. The order denying the appellant's petition for performance of the administrator's agreement is also reversed.

We concur: ST. SURE, J.; RICHARDS, J.

(63 Cal. App. 424)

Ex parte WATSON. (Cr. 725.)

(District Court of Appeal, Third District, California. Aug. 8, 1923.)

Drunkards $\S$ 2(1)—**Habeas corpus** $\S$ 30(2)—**Affidavits not alleging specific acts held not to warrant detention, and petitioner entitled to discharge on habeas corpus.**

An affidavit under which petitioner was imprisoned, alleging that from use of liquor and influence thereof he was irresponsible and insane, without setting out specific acts, was wholly insufficient, under Pol. Code, $\S$ 2185c, authorizing confinement for such cause, and requiring the affidavit to be as required by section 2168, relating to charge of insanity, and petitioner was entitled to release on habeas corpus.

Application by James Warren Watson for writ of habeas corpus to be directed to the Sheriff of Solano County to secure his release from custody on a charge of insanity. Petitioner discharged.

E. L. Webber, of Napa, for petitioner.

BARTLETT, Judge pro tem. Petitioner seeks his discharge on habeas corpus from imprisonment in the county jail of Solano county, alleging that his imprisonment is illegal and without any authority of law. The return to the writ shows that on June 4, 1923, an affidavit was made before the police judge of the city of Vallejo by one W. O. Watson charging that—

"On June 4, 1923, James Warren Watson had been for a period of several weeks last past, and then and there is a person who from the inordinate use of alcoholic liquor and the influence thereof is irresponsible in his acts and insane therefrom."

Petitioner contends that this allegation is wholly insufficient to comply with the re-

quirements of either section 2185c of the Political Code, as the basis for an examination justified under that section, or under section 2168, Political Code. The claim of petitioner is clearly supported by the decision of the Supreme Court in the case of *Henley v. Superior Court*, 162 Cal. 239, 121 Pac. 921. No specific acts and doings of the petitioner are alleged which would tend to support the conclusion of the maker of the affidavit that petitioner had lost the power of self-control through inordinate drinking of intoxicating liquors, nor of acts tending to show him to be dangerous to be at large by reason of insanity.

The petitioner is discharged.

We concur: FINCH, P. J.; BURNETT, J.

(63 Cal. App. 225)

FREEMAN et al. v. ADAMS et al.
(Civ. 4050.)

(District Court of Appeal, Second District, Division 2, California. July 26, 1923.)

1. Trial $\S$ 234(7)—**Instruction that jurors might consider what they would have done, or not have done, held erroneous.**

Instruction that, in determining what a reasonable and prudent man would do, the jury should remember that presumably the jury was composed of reasonable and prudent persons, and that each might ask himself what defendants did, or failed to do, which he would not have done, or would have done, was erroneous.

2. Municipal corporations $\S$ 706(1)—**Complaint held to charge failure to act reasonably and prudently, as well as violation of statute.**

Complaint, alleging that automobile driven immediately in front and a little to the right of the stage in which plaintiff was riding, suddenly, negligently, and carelessly, and without warning, turned directly in front of the stage, held to charge failure of driver to conduct himself in reasonable and prudent manner, as well as violation of Motor Vehicle Act, $\S$ 20, subd. (n).

3. Appeal and error $\S$ 1170(9)—**Instruction that jurors might consider what they would have done, or omitted to do, held not harmless.**

Where there was close question as to whether negligence of automobile driver was proximate cause of injuries sustained by passenger when stage tipped over in avoiding automobile, instruction that jurors might ask themselves what defendants did, or failed to do, which they would not have done, or would have done, held not harmless, under Const. art. 6, $\S$ 4½, prohibiting reversals, except for miscarriage of justice.

4. Carriers $\S$ 321(19)—**Municipal corporations** $\S$ 706(8)—**Instruction as to concurrent negligence of carrier and automobile driver criticized.**

In passenger's action against proprietor of stage and driver of an automobile for injuries

sustained when stage tipped over in avoiding the automobile, instructions that, if injuries were proximate result of combination of negligent acts, it was unnecessary to inquire into their relation in period of time, or whether they were concurrent, successive, "or independent," or whether one proximately contributed to result more than the other, might better have omitted the quoted words.

5. Carriers ⚡321(21)—**Municipal corporations** ⚡706(8)—**Instruction claimed to state rule of res ipsa loquitur should have been omitted.**

In passenger's action against stage proprietor and owner of an automobile for injuries sustained when stage tipped over in avoiding the automobile, instruction that plaintiff was not required to show particularly what specific act of negligence produced the injury, but only that accident could not have ordinarily occurred, had due care been employed by defendants, if not actually erroneous, as stating the rule of res ipsa loquitur, should have been omitted in interest of clarity.

6. Carriers ⚡321(1)—**Municipal corporations** ⚡706(8)—**Reference to defendants' acts, without limiting it to negligent act, held improper, but not misleading.**

In passenger's action against stage proprietor and owner of an automobile for injuries, instruction that intent to injure plaintiff, or violate law, or do acts causing injury was not essential element of negligence, but that it was sufficient if defendants did an "act" from which plaintiffs suffered immediate injury, should have said "negligent act," but could not have misled jury, where they were explicitly and repeatedly told that neither defendant was liable, unless negligent.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Anna B. Freeman and husband, against Hubert Adams, doing business under the fictitious name of El Cajon Stage, and another. From a judgment for plaintiffs, the defendant George W. Cramer, doing business under the fictitious name of Cramer's Bakery, appeals. Reversed.

Jennings & Belcher, of Los Angeles, for appellant.

Wright & McKee, of San Diego, for respondents.

WORKS, J. This is an action for damages for personal injuries suffered by plaintiff Anna B. Freeman because of the alleged concurring negligence of the defendants. The cause was tried by a jury, and judgment went against both defendants. Defendant Cramer alone appeals.

[1] It is contended by appellant and conceded by respondent that the trial court erred in giving the following instruction to the jury:

"In determining what a reasonable and prudent man would do under the circumstances,

you will remember that presumably a jury is composed of such reasonable and prudent persons, and you may each ask yourself, Did the defendants do, or fail to do, anything which, under the circumstances, I would not have done or would have done?"

It is plain that this instruction does not state the law. If it is to be presumed that every jury is composed of reasonable and prudent persons, that is far from saying that every member of a jury is actually reasonable and prudent. So to say would be to speak counter to the teachings of experience, and to discredit the truth of the classic anecdote concerning the 11 unreasonable jurors whom the reasonable twelfth could not convince. The presumption mentioned in the instruction is a disputable one, but the trial court made it conclusive in the eyes of the members of the jury and gave them an utterly false basis upon which to reason in arriving at a verdict.

[2] Respondent, relying upon the provisions of section 4½ of article 6 of the Constitution, insists that a reversal of the judgment against appellant need not follow from this manifest error of the trial court. That section is to the effect that no reversal of a judgment shall be caused by any error occurring at a trial—

"unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

This claim of respondent is based upon the view that the negligence charged against appellant involves no question as to what a reasonable and prudent man might or might not do. The catastrophe out of which the injuries to Mrs. Freeman arose was the overturning of an automobile stage in which she was a passenger. Appellant was the owner of and operated a delivery automobile, and respondents' cause of action against appellant was based upon the view that the negligence of the driver of the delivery auto was a proximate cause of the overturning of the stage, which was owned and operated by appellant's codefendant. The contention of respondent is that the only negligence charged against appellant is that his driver failed to obey the positive mandate of the law in operating the delivery auto at the time of the accident in question in the case, not that he operated it in a manner different from that in which a reasonable and prudent man would have operated it. Subdivision (n) of section 20 of the Motor Vehicle Act, so called (Stats. 1919, p. 216; Deering, Consol. Suppl. to Codes and Gen. Laws, 1917-1921, p. 1666), provides that no driver of a motor vehicle upon a public highway shall turn his car without seeing first "that there is sufficient space for such movement to be made in safety," and, if other vehicles reasonably may be

affected by the turn, without making with his arm a signal described by the statute. Respondents' claim is that the sole negligence of appellant's driver lay in his failure to observe these provisions of the law. In this view respondents are in error. The charge in the complaint is:

"That * * * a delivery automobile * * * which was being driven immediately in front of said stage, and a little to the right thereof, suddenly, negligently and carelessly and without warning turned directly in front of said stage."

What relationship the negligence thus charged bore to the accident in which Mrs. Freeman was injured will be developed later. It is enough for the present to observe that more than a mere failure to obey the law is alleged. The driver is charged, plainly, with having committed acts which a reasonable and prudent man would not have committed. The questioned instruction, therefore, touched directly upon the functions which the jury was to discharge. They were to judge whether appellant's driver had conducted himself in a reasonable and prudent manner, not merely whether he had obeyed the mandate of the law. In fact, leaving for a moment the question of pleading and considering the question of evidence, it may be remarked that if the driver of the delivery auto had observed the provisions of the statute to which we have referred, and yet had acted as some of the testimony indicates that he did act, he would nevertheless have been guilty of negligence. The truth of this statement will be demonstrated when we come, as we now do, to recite the facts in the case.

[3] Leaving, now, the contentions advanced by respondents, and proceeding on more general grounds, did the giving of the instruction result in a miscarriage of justice, as that term is used in the Constitution? In endeavoring to answer this question we have examined the entire cause, including the evidence. After such examination we state first those phases of the evidence which tend toward a support of the verdict, as follows: Defendant Adams owned and operated an automobile stage line between El Cajon and San Diego. Appellant, the owner of a bakery, operated an automobile delivery wagon or truck in connection with his business. On the day upon which Mrs. Freeman was injured she was a passenger on one of Adams' stages upon a trip from El Cajon to San Diego. The vehicle was driven by one Brenner. Immediately preceding it was a stage driven by Adams himself. The two stages, throughout the trip up and to the time of the catastrophe in which Mrs. Freeman was injured, maintained a distance apart of 150 feet or more. The accident occurred in San Diego at the intersection of University avenue and Arnold avenue. The former thoroughfare is 80 feet in width between curb

lines and extends east and west. Arnold avenue proceeds south from University avenue. A double-track street railway occupies the middle of the latter street. The two stages were moving west along the northerly side of University avenue. Appellant's delivery auto was proceeding west on the same street, ahead of the stage driven by Adams, and near the northerly street car track. It was being driven by one Davenport. As they approached Arnold avenue, Adams sounded his horn, but Davenport, according to Adams—

"didn't do nothing; he didn't give me no room, and I kept sounding my horn, and he kept crowding me over, and he was way out in here (indicating) in the middle of the car tracks. I was then south of the center of the street. * * * I kept sounding my horn and sounding it, and he wouldn't give me no road, and as I passed he seemed to swing back toward the right-hand side of the street; that is, toward the curb, the north curb, on University avenue."

As the two stages approached Arnold avenue, the one driven by Brenner was 150 feet behind Adams and was traveling at a rate of 2 or 3 miles an hour over the speed limit of 20 miles. Brenner kept this rate until he slowed down and turned to avoid a collision, as related below. After veering to the right and toward the north side of University avenue, as stated by Adams and admitted by Davenport, the latter made no signal with his arm, as required by law, indicating that he intended to turn to the left, cross University avenue, and proceed south to Arnold avenue, nor did he look back, as, in effect, he was required by law to do if he intended to turn. He did, however, turn toward the left at some time between the moment when Adams passed him and the time when Brenner came up, probably immediately after the former passed. None of the occupants of Brenner's stage saw the delivery auto until the stage was almost upon it. The statements of some of them follow. Mrs. Freeman testified:

"When I first saw the bakery wagon we were near the grocery store. The bakery wagon was directly in front of us. We were very near to it. I felt sure we had either to hit that car or make the turn."

She further said, on being questioned by a juror:

"We were not as far behind the bakery wagon as across the road. I first remember the bakery car was directly in front of us. I don't know how near, but I know it was very near. I know we had to make the turn or hit that car, so we certainly were very near."

A witness who was riding on the front seat with Brenner said:

"Mr. Brenner sounded his horn to pass a wagon in front of us—sounded his horn good. I saw the bakery wagon just as soon as it came across the road in front of us. * * * When I first saw the wagon, I stood up in

the car in my excitement and said, 'Watch out.' The bakery wagon, when I first saw it, was not more than 10 feet in front of the stage."

Brenner testified:

"I saw I either had to hit him or turn south on Arnold street. * * * I was sounding my horn. * * * I gave a good signal. I held my hand on it. I gave it a long signal. The driver of the bakery wagon did not change his course when I sounded my horn. I could not have gone around to the right of him and avoided the accident. He was directly in front of me when he turned, he turned directly in front of me. * * * When I first saw this bakery wagon, I was about 50 feet behind him."

To avoid a collision Brenner turned the stage toward the left and Davenport stopped the delivery auto. The stage passed in front of Davenport's car and at some considerable distance from it as it stood, ran into a curb at the southwest corner of the two thoroughfares, and overturned.

There is much difficulty involved in so construing the evidence, thus favorably stated, as to view it as furnishing a support for the verdict. That difficulty lies principally in the fact that the second stage was shown to have been at least 150 feet behind the first at about the time when Adams came up with Davenport. If this distance was maintained until Adams had passed Davenport, it is hard to understand why the car driven by the latter, starting to turn immediately behind Adams, was not seen by Brenner in ample time to enable him to avoid the accident. The street was wide, and there was no intervening obstacle. There are, however, several phases of the evidence from which the jury might have inferred that the distance was not maintained, or, at least, that Brenner was much less than 150 feet behind Davenport when the latter commenced to make the turn. In the first place, it is possible that Adams was forced to slow down to a considerable degree during the period in which, according to his testimony, he was experiencing his difficulty in passing Davenport, thus decreasing materially the distance between the two stages. Further, Davenport was driving much slower than Adams when the latter passed. This, together with the circumstance of his veering to the right, toward the north curb of University avenue, as Adams passed, gave Brenner the opportunity to approach rapidly in Davenport's direction before the latter began to make the turn. Again, the fact that no one in the second stage saw the bakery wagon until the stage was very near it, as detailed by the witnesses whose testimony is quoted above, was some evidence to the jury that the two vehicles were actually so near each other when Davenport began to make the turn that his negligence contributed proximately to the accident. Brenner was negligent in driving

faster than the law allowed him to drive but his excess over the speed limit was so slight, according to some of the evidence, that the members of the jury were possibly justified in concluding that he could not have avoided the accident if he had been driving within the limit. This point, however, we do not decide. The judgment must be reversed, as the sequel will show, and we are careful not to pass upon the weight or effect of the evidence presented in the present record, as a second trial of the cause may follow the reversal.

We have thus far dwelt upon the phases of the evidence which tend toward upholding the verdict, but there are other lights in which it may be viewed. There was testimony to the effect that Brenner's stage was from a block to a block and a half to the rear of Adams when the latter came up with Davenport, instead of only 150 feet, and a plat in the record shows the block between Arnold avenue and the thoroughfare next to it and toward the east to be 265 feet long. We have referred to the fact that evidence in the record shows that, just before the accident, Brenner was driving but 2 or 3 miles an hour over the speed limit. There was testimony showing that he was then driving 10 or 15 miles above the limit. We have quoted the testimony of Adams to the effect that, when he passed Davenport, the latter veered to the right and toward the north curb on University avenue. There was other evidence showing that after this movement Davenport never got far from the northerly rail of the northerly car track; his southerly wheels being in close proximity to that rail, and perhaps even to the southward of it. In other words, according to this testimony, Davenport, after Adams passed him, was directly in front of Brenner. It will be remembered that Adams testified that he was crowded south of the center of the street by Davenport before he could pass him. It will be seen, from the evidence thus epitomized, that there was much question under the evidence whether any negligence of Davenport was a proximate cause of Mrs. Freeman's injuries. The jury may well have experienced great difficulty in arriving at a verdict against appellant.

Under these circumstances, did the giving of the instruction now in question result in a miscarriage of justice? It is doubtful if such an instruction would be harmful in any case with many jurors. While the instruction is contrary to law, it is probable that it did not initiate in all the members of the jury mental processes different from those constantly employed by jurors in practice. It is much to expect of any juror that he could contemplate himself as lacking in reasonableness or prudence, or as possessed of an undue degree of either, or that he could reason from the standpoint of an imaginary be-

ing outside himself—the reasonable and prudent man of the law. Despite the fixed rules upon the subject, it is doubtful if many jurors will measure the conduct of others by any standard but that which would govern themselves under similar circumstances. There may have been on the jury in this case, however, jurors who could successfully have performed this feat, but for the instruction which was given them. We cannot close our eyes to the fact that the verdict as to appellant *may* have been entirely different, but for the giving of the instruction now under consideration. Does this fact furnish room for the application of section 4½ of article 6 of the Constitution? There are decided cases which bear directly upon the point. It was said in a case in which certain evidence had been improperly admitted:

"After a most careful consideration of the entire cause, including the evidence, but without the presence of the actual witnesses before us, we are unable to determine whether the defendants would or would not have been convicted by the jury had this erroneously admitted testimony been withdrawn from their consideration. This being so, we do not feel that section 4½ of article 6 of the Constitution can be given application to uphold the judgment." *People v. MacPhee*, 26 Cal. App. 218, 146 Pac. 522.

In another case, the trial court having erroneously admitted a confession in evidence, it was said:

"The salutary provision of section 4½ of article 6 of the Constitution cannot successfully be invoked to uphold the judgment. After a most careful consideration of the entire cause, including the evidence, we are unable to determine whether the trial judge would or would not have excluded the confession, had he heard defendant's testimony before ruling upon its admissibility; nor are we able to say whether the jury would or would not have convicted the defendant, if the erroneously admitted confession had been excluded from their consideration. This being so, we do not feel that section 4½ can aid the judgment." *People v. Columbus*, 49 Cal. App. 761, 194 Pac. 288.

The Supreme Court said in *People v. Lapara*, 181 Cal. 66, 183 Pac. 545, that:

"It must affirmatively appear to the satisfaction of this court that a defendant may well have been substantially injured by the error complained of before a reversal of a judgment of conviction may be had" under the section of the Constitution now under consideration.

From the rule laid down in these cases we conclude that the present judgment against appellant cannot stand. There is no doubt that substantial injury *may* have been done appellant by the instruction. We certainly cannot say that such injury was not done.

[4] In view of the possibility of a retrial of the action, we must notice briefly objections which are made to other instructions

given by the trial court. The jury was instructed as follows, omitting words and phrases which do not affect the question now to be mentioned:

"If you find that the plaintiff's injuries were the proximate result of the combination of the negligent acts of the two defendants, it will be unnecessary for you to inquire into the relation in period of time of such acts and negligence, or whether they were concurrent or successive or independent, or whether one proximately contributed to the result more than the other."

Appellant insists that this instruction was erroneous because of the inclusion in it of the words "or independent." Without passing upon the validity of this objection, it is enough to say that it were better if the two words had not been included in the instruction.

[5] The following instruction was given to the jury, the italics being ours:

"The plaintiff is not required to show particularly what the specific act of negligence was which produced the injury; it is only required to show by a preponderance of the evidence that the accident could not have ordinarily occurred, had due care been employed by the defendants; and you are instructed that if the testimony in this case shows, by a preponderance of the evidence, that the plaintiff's injuries were sustained by reason of the combined or concurrent negligent acts of the defendants, and that those negligent acts were the proximate cause of the injury, then it will be your duty to return a verdict for the plaintiff. If, however, you should find that one of the defendants was negligent, and that the other was not negligent, then you will find for the plaintiff, and against the negligent defendant, and in favor of the defendant who was not negligent."

It is contended by appellant that the italicized portion of the instruction is in effect a statement of the rule *res ipsa loquitur*, and that while the principle so termed may possibly have applied to defendant Adams, a common carrier, the court erred in attempting to extend its application to appellant. Taking all of the instructions together, it is doubtful whether the jury received a hint from the italicized portion of the instruction quoted that there is in existence such a rule as that characterized by the term *res ipsa loquitur*. We do not decide that question, however, contenting ourselves with the assertion that, in the interest of clarity alone, the italicized language should not have been given.

[6] It is insisted that the trial court erred in giving an instruction:

"That intent is not an essential element of negligence. Neither intention to injure the plaintiff nor intention to violate the law, nor an intention to do the act or acts which caused the injury, is necessary. It is sufficient if the defendants did an act from which the plaintiffs suffered an immediate injury."

The only fault found with this instruction is that in the last sentence the word "act" is used without placing the word "negligent" before it. It is entirely clear, from the instructions as a whole, that in using the word first mentioned the judge intended to refer to a negligent act. The members of the jury could have understood nothing else, as they were instructed explicitly and repeatedly that the plaintiffs could recover against neither defendant, unless that defendant was guilty of negligence, but all difficulty would have been obviated if the judge had inserted the word "negligent" before the word "act."

Judgment reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(63 Cal. App. 284)

ESTES v. HOTCHKISS. (Civ. 4525.)

(District Court of Appeal, First District, Division 1, California. July 27, 1923.)

1. Appeal and error ⇐173(6)—Defense of fraud when not relied on at trial cannot be entertained as basis of reversal.

In action for broker's commission where defense of fraud was not relied on at the trial, it cannot be entertained as basis of reversal.

2. Estoppel ⇐3(3)—Disclaimer by assignee held to nullify any interest she had.

In action by assignee for broker's commission, any interest the broker's wife had under prior assignment to her was nullified where, upon being made a party, she by answer disclaimed any interest or any right of action against defendant.

3. Brokers ⇐50—Defendant by continuing negotiations with prospective purchasers held to have waived conditions as to time.

Under agreement by defendant to pay commission to broker in case sale was made within 60 days, condition as to time was waived by continuing negotiations, especially where defendant entered into an extension contract with the prospective purchasers, and thereafter agreed in writing to pay broker the same commission, though on modified terms.

4. Brokers ⇐57(2)—Transaction held continuing, and broker entitled to commissions.

Defendant agreed to pay broker a commission if sale was made to prospective purchasers within 60 days. Thereafter sale was made, and note taken for deferred payment, and defendant agreed to pay commission as and when he received payment. The note was not paid when due, but, following further negotiations, the purchaser transferred its interests to another who paid the note. *Held*, that the transaction was a continuing one, and broker was entitled to commissions.

5. Assignments ⇐62—Assignee held not precluded from recovering because of his default as purchaser.

Where defendant agreed to pay commission to broker when he received payment from pur-

chasers, and, following default by purchasers, further negotiations resulted in transfer to third party who paid defendant, one of such purchasers held not precluded by the default from recovering as assignee of the broker.

6. Witnesses ⇐275(6)—Cross-examination as to assignment of claim to one who disclaimed interest properly excluded.

In action on assigned claim for broker's commissions which had previously been assigned to broker's wife, where such assignment had been canceled, and the wife filed disclaimer, cross-examination of broker concerning such assignment was properly excluded.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by H. M. Estes against W. J. Hotchkiss. From a judgment for plaintiff, defendant appeals. Affirmed.

Hadsell, Sweet & Ingalls and Creed, Jones & Dall, all of San Francisco, for appellant. Ira S. Lillick, of San Francisco (Hunt C. Hill, of San Francisco, of counsel), for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of plaintiff in an action to recover a commission for the sale of a ranch negotiated by one Wm. Holcombe, the plaintiff's assignor.

The facts of the case are as follows: In the spring of the year 1917 the defendant was the owner of the Trabern ranch in San Joaquin county. On or about the 14th of June said defendant delivered to Wm. Holcombe a memorandum in writing to the effect that, due to the fact that Holcombe had placed defendant in negotiation with Mr. Estes and associates, the defendant was willing to pay a commission of \$10,000, if "I make a sale to these people within the next 60 days." The transaction was not completed within 60 days, but under date of November 19, 1917, Estes and defendant entered into an agreement, wherein Estes agreed to buy said ranch for a price of \$284,155.55. Of this amount \$100,000 was covered by a mortgage by defendant in favor of the Western States Life Insurance Company, which the purchaser assumed and agreed to pay. The balance of the purchase price was covered by a note of the purchaser in amount of \$184,155.55, secured by a deed of trust on the property. It will be noted that no money changed hands, Estes merely assuming the above-mentioned obligations, and taking over the property. Thereafter Estes assigned to Central Farms, a corporation, composed of himself and associates, his interest in the contract, and under date of February 8, 1918, the defendant received from said Central Farms a promissory note for \$184,155.55, with the ranch as security therefor, said note maturing November 19, 1919. During all this time

nothing had been received by Hotchkiss, and nothing paid as a commission to Holcombe. As evidence that Hotchkiss still intended to pay the commission, however, the following memorandum was delivered to Holcombe:

"W. J. Hotchkiss, San Francisco, 101 California Street.

"February 28, 1918.

"This writing is to certify that William Holcombe has acted as broker in the sale by me of the property known as the Trahern Ranch, and for this service I have agreed to pay him the sum of \$10,000 as, when, and in the proportion as I receive payment on the purchase price from the purchasers. The purchase price is due on November 19, 1919, with the option on behalf of the purchaser to pay any part of the purchase price, if they so elect, at any time previous to that date. If the purchaser elects to pay any part of the principal sum previous to November 19, 1919, there then becomes due to and I will pay William Holcombe such proportion of the \$10,000 which I owe him as the payment made by the purchaser bears to the total amount due on the principal. If the purchaser does not pay any part of the sum due until November 19, 1919, but does pay the total amount due on that date, there will be due William Holcombe and I will pay him at that time the \$10,000, but there is nothing in this agreement which would imply that I am to pay him any part until I have received payment from the purchasers of the Trahern Ranch.

"W. J. Hotchkiss."

Under date of June 15, 1918, Holcombe assigned his right, title, and interest in said commission to H. M. Estes, the plaintiff herein, but it also appears that in November or December of 1917 Holcombe had assigned an interest in the same commission to his wife. Upon failure of Central Farms to pay the note when it came due, another agreement was entered into under date of November 29, 1919. The new agreement exacted certain promises and conditions affecting the sale of the property, and by which they were to make certain specified improvements. As consideration for the conditions to be performed, the defendant agreed not to enforce the deed of trust prior to April 1, 1920. Up to this time Estes had not advised defendant that he was the assignee of Holcombe's claim for a commission. However, under date of April 8, 1920, Holcombe wrote the following letter:

"1138 Bellevista Ave., Oakland, Cal.,

"April 8, 1920.

"Mr. W. J. Hotchkiss, 101 California St., San Francisco—Dear Sir: In connection with the Trahern Ranch, formerly owned by you and which through my efforts was sold by you in March, 1917, to Central Farms Company, composed of Mr. H. M. Estes and his associates, I understand that a resale has practically been completed by the latter. If my information is correct, you are about to release the present owners from liability under the trust deed accepted by you in payment for the land and to agree to the transfer of title to the new owners, accepting from them a commitment of some

kind to be paid later. I have delayed making demand on you for payment of commission due me of \$10,000 on original sale, as I had no wish to embarrass you or Mr. Estes and his associates by precipitating matters. Under existing circumstances however, I believe I should have acknowledgment of your intentions before the present negotiations are concluded, and trust you will see fit to so do at this time.

"Yours very truly, William Holcombe."

To this letter he received no reply, and shortly thereafter Estes wrote to defendant, notifying him of the assignment, and inclosing a letter from Holcombe to the same effect, receiving the following acknowledgment:

"I accept this notice without in any way acknowledging that I owe Mr. Holcombe anything or that I expect to pay him anything."

Negotiations were thereafter carried on between Estes and his associates and the defendant in connection with the purchase of the ranch, and in September, 1920, Central Farms transferred its interest to the River Junction Farms, Inc., the latter company paying to defendant the full sum due on the promissory note. Under date of October 21, 1920, Estes demanded payment of the \$10,000 commission, and upon refusal of Hotchkiss to pay the same commenced this action.

[1] Appellant makes several contentions in support of his appeal. The first two are: One, that Holcombe and Estes were partners or were jointly interested in the original transaction, and Holcombe did not have that exclusive loyalty to his principal which an agent must have to entitle him to a commission; and, second, that Holcombe, if not a partner of Estes, was an agent of Estes. Neither of these contentions finds sufficient support in the record. The answer of defendants does not allege that Holcombe and Estes were acting collusively in making this sale. The defendant offered no evidence in support of such a defense, but upon the cross-examination of Estes attempted to cast doubt upon Holcombe's loyalty to him in the transaction. There was no basis for such an insinuation, since it clearly appears that Holcombe merely acted to bring the parties together, and it appears from the record that defendant entered into the agreement without any coercion or misrepresentation whatsoever on the part of the broker. It is true, as heretofore indicated, that very liberal terms were given to Estes in the transaction, but these were in no way attributable to Holcombe. The record as we view it does not indicate that any fraudulent means were used by either Holcombe or Estes; indeed, it does not appear that the defense of fraud was relied on at the trial. This being so, it cannot be entertained as the basis of a reversal. *Rogers v. Kimball*, 121 Cal. 247, 53 Pac. 648; *Buck v. Canty*, 162 Cal. 226, 121 Pac. 924; *Hill v. Barner*, 8 Cal. App. 58, 96 Pac. 111. The case of *Glenn v. Rice*, 174 Cal.

269, 162 Pac. 1020, relied on by appellant, contemplates an agent "engaged by both parties to effect a sale of property from one to the other * * * *not as a mere middle-man to bring them together.*" (Italics ours.) That is not the case here. Holcombe brought the parties in touch with one another, and they made their own contract.

[2] Appellant's next contention is that the assignment of Holcombe to his wife of a portion of his interest of his prospective commission was proof that Estes and Holcombe were jointly interested and that:

"Said Harriet E. Holcombe has made and is making a claim upon the defendant herein for said \$2,500; that unless said Harriet E. Holcombe shall set forth her claim herein, and have said claim adjudicated in this action, said Harriet E. Holcombe will institute an independent action against this defendant on account of said claim for \$2,500."

Whatever interest Holcombe might have assigned to his wife was thereafter nullified by the fact that upon being made a party to the action, Harriet E. Holcombe, by her answer, disclaimed any interest of any kind or character in the premises, and particularly disclaimed any right of action against the defendant by reason of the alleged assignment.

[3] It is attempted to avoid payment of the commission on the grounds that the writing of June 14, 1917, limited the right of the broker to recover his earned commission to the contingency that the principals in the transaction would consummate their contract within 60 days. This might have been true if the defendant, upon failure of the purchaser to complete the purchase within that time, had refused to go on with the transaction; but this was not the case, and the fact that he did go on with the negotiations with Estes and his associates must be held to have amounted to a waiver on his part of that condition in the broker's contract. This is made more apparent by the fact that defendant entered into an extension contract with the party obtained by Holcombe as a prospective purchaser, and thereafter agreed in writing to pay Holcombe the same commission upon certain modified terms. This would seem to imply that the intention of the parties was to regard the agreement to pay the commission as a continuing one, dependent upon the final completion of the transaction and sale of the property to Estes or his assignees.

[4] The claim is made that even under the subsequent promise to pay, the commission was not earned, as the purchase price was not paid on or before November 19, 1919; that the price was not paid by Central Farms, Estes, McMillan or Silva, and that Holcombe, Estes, McMillan, Silva, and Central Farms were not parties through whom the defendant received the payment of the money derived from the final sale of the property. As

we view it, the transaction was a continuing transaction from the time of its original negotiation down to the time of its final sale to the River Junction Farms, Inc. The assertion of defendant that the purchase price was never paid by Central Farms, but by River Junction Farms, is not borne out by the facts. Central Farms held the legal title to the property by virtue of the deed by Hotchkiss to it, and the sale by Central Farms to the final purchasers necessitated payment by it, to Hotchkiss, of the amount secured by the deed of trust upon the property.

[5] The contention is made that Estes, as holder of the claim, could not permit the default to happen, and as one of the principals, participate in and help to arrange the new bargain, and still claim the commission, and also that the original transaction, wherein alone Holcombe rendered service, was never consummated "in such way that any moneys came in hand from which commissions would be payable." It appears that Holcombe performed all that had been expected of him, and nothing remained to be done but for the purchasers to carry out on their part the negotiations to a completion. Moreover, it appears that Estes had no interest in the commission until after the work of Holcombe in the transaction had been fully performed. As before stated the transaction viewed as a whole amounts to a fulfillment of the conditions under which Hotchkiss was to pay Holcombe or his assigns a commission.

[6] Appellant also urges several grounds of alleged error, not included in his original specifications, but sufficiently covered by their discussion, as for example, he complains that the court did not permit him to cross-examine Holcombe with reference to the assignment of an interest in the commission to his wife. But since, as we have seen, said assignment was canceled by the parties thereto, and Mrs. Holcombe had filed a disclaimer of any interest in the commission, as a result thereof the court properly restricted the defendant's cross-examination of Holcombe upon that subject.

The appellant also complains that the court did not permit him to go into details respecting the apparent concealment for a time of Holcombe's transfer of his right to said commission to Estes, but since the defendant nowhere in his pleadings asserted that Holcombe had in any way acted fraudulently as his agent in negotiating the sale of the property, and since it further appears that Holcombe had fully performed all of the services which he was to perform for the defendant in order to entitle him to said commission prior to his assignment thereof to Estes, it would seem that the defendant's effort to go into the subject of the subsequent relations between Holcombe and Estes upon cross-examination of the latter would have been futile.

It is also urged that the trial court erred in

giving certain instructions to the jury, and in refusing to give certain instructions requested on behalf of appellant. The appellant offers very little reasoning, and no authorities tending to show that the instructions of the court, when read as a whole, were not fairly responsive to the issues submitted to the jury.

The judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

63 Cal. App. 373

DONDERO et al. v. APARICIO et al.
(Civ. 2649.)

(District Court of Appeal, Third District, California. Aug. 3, 1923.)

1. Frauds, statute of §63(1)—Land contract or memorandum thereof must be in writing, subscribed by party to be charged.

An agreement for the sale of real property or an interest therein is not enforceable, and furnishes no ground for the recovery of the purchase price, unless the contract, or some note or memorandum thereof, is in writing, subscribed by the party to be charged.

2. Frauds, statute of §129(5)—Payment of purchase price not part performance of land contract.

The payment of the purchase price does not of itself constitute part performance of a contract for the sale of real property.

3. Frauds, statute of §129(1)—Part performance does not withdraw land contract from statute, except for purposes of relief in equity.

Part performance of a contract for the sale of land does not take contract out of the statute of frauds, except for purposes of relief in equity.

4. Frauds, statute of §158(4)—Evidence held not to prove delivery of deed claimed to have taken oral contract out of statute of frauds.

In vendor's action for balance due under an oral contract for the sale of land, in which the vendor claimed that there was a delivery of the deed and an acceptance thereof by the purchasers, taking the contract out of the statute of frauds, evidence held insufficient to sustain finding that it was delivered.

Appeal from Superior Court, Amador County; C. P. Vicini, Judge.

Action by Natalina Dondero and another against Juan Aparicio and another. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

T. G. Negrich, of Jackson, for appellants.

Wm. G. Snyder, of Jackson, for respondents.

HART, J. This is an action for the recovery of the sum of \$1,100, alleged to be

the balance due the plaintiffs from the defendants under an oral contract for the sale by the former to the latter of approximately 120 acres of land, situated in Amador county. The plaintiffs were given judgment, from which the defendants appeal, under the alternative method.

The plaintiffs are husband and wife. The land involved in the controversy was owned by the plaintiff Natalina Dondero; she having obtained title to the same through the estate of her deceased father and a deed from her sister, Rosie L. Fregulia. At the time of making the alleged agreement of sale, however, the probate of the estate of her father had not been completed, nor had she received a deed to her sister's interest in the property. On or about the 25th day of May, 1920, the said oral agreement was entered into between the parties hereto. By the agreement the defendants were to pay the sum of \$1,500 for the land, of which sum \$400 was paid in cash at the time of the making of the agreement, and, as the complaint alleges, the balance, \$1,100, to be paid—

"As soon as said Natalina Dondero could procure and record a deed from Rosie L. Fregulia, conveying to her the interest of said Rosie L. Fregulia in the above-described property, and upon the probate of the estate of Maria Cassasa, deceased, and the entry of a decree of distribution therein."

The complaint alleges that the plaintiff Natalina Dondero procured a deed from said Rosie L. Fregulia, conveying to her said Fregulia's interest in the property described in the complaint, and that she (said plaintiff) filed the same for recordation with the county recorder of Amador county, on the 8th day of October, 1920; that on the 27th day of September, 1920, the probate of the estate of her father, Maria Cassasa, deceased, was completed, and a decree of distribution entered therein, distributing the said property to the said plaintiff; that on the 8th day of October, 1920, a certified copy of said decree of distribution was filed for recordation in the office of the county recorder of said county; that on the 27th day of September, 1920, the plaintiff signed and acknowledged a deed conveying said property to the defendants—

"and submitted said deed to defendants for their approval, and tendered its deliverance to them, and demanded the payment of the balance of said purchase price, the said sum of \$1,100; that defendants thereupon approved said deed and purchased the said property, but requested of plaintiff that payment of the balance of said purchase price * * * be deferred to a future time, to be paid upon demand by the plaintiffs, and agreed that plaintiffs should retain possession of said deed until the said sum of \$1,100 should be paid."

It is further alleged:

That "on the 16th day of September, 1921, and many times prior thereto, and after the 29th day of September, 1920, plaintiff tendered the said deed to the defendants and demanded of defendants that they pay the balance of said purchase price; * * * that defendants have neglected and refused to comply with the terms of said contract on their part; that they have paid \$400 of said purchase price, * * * and no more, and have taken possession of said premises; that defendants are now in possession of said premises, and ever since the said 25th day of May, 1920, have been in possession thereof," etc.

The defendants, by their answer, admit, with certain qualifications, certain of the allegations of the complaint and specifically deny the remaining allegations thereof. As a special defense it is alleged that the agreement upon which the plaintiffs base their action was entirely oral and not reduced to writing, and in this connection the statute of frauds (section 1624, subd. 5, Civ. Code) is pleaded. The answer also sets up a special defense founded upon alleged fraudulent representations by the plaintiffs to the defendants at the time the agreement was made as to the productivity of the land which is the subject of the alleged agreement. It is alleged in this connection that the defendants, after taking possession of the land and while in such possession, and after, under the most favorable climatic conditions, testing in an appropriate manner the productive capacity of said land, and so finding that said land was not, as to productivity, what the plaintiffs represented it to be at the time of the making of the alleged agreement of sale, immediately notified the plaintiffs of their rescission of the said alleged contract. It is further alleged that it was subsequent to said notice of rescission that the plaintiffs, for the first time, tendered delivery of the deed to the defendants.

The defendants also filed a cross-complaint, in which they sought to recover back \$300 of the \$400 paid by defendants to plaintiffs on the purchase price upon the making of the said agreement, and to which cross-complaint the plaintiffs, by answer, interposed denials. The findings were in favor of the plaintiffs upon all of the essential issues submitted by the pleadings.

[1-3] An agreement for the sale of real property, or an interest therein, is, as is commonly known, nonenforceable, or furnishes no ground for the recovery of the purchase price of such property, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, etc. And payment of the purchase price does not of itself constitute part performance, and, even if it did, "part performance does not withdraw a transaction of this kind from the effect of the statute of frauds, except for the purposes of relief in equity."

Matheron v. Ramina Corp., 49 Cal. App. 690, 694, 194 Pac. 86, 87; Forrester v. Flores, 64 Cal. 24, 28 Pac. 107; Davis v. Judson, 159 Cal. 121, 131, 113 Pac. 147. It will be borne in mind that this is not a suit in which equitable relief is sought, but is an ordinary action at law in assumpsit. Therefore cases in which oral or parol agreements for the sale of real property have upon equitable considerations been justly upheld or enforced have no application to the present case. Nor do the cases cited by counsel for the plaintiffs lend support to the proposition that partial payment of the purchase price, even when coupled with the fact that the purported vendee has taken possession of the real property which is the subject of a parol agreement of sale, will have the effect of removing the transaction from the operation of the statute of frauds. In fact, one of the cases so cited (Byers v. Locke, 93 Cal. 493, 29 Pac. 119, 27 Am. St. Rep. 212), is entirely different from and wholly inapplicable to this case, while the others (Washington v. Soria, 73 Miss. 665, 19 South. 485, 55 Am. St. Rep. 555, and Darling v. Butler [C. C.] 45 Fed. 332, 10 L. R. A. 469) are opposed to the position taken here by the plaintiffs. Of course, as above stated, equity, looking at such transactions through the lenses of conscience, will, when the facts would render the invalidation of the agreement unconscionable, uphold the parol engagements of the parties, not as in repudiation of the statute of frauds, but wholly upon the theory that to permit the statute to stand as a shield against the unconscionable conduct of the party seeking to evade them through the agency of the statute would be offensive to the principles practiced in courts of equity, or, if a parol agreement for the sale of real property has been fully executed on the part of the seller, "and nothing remains to be done by the other than to pay the consideration, relief is generally afforded in law by permitting the plaintiff to recover, not upon the special contract, but in assumpsit or on the case, upon the promise implied by law, for the statute has no application to promises implied by law." 2 Reed on Stat. of Frauds, § 640; Washington v. Soria, supra.

[4] All these propositions, however, seem to have been recognized by the trial court and the plaintiffs, for the decision below and the position of plaintiffs there and here are that there was a delivery by the plaintiffs to the defendants of a deed to the land and an acceptance by the latter of said deed, and that therefore the transaction involved an executed agreement or transaction. The court made a finding according to this theory, but, as we will now proceed to show, there is no evidentiary support for the finding.

Natalina Dondero, one of the plaintiffs,

testified that the agreement of sale was made on the 27th day of May, 1920 (the complaint, as will be noted, states that the agreement was made on the 25th of May, 1920, but this is not material); that at the same time the defendants paid to the plaintiffs, on the purchase price of \$1,500, the sum of \$400; that the defendants thereupon took possession of the premises; that on the 27th day of September, 1920, all the parties met in the office of the attorney for plaintiffs at Jackson, Amador county; and that on that occasion said attorney prepared a deed purporting to convey to the defendants said land, the deed having been signed and acknowledged by the plaintiffs before said attorney as a notary public. After the signing and acknowledgment of the deed, the witness proceeded:

"They (referring to defendants) took it (the deed) in their hand, and then told me to keep it until they gave me the money. * * * They told me to hold that deed until they sold the wine in the cellar; that as soon as they sold the wine they would pay me."

She further testified that her husband, after the 27th day of September, 1920, made a demand on the defendants to pay the balance of \$1,100 on the purchase price of the land, and that, on one occasion, when she was present, both she and her husband demanded such payment, but that the defendants stated, in effect, that they desired to withdraw from or rescind the agreement, as they were not satisfied with the ranch.

The foregoing is in substance all the direct testimony given by the plaintiff Natalina Dondero, with respect to the matter of the alleged delivery of the deed, and it is clear that a delivery of the deed is not thus shown. On cross-examination, however, Mrs. Dondero repeatedly stated that she did not intend to deliver the deed until the balance of the purchase price was paid. Her testimony so given is as follows:

"Q. Where was that deed after it was signed in Mr. Snyder's [attorney for plaintiffs] office? A. I kept it until this came up, and then Mr. Snyder kept it. Q. When your husband went to the defendants to get the \$1,100 he didn't take the deed with him? A. No. Q. Would you have given that deed to the defendants at any time without first receiving the \$1,100? A. No. Q. And they never paid that \$1,100? A. No. Q. Of course, you would be willing to give them a deed now, if they would pay you \$1,100? A. Yes, sir. Q. Understanding what took place in Mr. Snyder's office, when you let them take the deed in their hands it was your intention that that deed was to belong to you until you got your \$1,100? A. Yes. Q. And that is your judgment yet? A. Yes. Q. And your intent? A. Yes. And they told me to keep it until they gave me the money. Q. If they had no money, you would not give them the deed? A. I think not."

Constantino Dondero stated:

That he was in Attorney Snyder's office at the time the deed was prepared and signed by

him and his wife. "When I had the deed made," he said, "I went and said: 'Here's the deed. You can pay the balance.' * * * They [defendants] were in the office of Attorney Snyder when the deed was signed."

He did not appear to know what occurred, or the purport of any conversation which took place, in his attorney's office, saying that his wife was carrying on the business at that time and that he probably did not hear "what they were talking about." On cross-examination, the witness testified as follows:

"Q. You were in Mr. Snyder's office, with your wife and the two defendants, when the deed was signed, were you not? A. Yes, sir. Q. Did you see anybody hand the deed to the defendants, and the defendants take it into their possession? A. I did not. Q. Did you see Mr. Aparicio, or either of the defendants, have that deed in their hand at any time? A. I did not. Q. You were there all the time that they were discussing the subject in Mr. Snyder's office, were you not? A. Not all day; I wasn't there all day. Yes; I was there. Q. As I understand you, you would never consent to that deed being given to the defendants until they first paid \$1,100? Is that right? A. Never give the deed before they paid."

The foregoing comprises a statement of all the testimony which the record discloses was received upon the question of delivery, and it is plainly manifest therefrom that the finding that the plaintiffs delivered the deed to the defendants is not only without evidentiary support, but that the evidence bearing upon the question of the delivery of the deed imperatively calls for a diametrically contrary finding. There is no question of conflict here upon that proposition. As is to be noted, the testimony which has thus far been considered comes entirely from the plaintiffs themselves. It plainly shows that they did not only fail to deliver the deed to the defendants, or either of them, but that it was not their purpose or intention so to deliver the instrument until the defendants had paid them the balance of the purchase price of the land; and their testimony upon the question of delivery was reinforced by that of the defendants, each of whom testified that he never at any time had physical possession of the deed, nor was the deed ever tendered to him, except upon the condition that they would first pay to the plaintiffs the \$1,100 balance on the purchase price. Moreover, the testimony of both the plaintiffs and the defendants upon the question of delivery harmonizes with the averments of the complaint, which goes no further than to say that the deed, upon being prepared, was submitted to the defendants for their approval, that they did approve it, and that the plaintiffs tendered the delivery thereof to the defendants.

The defendants make no serious claim here that the finding against their cross-

complaint is not sufficiently fortified by the evidence. The issue as to the alleged false representations of the plaintiff as to the productive character of the land does not, in view of the result at which we have herein arrived, require notice herein.

The judgment is reversed and the cause remanded.

We concur: FINCH, P. J.; BURNETT, J.

63 Cal. App. 292

CALKINS v. CALKINS et al. (Civ. 2627.)

(District Court of Appeal, Third District, California. July 28, 1923. Rehearing Denied Aug. 27, 1923. Hearing Denied by Supreme Court, Sept. 24, 1923.)

1. Partnership ⚡52—**Testimony of partners held to support finding of existence of partnership.**

Testimony of alleged partners that they executed written agreement to engage in business and share profits and losses, and that they could not say what became of the instrument, was sufficient to support finding as to existence of partnership.

2. Partnership ⚡218(4)—**Finding that corporate business was owned by partnership construed as meaning that it was owned and operated for its benefit.**

Though legal title to property was in corporation, and business was conducted and controlled through its officers, where members of partnership were equitable owners of stock, finding that the partnership owned the business may be sustained as meaning that it was owned and operated for benefit of the partners, and that partnership was entitled to proceeds.

3. Trusts ⚡95—**Where partners were equitable owners of stock, one taking title to property purchased with proceeds of corporate property took as constructive trustee for the partners.**

Where members of partnership were equitable owners of stock in corporation, each partner was entitled to one-half of proceeds of sale of its business and stock, and where, with knowledge of these facts and that proceeds of sale were used in purchase of other property, wife of one partner took title thereto, she became trustee for the partners.

4. Trusts ⚡371(2)—**Plaintiff may plead ownership and prove constructive trust in avoidance of defendant's claim of title.**

While it would be better for one seeking to establish constructive trust to plead necessary facts, he may allege his ownership and that defendant without right withholds possession, and, if defendant sets up title, may then show that he is equitable owner, and that defendant holds title in trust for him.

5. Appeal and error ⚡1071(5)—**Finding that defendant was trustee for plaintiff, though not alleged, held not prejudicial.**

Though there was no allegation that defendant held title as trustee for plaintiff, where

general allegations and denials raised issue as to character of plaintiff's as well as defendant's title, and the court was satisfied from the evidence that property was purchased under circumstances making plaintiff the equitable owner of an interest therein, finding that defendant was trustee for plaintiff was not prejudicial.

6. Limitation of actions ⚡100(3)—**Cause of action, though based on theory of constructive trust, when based on actual fraud, did not accrue until discovery of the facts.**

Where partner took title to property purchased with partnership assets in his wife's name with intent to deprive the other partner of his interest, and pursuant to conspiracy between him and the wife, cause of action by the other partner, though based on theory of constructive trust, did not accrue until discovery of facts constituting fraud, under Code Civ. Proc. § 338, subd. 4.

7. Limitation of actions ⚡197(2)—**Evidence held to warrant finding that plaintiff did not learn of fraud until within three years.**

In action to establish constructive trust in property purchased with assets of partnership, to which title was fraudulently taken in name of one partner's wife, evidence held to support finding that plaintiff did not learn facts constituting the fraud until within three years.

8. Appeal and error ⚡949—**Trial court has wide discretion as to facts or circumstances putting one on inquiry as to fraud.**

There is wide zone for exercise of discretion by trial judge in determining what facts or circumstances are sufficient to compel further inquiry as to facts constituting fraud, so as to start limitations running under Code Civ. Proc. § 338, subd. 4.

9. Trusts ⚡365(5)—**Finding against claim of laches in suing to establish constructive trust held warranted.**

Finding held warranted against claim of laches on part of plaintiff in suing to establish constructive trust in property purchased with assets of partnership consisting of himself and his son, to which title was fraudulently taken in name of the son's wife, where delay was at son's request to facilitate reconciliation between the son and the wife.

10. Trusts ⚡374—**Award of equal interests held unwarranted where defendant had contributed money besides buying interest of one partner.**

Where property was paid for in part with assets of partnership between plaintiff and another and in part with money of the other partner's wife, to whom the other partner conveyed his interest, judgment that plaintiff and the wife were equal owners held unwarranted.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Thomas D. Calkins against Malcolm F. Calkins and another. From a judgment for plaintiff, the defendant Veda H. Calkins appeals. Reversed.

Fowler & Nichols, of Turlock, and V. L. Hatfield and W. H. Hatfield, both of Sacramento, for appellant.

J. R. McHenry and Edward Bickmore, both of Merced, for respondent.

BURNETT, J. In 1911 the appellant and the defendant M. F. Calkins were husband and wife, and were living in the city of Salinas, Monterey county. At that time he and one Homer W. Wood were the principal owners of a newspaper known as the Salinas Democrat, which was conducted by the Democrat Publishing Company, a corporation. In the year 1912 plaintiff, who is the father of said M. F. Calkins, came to Salinas from Hayward, and they purchased the interest of said Wood in the paper. The corporation continued its publication as before.

In the fall of 1914 M. F. Calkins took an assignment from one Megladdery of a lease of the Monterey Cypress, a newspaper published in the city of Monterey, paying therefor the sum of \$150. There was a lack of equipment in said newspaper, and M. F. Calkins went to Oakland and borrowed from his father-in-law, a Mr. Hatfield, the sum of \$1,000, for which a note was given signed by said Calkins and by appellant. About \$250 of this money was used in paying bills, and the balance of \$750 went into said additional equipment. A little later plaintiff came from Salinas to Monterey, and he put into the said Monterey Cypress quite a sum of money, admitted by appellant to be over \$1,500, and a linotype machine. On February 28, 1914, the Monterey Publishing Company was incorporated with a capitalization of 1,500 shares of the par value of \$10 each. This company took over all the assets of the Monterey Cypress, for a part of which it executed its note for the sum of \$1,100 to James A. Murray, the former owner of the paper. All the business thereafter in connection with said newspaper was done in the name of the corporation. A certificate of stock for 751 shares was issued to appellant Veda H. Calkins. The stock book was destroyed and the parol evidence does not make it clear how many shares were originally held by respondent, but it does appear that on February 5, 1916, 751 shares were in the name of appellant, 60 shares in the name of respondent, and various other persons held 69 shares. These were all the outstanding shares, and on October 28, 1916, 878 shares were sold to Wallace C. Brown and one each to two other persons. Thus were virtually the entire property and business transferred to said Brown. The equipment was not sold in the name of the Monterey Publishing Company, but of V. H. Calkins. As payment for this paper Brown turned over \$500 in cash, a mortgage for \$2,100, made in his favor by one A. B. Smith, and his own promissory note for \$1,200. V. H. Calkins had confidence in her husband, and gave him a power of attorney to trans-

act her business. He was trusted implicitly also by the father, who left the management and control of his interests entirely to his son. Late in 1916 the Turlock Tribune was purchased from H. W. Dockham by V. H. Calkins, through M. F. Calkins, her attorney in fact, and one Lou K. Newfield, with whom she had previously entered into an agreement of partnership in Monterey for conducting said Tribune. This agreement fixed the respective interests at seven-tenths for her and three-tenths for him. Shortly afterward they and M. F. Calkins came to Turlock and began to publish the paper under the name of Calkins and Newfield. The total price to be paid for the Tribune was \$10,000, of which Newfield contributed \$1,500 in cash, V. H. Calkins the \$500 paid by Brown, and she put up the \$2,100 mortgage and Brown's stock in the Monterey Publishing Company, which had been pledged to her as collateral. The plaintiff came to Turlock some time after said purchase and worked for a while as a printer on the paper, and then went to Atwater, where he and M. F. Calkins purchased the "Atwater Signal." On November 7, 1917, M. F. Calkins made an assignment to Veda H. Calkins of all the interest he had in the Turlock Tribune, requesting in said written assignment that appellant pay to respondent the sum of \$1,317.50, which he acknowledged to be due his father as the latter's share of the proceeds of the stock of the Monterey Publishing Company. M. F. Calkins then left the Tribune and did not return. On two different occasions the Tribune printed the certificate of partnership, showing that Veda H. Calkins and Lou K. Newfield were partners in conducting the paper, the latter publication being September 10, 1917. On April 3, 1918, the Tribune printed the statement of circulation, ownership, etc., required by the federal law, showing the owners of the paper to be Calkins and Newfield. A similar statement was published April 2, 1919, representing the owners as V. H. Calkins and Lou K. Newfield. On March 27, 1920, Newfield sold his interest in the Tribune to Veda H. Calkins and ever since that date she has conducted the paper under her own name as the sole owner.

In addition to the foregoing undisputed facts, plaintiff claims that other matters should be considered, upon which more particularly he bases his claim of justification for the judgment in his favor. He contends that, in the latter part of December, 1912, in the city of Salinas, he and his son entered into a partnership for the purpose of owning and publishing different newspapers; that said partnership acquired the said Salinas Democrat, which was published by the Democrat Publishing Company, and later acquired the Monterey Cypress and organized said corporation, the Monterey Publishing Company, for the purpose of printing and publishing the latter paper; that defendant M. F. Calkins

was the business manager of these two different newspapers and had full charge of said newspaper business; that when the Monterey Publishing Company was first organized defendant M. F. Calkins caused to be issued in the name of his wife, Veda H. Calkins, 751 shares of the capital stock of said corporation, but the certificate was never delivered to her, but was indorsed by her in blank and remained in the safe deposit of M. F. Calkins until the subsequent sale to Wallace Brown; that said Veda H. Calkins was never, in fact, the owner of said stock, but that virtually the whole of the capital stock and the entire plant and business belonged to said partnership.

Moreover, plaintiff had practically nothing to do with the management of any of these newspapers but intrusted it exclusively to said son, and he did not know until some time thereafter that any of said stock had been issued to Veda H. Calkins; that upon the purchase of said Turlock Tribune defendant M. F. Calkins, without the knowledge of plaintiff, caused the said seven-tenths interest purchased by said partnership to be taken in the name of his wife, and that unknown to plaintiff the said copartnership agreement between said Veda H. Calkins and Lou K. Newfield was drawn up representing their interests as aforesaid; that these various acts, making it appear that Veda H. Calkins was the owner of seven-tenths interest in said Tribune were the result of a conspiracy between her and M. F. Calkins to defraud plaintiff of his interest in and to said property; that M. F. Calkins was manager of the Turlock Tribune from the early winter of 1916 up to the latter part of 1918, when the defendants separated as husband and wife, he entering the army and being discharged therefrom a few months later; that he returned to Atwater about January 1, 1919, when he made to his father a complete disclosure of his manipulation of the stock of the Monterey Publishing Company and the placing in his wife's name of the partnership interest in the Turlock Tribune; that appellant had at all times full knowledge of the interest and claims of plaintiff in and to the publishing business in Salinas, Monterey, and Turlock, and her claim of ownership of the Tribune is based upon said fraudulent conduct. The findings were in favor of plaintiff, and the judgment was for a dissolution of the partnership, and that "a full accounting of all the transactions done and had by said Veda H. Calkins in the matter of said newspaper business, and the matters incidental thereto at all times since she became a trustee for the interest of said plaintiff in and to said Turlock Tribune newspaper business and at all times since the legal title thereto has been held in her name, should be had; that, upon said full accounting had, the property of said copartnership and the partnership property now owned by plaintiff and defend-

ant Veda H. Calkins be sold and the debts and liabilities (if any) of said copartnership be paid and any surplus remaining be divided between plaintiff and defendant Veda H. Calkins and said defendant Malcolm F. Calkins, according to their respective interests therein." It may be added that it was found specifically that plaintiff is the owner of one half and Veda H. Calkins of the other half of said property.

The action is essentially one to enforce a constructive trust. This is conceded by both parties, although the complaint does not set forth any fraudulent conveyance, but alleges the existence of said partnership, the purchase by it of said newspapers, the complete management thereof by M. F. Calkins, the placing by him of said Veda H. Calkins in possession of said Turlock Tribune, the publishing plant and books and accounts in connection therewith, the wrongful use and conversion by her of a large amount of the funds of said copartnership, threats by her to sell or incurber said property; "that at divers and various times plaintiff has requested and demanded of defendant Malcolm F. Calkins an accounting of the business of said Turlock Tribune; that at all and each of said times defendant Malcolm F. Calkins did promise and agree with plaintiff that he would so account with plaintiff," but he has failed and refused to do so. The prayer was for an accounting, for a dissolution of the partnership, for a preliminary restraining order to prevent the sale or incumbrance of any part of the property, for the appointment of a receiver, and for the sale of the partnership property, and, after the payment of its debts and liabilities, for a division of the surplus between plaintiff and defendant M. F. Calkins. The answer denied that such partnership ever existed, and, as an affirmative defense, set up her sole ownership of the Tribune Publishing business, laches on the part of plaintiff in originally bringing the action, and the statute of limitations.

[1-3] The first point made by appellant is that the defendant failed to prove the existence of a partnership. The testimony of father and son was somewhat vague and unsatisfactory as to this issue. However, they both declared, in effect, that they executed a written agreement to engage in the newspaper business and to share equally the profits and losses. Neither could say what became of said instrument, but their oral testimony as to its substance and effect must be held to constitute sufficient support for the finding of the court. In view of the rule that governs an appellate court in considering a question of evidence, we cannot say, as contended by appellant, that the claim of partnership was an "afterthought" and was fabricated by plaintiff to avoid the statute of limitations. In this connection appellant, with apparently greater assurance, insists that the court was entirely in error in finding

that said partnership owned the business. "It is not denied," so she says, "by either the plaintiff or the defendant Malcolm F. Calkins that both the Salinas Democrat and the Monterey Cypress were operated as corporations; and that the plaintiff was a stockholder in both of those papers. It seems to be the theory of the plaintiff that by holding stock in a corporation one can be a partner. It is appellant's theory that the two forms of association are mutually exclusive of each other and that if property is owned by a corporation it cannot at the same time be owned by a partnership." Many authorities are cited in support of this position, including the carefully considered opinion in *Jackson v. Hooper*, 76 N. J. Eq. 592, 75 Atl. 568, 27 L. R. A. (N. S.) 658, wherein it was said:

"The law never contemplated that persons engaged in business as partners may incorporate, with intent to obtain the advantages and immunities of a corporate form, and then, Proteus like, become at will a copartnership or a corporation, as the exigencies or purposes of their joint enterprise may from time to time require. The policy of the law is to the contrary. If the parties have the rights of partners, they have the duties and liabilities imposed by law, and are responsible in solido to all creditors. If they adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners, and have only the rights, duties and obligations of stockholders. They cannot be partners inter esse and a corporation as to the rest of the world. Furthermore, upon grounds of public policy, the doctrine contended for cannot be tolerated, as it renders nugatory and void the authority of the Legislature—a co-ordinate branch of the government established by the Constitution—in respect to the creation, supervision, and winding up of corporations."

Undoubtedly the legal title to this property was held by said corporation, and the business was conducted and controlled through its officers and not by the partnership as such. There is, however, evidence in the record justifying the view that the equitable owners of the stock in the Democrat and the Cypress were plaintiff and his son, and that this was known to appellant. This being so, in view of the said agreement between these equitable owners, each would be entitled to one-half of the proceeds of the sale of the stock and business as provided in said agreement. Knowing these facts, and that the proceeds of the sale of the Cypress went into the purchase of the Turlock Tribune, appellant to that extent, in taking the title in her own name, would be a trustee for the partners. While, strictly speaking, it may not be accurate to declare the partnership owned or operated said business, yet it is reasonable to say that it was owned and operated for the benefit of said partners, and the partnership was entitled to the proceeds of the sale. We think this is, in effect, the finding of the trial court.

[4] Appellant next contends that "the plaintiff failed to sustain the case made by the pleadings." The point is that in the complaint it was alleged that the partnership is the owner of the Turlock Tribune and defendant V. H. Calkins is in possession of the said property owned by the partnership, whereas the evidence of plaintiff shows that the paper "was purchased in the name of V. H. Calkins and L. K. Newfield. The legal title to the Tribune was therefore in the defendant Veda H. Calkins and L. K. Newfield from the beginning and thereafter vested entirely in the defendant V. H. Calkins. * * *

It is obvious that what plaintiff meant to do was to attempt to establish a constructive trust in the property of the Turlock Tribune upon the theory that he advanced part of the consideration for its purchase, and that the defendant V. H. Calkins was what is known under the law as an involuntary trustee. In order to raise this issue it is axiomatic that he should have pleaded the facts upon which the court could find the existence of a constructive trust." Among the authorities cited in support of this view is 21 Corpus Juris, 670 et seq. As an example of what such complaint should contain, reference is also made to the case of *South San Bernardino, etc., Co. v. San Bernardino National Bank*, 127 Cal. 245, 59 Pac. 699. It may be admitted that the suggested course is the one usually pursued and may be the better form, but under our liberal system of practice it is not required. The plaintiff may allege that he is the owner of the property, and that the defendant without right withholds from him its possession, and if the defendant sets up title in himself the plaintiff may be permitted to show that he is the equitable owner and the defendant holds the title in trust for him. In other words, under such pleadings the plaintiff may introduce evidence to avoid the affirmative defense and to recover, if in good conscience he ought. The rule is thus stated in *Wendling, etc., Co. v. Glenwood, etc., Co.*, 153 Cal. 411, 95 Pac. 1029:

"It seems clear that in an action brought upon the theory that the vendor is the owner and entitled to the possession of the property, and that the defendant unlawfully withholds possession thereof, or has converted the same to his own use, the general allegations of ownership and right to possession, and unlawfully withholding or conversion are sufficient, and will render admissible proof of any facts sustaining such claim. * * *

It is not correct to say in a case of the character before us that the plaintiff's cause of action rests upon fraud. It rests upon his ownership of the property and the conversion thereof by defendant and fraud comes in only in reply to the defense that the defendant is the owner by reason of an alleged sale by the plaintiff. Technically, proof of fraud as to such sale was not a part of plaintiff's prima facie case, and was available only in reply to any claim of defendant based on the sale, but this was a mere matter of order of proof. It is the general rule that

in actions for the conversion of personal property where the property has been procured by fraud, it is not necessary to allege the fraud, but it is sufficient to declare generally, that the property was wrongfully converted."

The Supreme Court therein cites a large number of authorities so holding, and reviews various decisions in this state in harmony therewith.

[5] In this connection it may be observed that appellant criticises, as going beyond the issues of the case, the action of the trial court in finding that Veda H. Calkins holds and possesses an undivided one-half interest of said property as a trustee for plaintiff. But, as we have seen, the general allegations of the complaint and the denials and averments of the answer raised the issue as to the character of respondent's as well as that of appellant's asserted title. It is true that there was no allegation that she held as trustee, but this was included in the more general and comprehensive allegations. The court was satisfied from the evidence that the property was purchased with the funds of the partnership and that the title was fraudulently taken in the name of appellant; that thereafter M. F. Calkins transferred to her all his interest in the same, but respondent was still the equitable owner of an undivided one-half interest thereof. It would follow as a legal conclusion that she was the trustee for plaintiff to that extent, and at most this peculiar finding, whether regarded as of fact or as a legal conclusion, was unnecessary but not prejudicial. We are not unmindful of the fact that the complaint is more specific as to her possession than we have thus far indicated, and it could be plausibly argued that said finding is directly responsive to said allegation, but we deem the matter of too little importance for further consideration.

[6, 7] A more serious contention, as we view it, is that "the plaintiff's real cause of action is barred by the statute of limitations." Respondent contends that the case furnishes an instance of a constructive trust. We need not descant upon the peculiar features of that kind of trust, as known to our law, or to differentiate it from a resulting trust. These terms have been often explained by the courts, and for a concise statement of their character it is sufficient to refer to the comparatively recent decision of the Supreme Court in *Lezinsky v. Mason Malt Whisky Distillery Co.*, 185 Cal. 240, 196 Pac. 884. Appellant's claim is that the statute of limitations began to run when the title to the property was taken in her name, regardless of any notice to the plaintiff or of the doctrine of being put upon inquiry. If that is the law then, obviously, the judgment should have been in her favor, since more than four years intervened between that event and the filing of the complaint herein. In support of her position appellant cites,

among other cases, *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88; *Nougues v. Newlands*, 118 Cal. 106, 50 Pac. 386; *Broder v. Conklin*, 121 Cal. 282, 53 Pac. 699; *Barker v. Hurley*, 132 Cal. 26, 63 Pac. 1071, 64 Pac. 480. In the first of these it is said:

"The statute of limitations runs in favor of a defendant chargeable as trustee of an implied trust, and it is not necessary, in order to set the statute in motion, that he should have denied or repudiated the trust. * * * In such a case, the statute begins to run when the wrong complained of is done, and * * * the limitation [under section 345 of the Code of Civil Procedure] is four years."

A similar statement is made in some of the other cases. Indeed in *Lezinsky v. Mason Malt Whisky Distillery Co.*, supra, it is said:

"In the case of a constructive trust, however, the statute begins to run at once upon the doing of the acts by reason of which the trust arises. *Hecht v. Slaney*, 72 Cal. 363."

But, of course, this sweeping generalization of the court must be interpreted in the light of the facts of each case. In most of the decisions cited it appears that the defrauded party had knowledge of the fraud at the time it was committed or of facts sufficient to put him upon inquiry. For example, in the leading case of *Hecht v. Slaney* it is said:

"As the plaintiff's action was commenced more than four years after the order staying all proceedings against the insolvent ceased to be in force, it was clearly barred, unless saved by the averment in the complaint, that neither the plaintiff nor his grantor had any notice of the order setting aside the homestead, or of the false and fraudulent representations in the petition asking that it be set aside, until the 7th of May, 1884.

"But these were matters of record in the court, which, with reasonable diligence, Levy, the assignor, might seasonably have known, and it would seem should have known. * * * The rule in such cases is, that a party is presumed to know whatever he might, with reasonable diligence, have discovered; and when the fundamental facts upon which the alleged frauds rest are matters of public record, open to his inspection, ignorance of the fraud will not excuse his laches, nor stay the running of the statute."

In other instances, a purely constructive trust was involved without the element of actual fraud as in *Benoist v. Benoist*, 178 Cal. 234, 172 Pac. 1109. But herein the claim of respondent is that the acts of appellant culminating in the transfer to her of the title to seven-tenths of said property were based upon an intent to deprive plaintiff of his interest and of a conspiracy between her and her codefendant to defraud respondent of his rights. This, as we have seen, was not alleged in the complaint, but evidence was received to that effect and we are not prepared to say that such theory is entirely

unsupported. In such cases, as we understand the rule, subdivision 4 of section 338 of the Code of Civil Procedure applies. Therein it is provided that "the cause of action in such case [is] not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." We think the case is governed by the principle stated in *Unkel v. Robinson*, 163 Cal. 648, 126 Pac. 485, wherein it is said:

"True, the appellant is seeking to establish a constructive trust, but such a trust may arise under various circumstances which may embrace no element of fraud in fact, or even technical fraud within the law. Here the constructive trust which appellant endeavors to have established is based on fraud as the substantive cause of action."

The complaint therein alleged:

"That defendant had, between the months of May and November, 1905, fraudulently procured from plaintiff various sums of money aggregating \$4,020, which she had used in purchasing a house and lot in the city of Los Angeles, and that such fraud was not discovered by plaintiff until about November 1, 1905."

The prayer was:

"That it be declared that defendant held said real property as a trust for plaintiff for the amount of said \$4,020; that said property be sold and that said amount so fraudulently procured from plaintiff be paid to him from the proceeds of such sale."

The Supreme Court declared that the action was governed as to the statute of limitations by the case of *Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146, and *Duff v. Duff*, 71 Cal. 513, 12 Pac. 570, and referred approvingly to *People v. Blankenship*, 52 Cal. 619; *Moore v. Moore*, 56 Cal. 89; and *Caster v. Geil*, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84. We may add that in *Earhardt v. Churchill Co.*, 169 Cal. 728, 147 Pac. 942, the *Unkel* Case is cited with approval. If said section applies to the situation herein, then the question arises whether it must be held that plaintiff at any time, three years before the filing of the complaint, had knowledge or ought to have known of said transfer. Appellant makes a strong showing in favor of her contention that respondent must have known of the transfer of the property to herself and Newfield. She calls attention to the fact that the transaction was open and notorious, that the certificate of copartnership between them was published in the *Tribune* on two different occasions, and to other circumstances, which we need not enumerate, making it seem probable that he did have notice of her claim more than three years before he brought the action, or, at least, that he had knowledge of facts which he should have followed up and thereby acquired the information. The conduct of respondent as related by him does appear

strange and unusual. It is doubtful if many men would manifest such indifference to their property interests, but we cannot say that his story is unbelievable. We cannot hold that it is an unreasonable inference from his testimony that he was in no manner apprised of the transfer to appellant and of her claim to the property until the fall of 1918, and that he did not have actual knowledge thereof until January 1, 1919. As to his failure to inquire, it must be remembered that he had utter confidence in his son and left the management of the business entirely in his hands. It is true that before the sale of the Monterey paper he was informed that the majority of its stock had been issued in the name of appellant, but his son assured him that no trouble would result therefrom, and that he need not be disturbed. Besides, appellant wrote to him as follows:

"Dear Daddy Calkins: Just must tell you how sorry I am for making any ill feeling—just my stupid business sense, and because Malcolm had not made everything plain. I know your interest is the same as ours of course—the reason the stock is in my name now is to prevent any one taking the business away from us. I'll learn some day Daddy Calkins—please just love me and if Malcolm goes to Monterey I'd love to carry out Mother Calkins' plans and look after the house and be a daughter to you while she has to be away," etc.

She also wrote to the wife of respondent that—

"As for the Cypress I haven't had a real understanding—Daddy Calkins and Malcolm have, their privileges and interests are just the same and Daddy C knows the stock was all put in my name and why—it will be all right with Daddy when I explain to him—you see as Daddy Calkins says I haven't any business sense and I guess he is right. I saw Malcolm tonight. I didn't want him to tell me anything again unless he gave me a full explanation. I am going to trust him to run all the business."

It is easy to understand that the effect of such letters would be to allay any anxiety on the part of respondent, and when we recall also the implicit faith he had in his son, his inattention to his interests and his failure to take steps earlier to maintain his rights are not surprising. No doubt his experience was similar to that of many a father who quite naturally, but rather unwisely, has intrusted his own business affairs to the unlimited control of his son.

[8] In considering the record we must, of course, remember that there is no hard and fast rule as to what fact or circumstance is required to compel further inquiry upon the part of the injured party, and that in such cases there is a wide zone for the exercise of the discretion of the trial judge. We dismiss this feature of the case with the statement that there is warrant for the claim of respondent that the earliest circumstance which would operate to set the statute in

motion is found in the letter to him from appellant of September 19, 1918, in which she stated:

"You have never had a true understanding of the Monterey business or that of the Turlock Tribune, some day perhaps if you are interested I will explain all to you. I am not under any obligation to you or to Malcolm for this business, but to my father."

But between this as the starting point and the filing of the complaint, on May 21, 1921, less than three years elapsed.

[9] There is force also in the claim of appellant that respondent is properly chargeable with laches. The doctrine, of course, is familiar, and as an abstract proposition it does not evoke controversy. It is said to be—

"an inherent doctrine of equity jurisprudence that nothing less than conscience, good faith, and reasonable diligence can call courts of equity into activity, and that they will not grant aid to a litigant who has negligently slept on his rights and suffered his demand to become stale where injustice would be done by granting the relief asked." 21 Corpus Juris, 212.

Appellant declares:

"While it was doubtful whether Veda H. Calkins could make a success of the Tribune, plaintiff stood by and waited; when it developed that the paper had become unusually successful, that it was making money, that it had increased 50 per cent. in value, that its advertising and circulation was fivefold what it had been, the plaintiff and his son decided that it was time for them to have the fruits of his success and this action followed. This increase in value is one of the elements of laches and generally bars relief. *Stevenson v. Boyd*, 153 Cal. 630, 96 Pac. 284, 19 L. R. A. (N. S.) 525.

It is to be noticed, however, that the very case of *Stevenson v. Boyd*, while emphasizing the importance of diligence and good faith upon the part of the claimant, reaffirms the doctrine, as stated in *Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896, that—

"whether or not, under all the circumstances, the delay has been such as to render it inequitable to grant the relief is, in the first instance, a question for the trial court, the determination of which is left * * * 'to the sound discretion of the chancellor in each case.'"

Respondent explains the delay in bringing the action, and we cannot say that the trial court was not warranted in accepting the explanation as satisfactory and sufficient. The principal reason was based upon the request and importunity of his son that he forbear bringing the action, as the son hoped to effect a reconciliation with his wife, which the institution of the suit would probably prevent. As claimed by respondent, he was thus placed in a peculiar position—

"That of enforcing his rights and possibly preventing a reconciliation between his son and the latter's wife, or waiting to see what developed in the matter."

It is undoubtedly true, also:

"That the relationship of the parties always has an important bearing on the question of laches, and that delay under such circumstances is not as strictly regarded by the courts as in cases where the parties are strangers to each other." *Dugan v. O'Donnell* (C. C.) 68 Fed. 983.

It is natural that the trial court should feel inclined to exercise its discretion in favor of respondent, who stripped himself of all his property to invest in the Cypress and who is no longer a young man, and one can hardly forego the reflection that appellant might well have offered to reimburse him with interest for what he put into the "Tribune" and thereby probably have avoided this expensive litigation.

[10] But the court found that plaintiff is the owner of an undivided one-half interest of said business and made its decree accordingly. It is to be remembered that originally three-tenths were purchased and paid for by Newfield, and his interest was subsequently bought by appellant. The theory of respondent is that this was paid for out of the proceeds of the business and should be charged with the trust, but we find no evidence to support that view. Of course, if the money came from her own funds the said three-tenths interest should not be included in the partnership property. At any rate, it is admitted by respondent that she contributed directly to the purchase of the Tribune the sum of \$1,164 which she received from the life insurance of her father. To this should be added the sum of \$750 which was borrowed from her father and was used by M. F. Calkins as part of the purchase price of the equipment of the Cypress. This was given to her, and the gift relieved the partnership from the obligation and thereby increased to that extent the amount available for the purchase of the Tribune. The effect was the same as though she had actually contributed that sum to the business. Without recapitulating the figures we may say that this would entitle her to approximately one-third of the property, and since one-half of the other two-thirds was conveyed to her by M. F. Calkins, respondent at the utmost should be awarded only one-third. And manifestly if it should be shown that she paid Newfield from another independent source, her interest should be increased by that three-tenths.

For the reasons stated the judgment is reversed.

We concur: FINCH, P. J.; JONES, Justice pro tem.

(63 Cal. App. 426)

BUSH v. WEED LUMBER CO. (Civ. 2632.)

(District Court of Appeal, Third District, California. Aug. 8, 1923.)

1. Negligence $\S$ 32(2)—“Invitee” distinguished from “licensee.”

An invitation to use the premises of another is inferred, where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using them.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Licensee.]

2. Negligence $\S$ 32(2)—Well driller on search for spring held an invitee.

Where lumber company posted an advertisement offering a reward to any one who found a spring that would furnish the company's camp with water, and the company's foreman encouraged a well driller to search for a spring and invited him to use the company's train in going to and returning from the place of his search, the well driller, while on the company's premises, was an invitee to whom the company owed the duty to exercise ordinary care to render the premises reasonably safe.

3. Negligence $\S$ 32(3)—Owner's duty extends only to premises where invitee is likely to go.

The duty of the owner to an invitee to keep the premises in a reasonably safe condition need not necessarily apply to the entire premises, but only to that portion thereof where the invitee would, under the circumstances and conditions of his invitation, naturally be likely to go.

4. Appeal and error $\S$ 1005(2)—Approved verdict not disturbed unless unsupported by any evidence.

To set aside order denying a new trial moved for on the ground that the evidence did not justify the verdict, the evidence must be such that the verdict cannot be supported on any hypothesis whatever.

5. Negligence $\S$ 136(15)—Negligence as to invitee injured by crane held question for jury.

In an action against a lumber company for injuries to a well driller struck by a crane, while on the company's premises in search for a spring, pursuant to the company's advertisement offering a reward to finder, *held* that the questions as to whether the plaintiff was on that part of the company's premises where he would be likely to go, and whether the company's operation of the crane constituted negligence, were for the jury.

Appeal from Superior Court, Siskiyou County; George H. Cabaniss, Judge.

Action by P. W. Bush against the Weed Lumber Company. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

B. K. Collier and J. P. McNamara, both of Yreka, for appellant.

Taylor & Tebbe, of Yreka, for respondent.

JONES, Judge pro tem. The plaintiff brought this action to recover damages for personal injuries alleged to have been caused by the negligence of defendant.

There have been two trials of the action, at the first of which the court granted defendant's motion for a nonsuit, but upon an appeal the judgment based thereon was reversed. 55 Cal. App. 588.¹ At the second trial a jury returned a verdict for defendant, and from the judgment and order denying his motion for a new trial, plaintiff has appealed.

In support of his appeal but one point is raised by appellant, namely, “that the evidence is insufficient to justify the verdict, or that the verdict is contrary to the evidence.” The nature of the action is set forth in the opinion of this court rendered on the former appeal, and a résumé of the evidence necessary to be considered on this appeal is as follows:

“Plaintiff testified: His vocation was that of well driller, and in June, 1919, had an agreement with the defendant to put in a well, and was boarding at the Weed Camp; Camp No. 3 at Morrison. On a building of the defendant he noticed an advertisement offering any one who would find a spring that would furnish the camp with water, the sum of \$100. He had a talk with Mr. Murphy, the general foreman of the defendant company, about the notice. He had to cease drilling until a certain lost part could be replaced, and during this time he had the conversation with Mr. Murphy, in which he told him that one Phelps had said that he and Frank Mills had found a spring upon the side of Mt. Shasta, and that Phelps had described where they had found it. Murphy told him while he was laying off to go and hunt for it; to go to the barn, get a horse and go horseback. Told him that he couldn't ride horseback, that he would go out on the train as far as he could, and come back on the train. Also told Murphy that a man by name of Hall had told him of water seeping out of Whaleback. He (meaning evidently Murphy) told him to go look for it, too. On June 7th, he went out to hunt for water, walking that day. On June 9th, got on the train and went out to where they spotted the crane. They took the crane along with them that morning and spotted it, and he got off the train and went up to Whaleback, and hunted for 3 or 4 hours. Then he started back to the crane to take the train to go back to camp. The crane had not been moved while he was gone. The train was not there. He asked the crew if it had been up, and he thinks they said it hadn't. Went over and sat down on a stump, the crane would kind of tip when they would pick up logs. Thought it might be dangerous to sit there so got up and went in back of crane about 30 or 40 feet from it. Sat down on a log, and took some rocks out of shoe. Was tired; was going to

$\S$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

¹ 204 Pac. 24.

wait for the train and rest. Finally got rested, and thought he would walk to camp, when he looked up and saw crane was coming over backwards toward him. Had been resting about 5 or 10 minutes. Point where he was would be a direct line from where he started back to go to the camp; it would be in between on a direct line. It was the most direct route from the place where he had been hunting back to camp. The crane was cabled, but it didn't hold, the derrick fell straight back and hit him on the back. Crane weighed about 20 ton. Log being loaded at time of accident somewhere about 2 feet; less than a medium log; about 16 feet long.

"On cross-examination he testified: Lived at Camp 3, one-half or three-quarters of a mile from the Merry Crane. Mr. Murphy told him to hunt for water at the base of Mt. Shasta, to hunt for the water that Hall had told him about, seeping out of Whaleback. There is a mountain they call Whaleback, and he was hunting along the side of the mountain. Understood that he could go anywhere for water up above the place up there. Was hunting for water anywhere from 200 yards to a mile and a half from the Merry Crane. He came back to take the train where he got off. Didn't care to see the crane work, had seen it work hundreds of times. Didn't know it was a dangerous machine to be around. Came there to take the train, and inquire of the crew if the train had been up. Was just beyond the crane, and came right down to it in a direct route to the camp. There was no path, just woods and brush. Came from where he was right straight down there, rocks and canyons there. A man would travel as straight as he could. There was no trail or wagon road or anything of that kind, a man naturally would hunt his own course. Must have traveled 4 or 5 miles around Whaleback that day. Crane was where it was when he had gotten off train in the morning. Understood train would be up to get the loaded cars. Went mile and half or two miles above crane up the Whaleback. When he was sitting in front of crane, he saw it dip down. Got up and moved, believing it unsafe to stay where he was. Didn't know it wasn't working just right. Didn't know but what something might happen, so got up and went around in back. Didn't know there was any danger there. Hadn't been warned. Did not know place where he moved to be a dangerous one. Didn't think crane could possibly tip over backwards. Some of the men working could see him. They did not say anything. No signs of danger posted around.

"Lloyd W. Hoff testified: In June, 1919, was firing a locomotive for the Weed Company at Morrison Camp 3; know the Merry Crane that tipped over. Track where the crane was standing was built on said fill, very bad condition; not fit to put a locomotive on, ties were rotten. Was at crane 10 or 15 minutes after it tipped over; track had slid out. It wasn't in condition to hold anything up of that weight. Had not backed the crane in there that morning, it went in on its own power. Did not run locomotive out to where it got bad or to where the accident happened. Came two or three car lengths from the place of the accident with the locomotive. Crane had not been anchored.

"M. Charles Hass testified: Mechanical en-

gineer. Had been employed by the Weed Company for three years. Had something to do with the repairing of their cranes. They used the Ohio Locomotive Crane designated as the Merry Crane. Approximate weight 20 tons. It is not safe to operate one of these cranes without anchoring it. Customary for the Weed Company to anchor them to the track with chains. Not a natural or common thing for them to turn over when properly operated. If properly handled, they are not dangerous to work. They have tipped over quite a number of times. Are used on temporary tracks where locomotives are not expected to go, where the grade is bad or where it is hard to make a permanent track. Would say crane would not handle one ton on the side without tipping over unless chained. The liability of its tipping over if it wasn't chained would be increased if the track was poor. It would be dangerous and unsafe unless the crane was chained to operate it sideways in loading logs.

"Testimony of C. W. Murphy for defendant: In 1919 was superintendent of the logging. With the Weed Company since 1910. They have two of the Ohio cranes. Used to pick up logs in bad places. In loading logs they are not fastened to the track, unless there is an extra heavy log. In 1919 railroad ran to Camp 6. Place where crane was was the tail of a switchback. Put tail around side of mountain to let crane go in to get a few logs. Trains ran through the other leg of the Y, possibly 1,500 feet from where crane was working. Crane was not where train would go to get passengers or anything else. Crane worked upon a skeleton track, ties laid, every other tie spiked, not surfaced at all. Did not use passenger train or logging train out there. It was not a route for logging train. Whaleback extends 8 or 10 miles. No roads running from Whaleback to the crane and on to the camp. Brush and rocks; a little timber, rough country on hillside, no such thing as a direct route from Whaleback to the camp. No trail. A man going would simply have to wind around.

"Mr. Bush came to me and said that Mr. Phelps had told him where there was some water. We had a reward up for water and he said: 'I have got my tools lost in the well, I think I will go up and find it; I know where to go and find it.' I says, 'That is all right,' so he got a lunch together and went off to see if he can find it. * * * I says, 'Mr. Bush, there is an extra horse in the barn that you are welcome to use; you better go and get the horse and ride.' He told me about Phelps and somebody else. I don't remember who it was besides Phelps told him. He told me Phelps; I remember Phelps because I knew him, and somebody else at the time told him he knew where there was a spring of water. I says, 'All right, the reward is there.' I didn't direct him to go anywhere. He thought he knew where he could find it. * * * I think I told him that he could go on the train if he couldn't ride a horse. * * * I didn't care where he went. * * * I don't remember any conversation on Whaleback. He told me he was going to hunt for water, he said he knew where there was some water. He didn't say anything about going in the vicinity of the Merry Crane, or anything. Only thing, it was just mentioned. I said, 'if you can find the water, there was

the reward, go get it.' Never directed him which course or where to go. I didn't know where he wanted to go. * * * He said he was going to the foot of Mt. Shasta. Whale-back is a different ridge from Mt. Shasta. An opening between there and Mt. Shasta. * * * It is very dangerous for a man that isn't working on it to go around the crane. Most dangerous place is behind the crane when it is lifting. * * * We don't generally chain it or block it. An ordinary log would weigh a ton; some of them may be a ton and a half or two ton. There would be no necessity at all to lock the crane onto the rail to handle two tons with a 50-ton plant. It would not do any good to chain it around the track. Skeleton track wouldn't hold it. It would take the track with it.

"In conversation with Mr. Bush, he didn't say anything about two different places. 'Q. You were willing to have him hunt anywhere in the vicinity that he wanted for this water? A. Just the same as anybody else.' He said he didn't want to ride a horse. I think I told him 'all right, go any way you like, on the train, go any way you like; didn't make any difference to me.' I know of crane tipping over twice in one day. It tipped over a good many times; we expect them to tip over. I suppose you could anchor crane to trees on either side. I don't think it would be practicable. You could anchor it from pulling sideways. I don't know as that would do you any good when you come to tip over. Crane weighed 50 tons when filled with scrap iron. I think this crane was filled, practically so, couldn't say that it was filled altogether.

"Lloyd W. Hoff (in rebuttal): Crane was sitting beyond switch. Hauled the crane crew out there, * * * stopped at the switch and let the crane crew off. That morning was just enough beyond the switch to get the cars in the clear, so they could throw the switch and go on up in the woods, was possibly two or three car lengths from the crane. Crane was then sitting where the accident occurred. 'Q. You mean you ran up on the switch to deliver the men working on the Merry Crane? A. We stopped at the switch for them to get off. Q. How far is the switch from the place where the accident occurred? A. I don't remember, about 12 or 14 car lengths.'"

[1, 2] That appellant was on the premises of respondent as an invitee, and not as a licensee, is evident from the testimony of the witness Murphy, which shows that the former was engaged in searching for water, following a conversation with the latter in which appellant was encouraged to make the search, and was invited to use the train of respondent in going to and returning from the place of his search. An invitation to use the premises of another is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using them. *Bennett v. L. & N. R. Co.*, 102 U. S. 577, 6 L. Ed. 235.

The status, then, of appellant being that of an invitee, it became the duty of respondent to exercise ordinary care and prudence to

render the premises reasonably safe for the appellant (*Cooley on Torts* [2d Ed.] p. 718; *Clark v. N. P. R. Co.*, 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508; *True v. Meredith Creamery*, 72 N. H. 154, 55 Atl. 893), and that duty has reference to such dangers as might reasonably be anticipated by a prudent and careful man (*Hart v. Grennell*, 122 N. Y. 371, 25 N. E. 354). In *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794, it is said:

"One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, * * * is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so."

And in the case of *Mayne v. Chicago, etc., Ry. Co.*, 12 Okl. 10, 69 Pac. 933, we find language of similar import:

"What is usual, the law requires a person doing a wrong to anticipate and provide against, but the law does not require that even a wrongdoer shall anticipate and provide against the unusual."

[3] The duty of the owner to an invitee to keep the premises in a reasonably safe condition need not necessarily apply to the entire premises, but only to that portion thereof where the invitee would, under the circumstances and conditions of his invitation, naturally be likely to go.

"The degree of care required to be taken when one invites another to enter his premises is reasonable care. It may be qualified by the circumstances of the invitation, which include the character of the place * * * which the visitor is invited to use, the nature of the use which he is invited to make of it, and the conditions and circumstances under which such use is invited to be made." *South Australian Co. v. Richardson (Australia)* 20 C. L. R. 181, 9 B. R. C. 52.

"Negligence consists in the violation of some duty, having regard to the relation between the parties, to time, place and circumstances. * * * This duty is relative not absolute" (*Dowd v. Chicago, etc., Co.*, 84 Wis. 105, 54 N. W. 24, 20 L. R. A. 527, 36 Am. St. Rep. 917), and the rule is that negligence is a question of fact for the jury, even when there is no conflict of the evidence, if different conclusions can be rationally drawn from the evidence (*Wahlgren v. Market Street Ry. Co.*, 132 Cal. 656, 62 Pac. 308, 64 Pac. 993).

[4, 5] In order to sustain the contention of appellant it must be held that the conclusion of the jury cannot be supported on any hypothesis whatever; that the character of the evidence was such that only a

verdict finding respondent liable was proper. We are not persuaded that such a condition exists in this case, for it cannot be said, as a matter of law, that the appellant at the time he received the injuries complained of was in a part of the premises covered by his invitation; nor can it be said, as a matter of law, that the appellant, if an invitee, was in a part of the premises where he would naturally and ordinarily be likely to go, in view of the character and circumstances of his invitation, nor can it be said, as a matter of law, that the respondent should have reasonably expected, in view of the character of the invitation given to appellant to search for water and to take the train in pursuing his search, that the appellant would likely go to the vicinity of the crane and in close proximity to it. It would be for the jury to say whether the operation of the crane in the manner admitted by the witness Murphy, at a point 1,500 feet from the main line of the company's railroad, and not in the vicinity of any road or path, constituted a failure on the part of respondent to exercise reasonable care in respect to the appellant.

Considering all the pertinent evidence in the case, it is apparent that reasonable men might differ as to the inferences which might be drawn therefrom, and it cannot be properly declared that no reasonable man could find in favor of the defendant.

"If the finding of fact is based upon a reasonable inference, it is not within the power of this court to set it aside." *Ryder v. Bamberger*, 172 Cal. 791, 799, 158 Pac. 753, 756.

The judgment and order appealed from are therefore affirmed.

We concur: FINCH, P. J.; BURNETT, J.

63 Cal. App. 381

MAYR v. GOLDSCHMIDT et al. (Civ. 4195.)

(District Court of Appeal, Second District, Division 2, California. Aug. 3, 1923. Rehearing Denied Aug. 31, 1923. Hearing Denied by Supreme Court Sept. 28, 1923.)

1. Partnership ⚡147—Partner not authorized to bind copartner upon contract of guaranty.

Generally a partner has no authority to bind his copartner upon a contract of guaranty.

2. Partnership ⚡217(3)—Evidence held to prove partner authorized to execute contract of guaranty.

Evidence held to prove that a partner had authority to bind the copartner upon a contract of guaranty.

3. Evidence ⚡148—Telephone conversation with one partner held admissible to prove authority of other partner to make contract of guaranty.

In an action against a copartnership upon contracts of guaranty, in which one part-

ner denied that the other had authority to bind the copartnership, plaintiff's testimony that the first partner told him over the telephone that other partner had authority held admissible as against the contention that plaintiff did not know with whom he was talking; such objection going to the weight of the evidence, and not its admissibility.

4. Appeal and error ⚡931(2)—Appellate court will assume that trial court had proper rule as to burden of proof in mind in deciding case, notwithstanding remarks to contrary in ruling on evidence.

In an action against a copartnership on contracts of guaranty, tried by a court without a jury, in which the court made certain statements in ruling on admissibility of certain evidence, indicating that the burden of proof as to authority of partner to bind the copartnership was on the defendants, the court on appeal will assume that the trial court became enlightened on the subject before the case was finally decided.

5. Appeal and error ⚡997(2)—Denial of nonsuit not disturbed where evidence at conclusion of case was sufficient for the jury.

An order denying a motion for a nonsuit will not be disturbed, although the evidence at the close of the plaintiff's case was so weak that it might properly have been granted, if upon the conclusion of the whole case, there was evidence sufficient for a submission of the case to the jury.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Walter A. Mayr against Herman H. Goldschmidt, Goldschmidt Bros. (a dissolved copartnership), and another. Judgment for plaintiff, and the named defendants appeal. Affirmed.

Ernest C. Griffith, Loewenthal, Loeb & Walker, and Loewenthal, Collins & Loewenthal, all of Los Angeles, for appellants.

Norman A. Bailie and Turner & Granger, all of Los Angeles, for respondent.

WORKS, J. This action was brought to recover upon two guaranties. One Milton Kauffman executed two promissory notes payable to Goldschmidt Bros., a copartnership composed of Herman and Max Goldschmidt. Upon the execution of the notes Max Goldschmidt wrote on the reverse side of each of them the guaranty which is the basis of the action. He signed each of the guaranties, "Goldschmidt Bros., by M. Goldschmidt." The notes were by Kauffman, to whom they were handed by Max Goldschmidt, then taken to plaintiff, a money lender, who paid over to Kauffman the amount of the principal of the two pieces of paper, and kept them. The money was used in the development of a land project known as Valencia Groves. The notes not having been paid at maturity, the present suit re-

sulted. The defense made by Herman Goldschmidt and by the copartnership, which had at the time of the trial been dissolved, was that Max Goldschmidt had no authority to execute the guaranties in the name of the firm. Plaintiff had judgment, and Herman Goldschmidt and the copartnership appeal.

At the time of the transactions which are involved in the action, the copartnership was engaged, principally at least, in the liquor business, but the trial court found that the Valencia Groves venture was also included in the partnership business. This finding is assailed as having no support in the evidence. In the record there is some showing of the following facts: Herman and Max Goldschmidt together frequently became interested in business ventures and transactions apart from what was evidently the original purpose of the partnership, the operation of a winery and distillery. One of these was the purchase and subsequent sale of a tract of land known as Baldwin Park, in which Kauffman was also interested. Herman Goldschmidt himself testi-

"The first Baldwin Park property was purchased when I was going to Europe in 1911. I did not have any conversation about that time with Mr. Kauffman as to how that property should be handled. I told him, 'I am going to Europe, and you can take it up with my brother.' The profits were to be divided; myself and Max were to get a half. Goldschmidt Bros. advanced considerable money on the Baldwin Park property. * * * I told Mr. Kauffman that I was willing to go into it, and that was all. * * * I didn't know how the proposition was going to be handled, and I didn't care."

A part of the testimony of Kauffman follows (he is speaking of Baldwin Park):

"Father and I furnished some of the money to buy it, Goldschmidt Bros. furnished the balance. I had conversations with Herman Goldschmidt in regard to this Baldwin Park property. I spoke to him many times before and after I purchased the land. * * * We were to divide the money equally on the profits. * * * Goldschmidt Bros. furnished \$4,000 or \$5,000. My father and I furnished possibly the same amount. * * * We sold the property, and with the money paid off the different obligations. Most of the money was in the shape of mortgages, payable at different times. As these mortgages were paid and the interest was paid on them, we put it into the land which was afterwards turned into the Valencia Groves Company. After this Baldwin Park proposition was finally wound up, and the proceeds of it were in money and mortgages, I discussed with Max and Herman Goldschmidt the entering into another real estate transaction being the portion of a tract of land south of Covina. This tract of land was eventually called the Valencia Groves land."

There was evidence also that moneys were advanced by "Goldschmidt Bros." in connec-

tion with the Valencia Groves deal, and that the amounts were evidenced by checks executed in the firm name. The same books of account which contained the entries relating to the liquor business of the firm also showed transactions concerning the Valencia Groves matter. Appellants contend that the strongest construction which can be placed upon the evidence is, not that the copartnership was interested in Valencia Groves, but that Herman and Max Goldschmidt participated in the venture as individuals. Specifically, it is insisted that the entries in the books as to the Valencia Groves transaction are to be regarded as relating only to the members of the firm as individuals, and not to the copartnership itself. Appellants say that entries showing the issuance of checks by the firm in payment of tailoring bills of one of the members are not to be taken as evidence that the clothes purchased were the property of the partnership. While this latter view of appellants may be correct, that is not equivalent to an assertion that the entries in the books concerning the Valencia Groves transaction are not to be taken as some evidence that the venture mentioned was a partnership affair. Those entries are doubtless to be considered as evidence in that direction, although perhaps of slight weight, as the individual members of the firm often did make payment of their personal bills by means of partnership checks. There is in the record, however, as we have shown, considerable other evidence to be added to the showing made by the books. To the general proposition advanced by appellants, that the evidence shows without dispute that the two brothers had only individual interests in the Valencia Groves lands, we cannot assent. There was surely ample evidence justifying the trial court in drawing the inference that the venture was a part of the partnership business. There is matter in the record, in addition to that to which we have referred, furnishing support to the finding in question, but we have refrained from specifically pointing it out. The evidence which we have quoted is enough.

[1, 2] Taking it as settled, then, that the Valencia Groves deal was a partnership affair, did Max Goldschmidt have authority to sign the partnership name to the guaranties? This question is answered in great part by what we have said above. It is undoubtedly the general rule that a partner has not authority, upon a mere showing of the existence of the partnership, to bind his copartner upon a contract of guaranty, and this upon the ground that "The normal partnership is organized to carry on a business for its members, and not to assist other persons by becoming surety for them, or answerable for their debts." 30 Cyc. 515. Here, however, there appears to be no room for the

application of the rule. If the situation already disclosed does not show that the present case is not within the reason of the rule, that fact will appear from additional circumstances to which we shall presently advert. We have already said that the money received from respondent was used to further the Valencia Groves affair. That circumstance alone indicates that the papers signed by Max Goldschmidt were not guaranties in the sense of the reason for the rule, but were only guaranties in form, employed for the purpose of borrowing money for use in the enterprise, in furtherance of which Goldschmidt Bros. and Kauffman were together to furnish funds. That the transaction is to be so regarded is indicated by further evidence appearing in the record. Kauffman testified that, after Goldschmidt Bros. had advanced large sums of money on the Valencia Groves enterprise, Max Goldschmidt told him that they were not in a position to advance more money out of their own funds, "that he [Max] would have [sic] borrow money on the outside; make arrangements to finance, that is." The examination of the witness then proceeded:

"Q. Did you ever discuss that matter with Herman? A. Yes. Q. What did Herman tell you? A. 'See my brother.' Q. Did you tell Herman that you would have to borrow money on the outside? A. Yes."

When Kauffman, who had already made a call upon respondent about the business of the loan, came a second time with the first of the two notes, the guaranty being upon it, respondent called the office of Goldschmidt Bros. over the telephone before paying over the money. This is respondent's testimony as to what then occurred:

"Whether he [Kauffman] returned that day or the next I do not remember, but I took the note * * * and I telephoned—I rang up Goldschmidt Bros. and described the note, and asked for the manager of Goldschmidt Bros. I asked for the manager, and the party said, 'Just wait a minute;' and shortly—I waited a minute, and someone else came to the 'phone. Q. * * * You had a conversation with that person on the 'phone? A. I did, sir. Q. Have you since that time ever had a conversation with Herman Goldschmidt? A. I have. Q. When? A. In your office. Q. When you had this conversation with Herman Goldschmidt in my office could you recognize the voice which you talked to over the telephone? * * * A. I did. Q. * * * Whose voice was it? A. I thought it was Herman Goldschmidt's. * * * Q. * * * Do you still think so? A. I do. * * * Q. * * * It is your best judgment that it was Herman Goldschmidt's voice? A. Yes sir, I should say it was. Q. State the conversation. * * * A. I stated that Milton Kauffman was in the office with the note indorsed by them, and asked them if they had made the indorsement— Q. And he answered what? A. —whether it was the bona fide indorsement of Goldschmidt Bros., the firm. And they said, 'Yes, that is all right; that is

our indorsement, and we stand back of the note.' And I said, 'To whom shall I give the check for it? Shall I mail it or give it to Mr. Kauffman?' He said, 'Just give it to Mr. Kauffman; that is all right.'" (This conversation, it will be observed, related to the loan on the note first presented to respondent by Kauffman. The transaction on the second note came later.)

From all these circumstances we are bound to conclude that there is in the record sufficient evidence to show that Max Goldschmidt had express authority to execute the two guaranties in the name of Goldschmidt Bros.

[3] Appellants present several questions which fall to the ground with the conclusions we have reached upon the two points above discussed. There are, however, one or two matters which require a brief notice. It is contended that the trial court erred in receiving in evidence the telephone conversation which we have already set forth as detailed by respondent. The objection to the evidence is on the ground that it does not appear that respondent talked with any person in authority in the office of Goldschmidt Bros. It is insisted that respondent could not have recognized, from a later conversation with Herman Goldschmidt, that it was the voice of the latter which came to him over the telephone. This objection goes to the weight of the evidence, not to its admissibility. The fact that respondent testified that it was Herman's voice which he heard over the wire made it compulsory upon the court to receive the evidence. The weight to be ascribed to the alleged conversation was a matter for the later consideration of the tribunal. In passing upon the question of the admissibility of this telephone conversation we have not overlooked the case of *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 298, 125 Pac. 242.

[4] It is contended that the trial court erred in entertaining the view that the burden of proof was on the defendants to show that Max Goldschmidt was without authority to bind the partnership by the two guaranties. We employ the expression "entertaining the view" advisedly, for there was no ruling of the court upon the question, as there might have been if the cause had been tried by a jury, and the judge had given an instruction upon the law regarding the burden of proof. The bill of exceptions shows certain expressions of the court upon the matter of the burden of proof, laying aside all question as to whether his utterance on the subject was properly included in the bill. What he said, however, was spoken in the course of his remarks in ruling upon a question of evidence, and they did not amount to an order or ruling upon the question of the burden of proof. If we grant for the sake of argument that the judge was in error in his views, we have no means of knowing whether the error continued up to the time when

he signed the findings and judgment in the cause. In such a condition of affairs we should assume, if it were necessary, that he became enlightened upon the subject before the cause was finally decided. Under the objection now before us we can see nothing to decide.

[5] The sole remaining point is that the court erred in denying a motion for nonsuit but it does not follow that a reversal of a cause will result when a trial court denies a motion for nonsuit which it should have granted, not deciding that the motion should have been granted in the present instance.

"It is well settled that an order denying a motion for a nonsuit will not be disturbed, although the evidence at the close of plaintiff's case was so weak that it might properly have been granted, if, upon the trial, the defect is overcome by evidence subsequently introduced. If, upon the conclusion of the whole case, there is evidence upon the material issues warranting the submission of the cause to the jury, the question of whether the court erred in denying a nonsuit becomes of no consequence." *Peters v. Southern Pacific Co.*, 160 Cal. 48, 116 Pac. 400.

The facts of the present case bring it directly within the rule thus stated.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(63 Cal. App. 347)

SHURMAN v. LOOK. (Civ. 2623.)

(District Court of Appeal, Third District, California. Aug. 2, 1923.)

1. Deeds ⇨196(3)—Presumption of undue influence held overcome by evidence.

Evidence, in action to set aside a deed to one occupying a relation of trust and confidence to the grantor, held sufficient to overcome the presumption of undue influence.

2. Appeal and error ⇨931(1)—Assumed that trial court followed correct rule announced by it as to scrutiny of transaction between persons in confidential relation.

It is to be assumed, on appeal from judgment for defendant, in action to set aside a deed to one occupying a confidential relation to grantor, that the trial court followed the correct rule announced by it as to scrutiny of such transaction, and was entirely satisfied that the presumption of undue influence was overcome, and the grantor under no actual or constructive constraint.

3. Appeal and error ⇨1009(2)—Conclusion of no undue influence in deed to one in confidential relation not disturbed if it has any legal support.

Conclusion of the trial court, in action to set aside a deed to one occupying a confidential relation to grantor, that the presumption of

undue influence was overcome by clear, satisfactory and conclusive evidence, cannot be disturbed on appeal, if there is any substantial evidence to uphold it.

4. Deeds ⇨211(4)—No certain kind of evidence to overcome presumption of undue influence.

No certain kind of evidence, such as that there was adequate consideration, is indispensable to support a finding in favor of validity of a deed to one occupying a confidential relation.

5. Deeds ⇨72(3)—Adequacy of consideration not necessary to validity of deed to one in confidential relation.

Civ. Code, § 2235, declaring that all transactions between trustee and beneficiary, whereby the trustee obtains any advantage from the beneficiary, are presumed to be entered into without adequate consideration and under undue influence, does not make adequacy of consideration indispensable to deed to one occupying a confidential relation.

6. Deeds ⇨72(3)—Independent advice to grantor potent reason for sustaining deed to one in confidential relation.

Affirmative evidence of independent advice to grantor furnishes a potent reason for sustaining validity of a deed to one in a confidential relation to grantor, though the case involves only the presumption of undue influence from the relation.

7. Trial ⇨105(2)—Hearsay evidence considered in absence of objection to admission.

Hearsay evidence having been received without objection may be considered.

8. Appeal and error ⇨1071(3)—Erroneous finding not affecting judgment harmless.

Finding, in suit to set aside a deed to one occupying a confidential relation to grantor, that grantor did not have great trust and confidence in grantee, though contrary to the evidence, is without prejudice, where, if the other way, it would not affect the judgment for defendant.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Martha Shurman against Halleck Hart Look. Judgment for defendant, and plaintiff appeals. Affirmed.

Irving D. Gibson and Herbert E. White, both of Sacramento, for appellant.

C. E. McLaughlin and W. F. Renfro, both of Sacramento, for respondent.

BURNETT, J. The action is by a devisee under the will of Sophia Graff, deceased, to set aside a deed executed by her some three years after the execution of the will and approximately a year before her death. The character of the attack made upon the deed is sufficiently disclosed by the following allegations of the complaint:

"That for many years prior to the death of said Sophia Graff, defendant had been continuously, and at the time of the death of said

Sophia Graff, was, the family physician of said Sophia Graff, her intimate personal friend and trusted and confidential adviser in all matters and transactions and that for many years, to wit, more than ten years prior to the death of said Sophia Graff, she had complete trust and confidence in defendant and believed that defendant would not advise her or persuade her to act against her own interests or for the advantage or benefit of defendant; that at the time of the death of said Sophia Graff and for more than two years prior thereto, defendant continually had and exercised complete influence, domination, and control over the mind and acts of said Sophia Graff, and that by reason thereof defendant could, and did, during all of said period, dominate, control, and influence, in whatever manner he might wish, the conduct and acts of said Sophia Graff; that for more than one year prior to the death of said Sophia Graff, by reason of the dominating influence and control which defendant exercised over the mind of said Sophia Graff, she permitted defendant to have control and exclusive charge of all legal and other papers and all matters and things concerning her property; * * * that by reason of said dominating influence and control and said trust and confidence reposed in defendant, as plaintiff is informed and believes and therefore alleges, defendant was able to and did procure said Sophia Graff to sign that certain purported and pretended deed of conveyance hereinabove mentioned, purporting to convey to defendant that certain real property described therein; that said deed was signed by said Sophia Graff at a time when she was incapable of understanding the nature, quality, or effect of her acts, and at a time when she did not realize or give attention to the effect of said purported deed, and that said Sophia Graff signed said purported deed during and while she was subject to and under said dominating influence and control of defendant and because of the great trust and confidence which said Sophia Graff reposed in defendant at said time; * * * that defendant did not permit said Sophia Graff to have, and she did not have, any independent or other advice, counsel, or information whatever concerning said purported deed, the purpose or effect thereof, and that said Sophia Graff signed said purported deed without any knowledge, information, or advice whatever as to the effect thereof and solely because of said dominating influence and control and trust and confidence hereinabove mentioned; that said purported deed was procured and obtained by defendant from said Sophia Graff for the purpose and with the intent to defraud and deprive plaintiff and the other devisees other than defendant of all their right, title, and interest in and to said real property and to obtain and acquire the title to the whole of said real property in the name of defendant without any consideration of any kind or character passing from defendant to said Sophia Graff in violation of the trust and confidence reposed in defendant by said Sophia Graff, and in fraud of plaintiff."

In his answer defendant denied all the allegations of the complaint charging or implying any domination or influence or improper conduct in relation to the execution

of the deed, and also the allegations as to the consideration and independent advice, and he averred his ownership of the property by reason of said deed executed knowingly, intentionally, and freely by said Sophia Graff for a valuable consideration. The findings and judgment were in his favor, and plaintiff brings the appeal.

We may dismiss with a word or two every consideration of intentional mischief or actual undue influence on the part of defendant, as well as any want of information or knowledge on the part of the grantor of the nature and effect of said deed, as there is no pretense of any evidence to sustain the theory of the complaint in those respects. Indeed, as we understand the position of appellant, her only claim here is that the judgment must fall by reason of the confidential relation that existed between the parties; the presumption that flows from such relation, and the failure of respondent to satisfy the requirement of the rule demanding that he overcome by clear and satisfactory proof the legal compulsion of such presumption. She states in her brief:

"It is very evident that defendant has misapprehended the character of undue influence charged in this case. A great part of defendant's brief is devoted to a discussion of evidence tending to show that Sophia Graff was 'an unusually competent woman, in good health, strong will and superior intelligence.' It was not claimed on the trial, and is not now asserted, that any actual undue influence was proven to have been exerted upon Mrs. Graff by Dr. Look, but it was sufficient to prove that fiduciary relations existed between them, and thereupon a presumption of undue influence was raised which could be in no wise affected by any evidence as to the intelligence or will power of Mrs. Graff. * * * The burden was necessarily on Dr. Look to show that the transaction was fair and regular, and that there was an adequate consideration for the transfer. To sustain this burden and rebut the presumption against him, it was necessarily incumbent upon him to introduce evidence that he had a legal claim for his medical services, payment for which was the alleged consideration, and also of their reasonable value, to afford some basis for determining that the consideration was adequate. He met this duty with eloquent silence, and the state of the record is that the services were of no value because no evidence of their value appears."

To support her view of the law, appellant cites a number of authorities, among them being the late cases of *Espinosa v. Stuart*, 52 Cal. App. 477, 199 Pac. 66; *Bonifacio v. Stuart*, 52 Cal. App. 487, 199 Pac. 69; and *Magee v. Brennenman*, 188 Cal. 562, 206 Pac. 37.

Before commenting upon these and other authorities or stating what we conceive to be the true rule in such cases, we deem it proper to set forth the main part of the evidence upon which respondent relies to jus-

tify the judgment in his favor. It seems that William F. Renfro, a reputable attorney of Sacramento, drafted the deed in question, and as to what occurred between him and Mrs. Graff he testified:

"Well, Mrs. Graff came in a little after two in the afternoon, and told me that she came up to have me draw a deed to Dr. Look; said that she wanted to make him a deed of the property down on Fifth street, for what he had done for her. I said, 'Well, have you got a description?' 'Yes,' she said, 'I have got it here on a piece of paper.' So, as is my usual custom when I draw any documents of any importance, I get my shorthand book and write it all out, first in shorthand, to get it as I want it; then I sit down at the typewriter and run it off. That is what I did, and when I finished the sheet, I read it over to her, and asked her if it was satisfactory, and she said yes. She signed it. I then took her acknowledgment, and after I had taken her acknowledgment, I said to her: 'Now, Mrs. Graff, do you want to hold this deed, or do you want the doctor to have the title now?' 'Well,' she said, 'I want him to have it now, because that is what I came up here for.' 'Well,' I said, 'in order for the title to pass, it will be necessary that a delivery be made, and, if you want him to have it now, why I will call the doctor up on the phone, and see if he is there, and if he is why I will have him come to my office, and we will deliver it to him here.' She says, 'All right; call him up.' I called the doctor up, and he came up in about 10 or 15 minutes after I had called him. When the doctor came up, I explained to him why I sent for him. I told him that Mrs. Graff had made the deed in his favor and I told her that if she wanted the title to pass now, that she had better make a delivery to him at once, if she wanted it passed at once, and she said that she did; 'that is why I sent for you.' She had the deed at that time in her hand, and she said, 'Yes, Doctor, here is the deed.' She says, 'I want you to have it for what you have done for me in the past.' She gave the deed to the doctor, the doctor thanked her, and they had a few words, and shortly after that they went out, and I heard the doctor say, as he was going out, 'Now you can stay in this place as long as you want to.'"

He testified, further, that he did not know why she had come to him to draw the deed; that he had never seen her before and did not have any communication with Dr. Look in reference to it until the latter came over to the office in response to said telephone. He also testified that while they were waiting for the doctor to come she said to him:

"I have drawn my will, Mr. Renfro, but I am not satisfied with it. There are some changes that I want made, but I don't want to make them until certain contingencies arise, and they haven't happened yet, and I don't want to have my will rewritten until they do happen. When they do I will come in and I will have you write my will for me."

Defendant's testimony as to what occurred when the deed was delivered was substan-

tially the same as that of Mr. Renfro, his statement being:

"When I came in the door I saw Mrs. Graff standing back of the desk holding the document in her hands; she said: 'Here Doctor is a deed to my property, it is now yours; I give you this for what you have done for me.'"

He further testified that prior to this occasion he had been told several times by Mrs. Graff that she intended to deed him the property for what he had done for her:

"She said she wanted to pay me, and she did not want to take up any of her mortgages, because it would reduce her income and she wanted to pay me with the property * * * for my services for her and her mother. * * * She told me that she had consulted at one time yourself [attorney for appellant] * * * and that you advised against it, that the property would pass out of her hands"; that this statement about the consultation was made a short time before the deed was executed; "she was suffering of late years, the last ten years with enlarged liver; that brought it up, I had to come there to watch her * * * she said, 'I will give you this property—it is dead, there is no income from it at all, if you are satisfied with it, I will give it to you.' I said, 'Very well, if it is satisfactory to you it is to me.' * * * When I started in with her, she had an attack of chronic catarrhal deafness, that was almost interminable, I worked on that for years, I do not know how many years; * * * about the last ten years the enlargement of the liver developed. * * * I treated her for that condition all the time, whenever it gave her trouble first; then later on she was taking medicine for that."

He further testified that he never presented any bill to Mrs. Graff and never collected anything for his services to her or to her mother, and that he loaned Mrs. Graff considerable sums of money the last few years of her life, and that the deed was to include said sums; that, prior to the execution of the deed, he never spoke to Mr. Renfro or to Mrs. Graff about it, and he did not know that she was going to Mr. Renfro's office.

Much other evidence of importance appears in the transcript, but we deem it unnecessary to quote further. We may say, however, as to the entire record that beyond question the trial court was legally justified, as substantially asserted by respondent, in reaching these conclusions: (1) After Sophia Graff had devised this property to appellant, respondent and another, all strangers to her blood and bounty, she entertained and expressed her intention to convey it to respondent. (2) She sought and received independent advice from the attorney for appellant, who not only advised her against the execution of the deed, but informed her of its effect. She had also the independent advice of Mr. Renfro as to the effect of the delivery of the deed. (3) She was a woman of more than ordinary mental vigor, and dif-

ficult to persuade or influence. (4) After her consultation with the attorney for appellant, apparently being dissatisfied with his advice, she voluntarily sought another attorney, taking with her a description of the property, and at her direction the deed was there prepared by Mr. Renfro and signed and acknowledged by her without the presence of respondent. (5) Mr. Renfro informed her that unless she delivered the deed it would be of no effect, and she requested him to telephone respondent to come to the office, and after his arrival she delivered to him the deed, stating, as we have seen, why she conveyed to him the property. (6) Respondent never at any time requested or suggested to her that she either devise or convey to him any of her property. Neither did he encourage her when she told him she intended to pay him in this way. (7) There was a good and valuable consideration for the deed. (8) At the time the deed was executed she told Mr. Renfro that she was not satisfied with her will and intended to have it rewritten, thus indicating that she had the will in mind and intended the deed to supersede it as to this property.

[1-3] In view of the foregoing we think it would be a usurpation of the legitimate province of the trial court for us to say that the presumption of undue influence was not overcome and the decision should have been in favor of appellant. While it is true, as stated by the trial judge, that "the law is very jealous of this kind of dealings, scrutinizing them very searchingly and suspiciously when they are had in a way that leaves any doubt of their integrity and that they were fairly obtained and justly procured," yet it is for the trial court to determine, after a consideration of the entire evidence, whether the transaction was fair and honest and the conveyance was the voluntary, untrammelled, and uninfluenced act of the grantor. It is to be assumed, of course, that the trial judge herein followed the rule which he announced and was entirely satisfied that said presumption of undue influence was overcome and the grantor was under no actual or constructive constraint when she executed the deed. *Barry v. Beamer*, 8 Cal. App. 200, 96 Pac. 373. It may be admitted that in cases of this character the evidence should be "clear, satisfactory, and conclusive," but, as distinctly held in the *Barry Case*, supra, supported as it is by the numerous authorities therein cited, whether the evidence in any case is of this character must be determined by the trial court, and if there is any substantial evidence to uphold the findings they are binding upon an appellate tribunal. In view of the earnest contention of appellant, we cannot make it too plain that the authority of this court to review the conclusion of the trial court is subject to the same limitations that pre-

vail generally in cases that are appealed. We may admit that, if the lower court had decided in favor of appellant, we could find in the record support for such finding. Said presumption of itself would be sufficient legally to justify that conclusion. Moreover, appellant with great skill and plausibility points out certain facts and circumstances disclosed by the testimony which, she claims, tend to an interpretation of the transaction favorable to her contention. But, we repeat, the foregoing is beside the real question, which is whether there is any legal support for the judgment in favor of respondent.

[4] We may be permitted to say, also, that appellant is in error in contending that any certain kind of evidence is indispensable to support a finding in favor of the validity of the conveyance. She argues that it must have been shown, for instance, that there was an adequate consideration for the deed and, since the evidence does not show that the services of Dr. Look were worth in money as much as the property in dispute, the case for defendant was not made out. The truth is, however, that adequacy or inadequacy of the consideration is an important circumstance to be considered by the trial court in arriving at a conclusion, but if the appellate court should be satisfied that the consideration was, according to the ordinary standards, pecuniarily inadequate, that alone would not justify a reversal. Herein there is no direct evidence of the reasonable value in money of the services of respondent, but manifestly from his recital of his attentions to Mrs. Graff for over 15 years a just compensation would mean the payment of thousands of dollars. We may add that his failure to make an estimate of what his services were worth in money was probably due to the interruption by appellant of the witness when he was attempting to answer the question: "What was the value of your services to Mrs. Graff?" He said he could estimate, although he kept no record. Before he could state his estimate, however, his attention was directed to other questions. But, at any rate, it is reasonable to say that Mrs. Graff undoubtedly considered his services of incalculable value and that his long-continued kindness to her and to her mother, manifested not only as a physician, but as a constant friend, deserved the recognition which she accorded by the conveyance.

[5] Appellant seems to think that adequacy of consideration is required by the terms of section 2235 of the Civil Code. The language of that section is:

"All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

It is apparent that this section provides for a rule of evidence, a presumption that must be applied whenever such condition exists. But it is a disputable presumption, and simply means that when such relation of confidence appears it is not incumbent upon the beneficiary to offer any proof of actual undue influence, the law creating that inference, but the burden is then cast upon the trustee if he desires to maintain a contract of advantage to himself, to satisfy the court that his dealings with the beneficiary were in the utmost good faith and unaffected by the influence of the confidential relation. Manifestly, the courts cannot take away from any party the constitutional right to dispose of his property as he sees fit, to give it away or to sell it for whatever price he desires to whomsoever he pleases, but for the protection of the weak against the strong and to aid in the determination of the actual condition of the mind of the party from whom the advantage is secured the Legislature has provided this rule of evidence.

The question has been frequently considered by the courts of this and other jurisdictions, but only a few of the decisions do we deem it advisable to notice specifically.

In *Hemenway v. Abbott*, 8 Cal. App. 450, 97 Pac. 190, the various circumstances that are deemed important in such transaction are discussed and the general rule is stated as follows:

"The agent and principal are not prohibited from dealing with each other; but in all their dealings respecting the subject-matter of the agency the utmost good faith is required; and the burden of proof is upon the agent to show affirmatively that he acted in good faith, fairly and honestly. Where such proof is made, a deed from the principal to the agent will be sustained."

It was held therein that since the evidence showed the parties to be in a position to form an independent judgment and the grantor was capable of disposing of his property without the aid of an attorney or independent advice, neither the absence of such advice nor the inadequacy of the consideration nor the fact that it was a gift without other equitable incidents would warrant the cancellation of the deed on the ground that there was a confidential relation.

[6, 7] While, as to the importance of independent advice, the *Hemenway* decision distinguishes between cases turning upon the exercise of actual undue influence and those involving the presumption of such influence arising from the confidential relation, holding that only in the former is it of vital significance, yet it does not militate against the view that, in both classes, affirmative evidence of independent advice furnishes a potent reason for sustaining the validity of a conveyance. In this case that circumstance was entitled to great weight; and, no doubt, it was so regarded by the trial court. It is

true that the advice of appellant's attorney appeared through hearsay testimony, but no objection was made to it, and under such circumstances it may be considered as evidence unobjectionable in form. Besides, the fact that the attorney for appellant made no denial of the consultation, although he was on the witness stand, leaves no doubt that she actually consulted him in reference to the deed, and one knowing his ability and thoroughness in legal matters would entertain no misgivings that she was not fully informed as to every important phase of the situation. It is true that the exact time of the consultation does not appear, but only a little while before the deed was executed she informed respondent of the occurrence, showing that it had not been forgotten, and there is nothing in the record to compel the conclusion that the confidential relation had any effect whatever in causing her to disregard the advice of the learned attorney for appellant.

In *Zihn v. Zihn*, 153 Cal. 405, 95 Pac. 868, wherein a deed of gift from a father to his daughter was assailed on the ground of fraud, it was said:

"Any presumption of fraud arising from the admitted allegations of the complaint respecting the confidential relations of the parties may be rebutted, and the effect of the presumption, if any is raised, is merely to throw upon the donee the burden of showing that the gift was made freely and voluntarily, with full knowledge of all the facts, and with perfect understanding of the effect of the transfer. * * * *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910; *Arellanes v. Arellanes*, 151 Cal. 443, 90 Pac. 1059."

In *Metropolis, etc., Savings Bank v. Monnier*, 169 Cal. 592, 147 Pac. 265, the relation of attorney and client was involved, and the court said:

This relation "is of a fiduciary character, and the Civil Code (section 2235) clearly provides that all transactions between a trustee and his beneficiary during the existence of the trust, by which he obtains any advantage from his beneficiary, 'are presumed to be entered into by the latter without sufficient consideration and under undue influence.' This does not mean that a trustee may not deal with his beneficiary. But if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evidence that the transaction was fair."

In *Cox v. Schnerr*, 172 Cal. 371, 156 Pac. 509, *Campbell v. Genshlea*, 180 Cal. 213, 180 Pac. 336, and *Fowler v. Enriquez*, 56 Cal. App. 107, 204 Pac. 854, the principle is reasserted and discussed, it being said in the last of these:

"It is contended by appellant, however, that the presumption was overcome by testimony introduced by him. There was considerable testimony presented by appellant on the subject, it is true, but we cannot say that it was suffi-

cient to outweigh the presumption. The solution of that question was within the peculiar and final province of the trial court, for the presumption on the one hand and the testimony opposed to it on the other presented but a conflict of evidence. The finding of the trial court on the subject is final. *French Bank v. Beard*, 54 Cal. 480."

See, also, *Nobles v. Hutton*, 7 Cal. App. 14, 93 Pac. 289, and *Piercy v. Piercy*, 18 Cal. App. 751, 124 Pac. 561.

This well-established rule amply justifies and constitutes the foundation for the decision in each of the late cases to which appellant refers.

In *Espinosa v. Stuart*, supra, the controversy arose out of a transaction between the plaintiff as client and the defendant as his attorney and legal adviser. The court pointed out that the plaintiff had deeded to the defendant property of the value of \$40,000 and had assigned to him rents amounting to several thousand dollars more and that the value of the services rendered by the defendant to the plaintiff was only \$500. Attention is also directed to other facts indicating the gross inequity of the transaction, and it was very properly held that the trial court was warranted in the decision for plaintiff, both on the ground of "actual undue influence and a violation of fiduciary relations." Assuredly, as said by the District Court of Appeal, in such case "the attorney, or those claiming under him, cannot safely rest, as they did in this case, without affirmative proof of the facts surrounding the transaction."

Bouton v. Stuart, 52 Cal. App. 484, 199 Pac. 71, involved a similar situation and resulted in an affirmance of the judgment. The plaintiff therein also relied upon active as well as implied undue influence, one of the allegations of the complaint being that a written contract between the parties called for a fee measured at two-tenths of the plaintiff's share, whereas the defendant took from the plaintiff transfers measured at three-tenths. The plaintiff introduced testimony to support her complaint, and, as the court says:

"The defendant introduced some testimony to the effect that the plaintiff had been advised as to the contents of the papers which she signed; thereupon, and in rebuttal, the plaintiff called the county assessor, and, over the objection and exception of the defendant, the assessor testified that the whole tract, of which the property in dispute was a part, had a value of \$800,000. There was no error in receiving the testimony. The burden of showing that the transfers were fair and that the consideration was adequate rested on the defendant."

There is no doubt the ruling was correct. The plaintiff was not required to rely only upon the presumption of undue influence, but had a right to aid and supplement it by showing such circumstances as the inade-

quacy of the consideration. While the court's statement that the burden was upon the defendant to prove that the consideration was "adequate" is somewhat inaccurate, if the expression was used to indicate a monetary equivalent, the decision is manifestly sound. It may be that the court used the term, however, as indicating a consideration "not so disproportionate as to shock our sense of that morality and fair dealing that should always characterize transactions between man and man." *Eaton v. Patterson*, 2 Stew. & P. (Ala.) 9, 19. If so, it could hardly be criticized.

Bonifacio v. Stuart, supra, was a similar case and the judgment was affirmed for the same reason. Therein the court noticed the failure of the appellant to distinguish between the case of actual undue influence and the violation of the duties arising out of a fiduciary relation, and properly held that in the latter class it was not necessary to prove any overt acts of or constituting undue influence since reliance could be had upon said presumption.

In the *Magee* Case, likewise, the judgment of the lower court was in favor of the beneficiary, and a reading of the decision leaves no doubt that the judgment was right and was properly affirmed. The Supreme Court concisely and clearly stated the rule to be that, when a confidential relation is shown, the burden is shifted to the trustee who has gained an advantage to prove "that the transaction was fair and regular and was entered into by respondent voluntarily with a full knowledge of the facts."

We deem it unnecessary to notice other cases that have been cited, as we think there is no substantial want of harmony as to the controlling legal principles.

It follows that no finding that the consideration was adequate was required. There was, indeed, no such allegation. Plaintiff, as we have seen, alleged that there was no consideration whatever for the conveyance. The court negated this averment and found "a good and valuable consideration" for the conveyance. This, in connection with the other findings showing that the deed was executed freely, voluntarily, understandingly, and when the grantor was not subject to any extraneous influence, is sufficient to support the judgment. At any rate, the findings necessarily compelled a judgment against the plaintiff, since the court found against her upon all the material allegations of her complaint.

[8] Appellant also criticizes the finding "that Sophia Graff did not have great trust and confidence, or trust or confidence, or repose great trust or confidence in said defendant, at the time of the making and execution of said deed." It is true the evidence does not support this finding; to the contrary, it shows that she did have great

trust and confidence in him. No doubt, that was one of the reasons why she deeded him the property. However, the error is without prejudice, since, if the finding had been the other way, as it ought, it would not affect the judgment.

We have examined with care all the points and all the authorities that appear in the thorough and comprehensive briefs of appellant, but we think there is no sufficient reason for disturbing the judgment of the trial court.

We may say, in conclusion, that the result does not appear to be unconscionable. It is not at all strange or surprising that Mrs. Graff should deed the property to respondent, although it was of the value of \$8,500 and comprised about three-tenths of her estate. He had performed valuable services for her over a long course of years and seems to have been, besides, a warm personal friend. She had no immediate relatives and there is no evidence that she had any particular regard for her collateral kindred, or that any one else had such persuasive claim to her bounty as respondent.

At any rate, upon well-established principles, our duty seems plain, and the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

63 Cal. App. 409

STEWART v. MOZZETTI. (Civ. 4457.)

(District Court of Appeal, First District, Division 1, California. Aug. 4, 1923.)

1. Stipulations ⇐14(1)—Agreement of parties in open court held to justify finding that goods were delivered to defendant.

In an action for goods sold and delivered, agreement of parties in open court at commencement of trial that the goods were sold to defendant and delivered "to somebody" at a place formerly occupied by the defendant, *held* to justify a finding that the goods were delivered to the defendant.

2. Principal and Agent ⇐123(1)—Evidence held insufficient to prove novation by agent was binding on principal.

In an action for goods sold and delivered, testimony that seller's soliciting agent agreed to the substitution of a new debtor in place of the old one *held* not to prove a novation under Civ. Code, §§ 1530-1532, there being no showing as to the agent's authority to bind seller, or seller's acceptance of substitution or consent thereto.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by F. R. Stewart against Ben Mozzetti. Judgment for plaintiff, and defendant appeals. Affirmed.

W. P. Caubu, of San Francisco, for appellant.

Hiram E. Casey, of Santa Rosa, and Joseph C. Meyerstein, of San Francisco, for respondent.

ST. SURE, J. This appeal is without merit. Defendant seeks the reversal of a judgment against him for the sum of \$293, with interest thereon from the time of the commencement of the action, and costs of suit.

The complaint is for goods sold and delivered by plaintiff's assignor, the Travis Glass Company, a corporation, having its place of business at Clarksburg, W. Va., to the defendant. Said goods were of the value of \$533.44, and comprise two shipments of milk bottles. The answer specifically denies the allegations of the complaint, and sets up a separate defense of novation.

The trial court found that the first shipment of goods was sold and delivered to defendant by plaintiff's assignor, and that defendant agreed to pay the sum of \$293 therefor. The court also found that a novation was not established. Defendant says that the appeal is taken upon the grounds: (1) That there is a total failure of any evidence showing a sale and delivery of the goods; and (2) that there was a novation.

[1] The record shows that at the commencement of the trial it was agreed by the parties, in open court, that the goods were sold to defendant at the price named in the complaint, and delivered—"to somebody," as counsel for defendant naïvely admitted, and "the admission," he says, "covers a delivery to 'somebody' at a place formerly occupied by the defendant." We think the trial court, in view of all the facts and circumstances of the case, was justified in finding that the "somebody" to whom the delivery was made was the defendant.

[2] Upon the question of novation: Novation is the substitution of a new obligation for an existing one. Section 1530, Civ. Code. It is sought to bring this case within paragraph 2 of section 1531, Civil Code, which provides that novation may be made "by the substitution of a new debtor in place of the old one, with intent to release the latter." Novation is made by contract, and is subject to all the rules concerning contracts in general. Section 1532, Civ. Code. An attempt is made to show a novation by the testimony of defendant and other witnesses, which testimony is to the effect that a soliciting agent of plaintiff's assignor agreed to the substitution of a new debtor in place of the old one. There is no showing whatever that the agent had any authority to so bind his principal, nor is there any showing that,

even admitting the testimony of the defense relating to novation as true, the principal ever consented to or ever accepted such substitution.

Judgment affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

(63 Cal. App. 411)

WHITNACK et al. v. ELLWORTHY et al.
(Civ. 2606.)

(District Court of Appeal, Third District, California. Aug. 7, 1923. Hearing Denied by Supreme Court Oct. 4, 1923.)

1. Brokers ⇐8(3), 37—Evidence held to support finding of agency and of agent's secret profits.

Evidence held to show defendant acted as plaintiff's agent in an exchange of property, and secretly profited by procuring plaintiffs to execute a note and mortgage which were without consideration and not a part of the purchase price, but were given to codefendant for the use and benefit of defendant.

2. Brokers ⇐31—Agent bound to inform principal that he was selling his own land, and not that of another.

If defendant was not acting as plaintiff's agent in procuring property from P., but was selling his own property, in effect, his purchase from P., it was defendant's duty to have told plaintiff or the latter's agent that he (defendant) had an interest in the property he was trying to sell plaintiffs, so that they could have been on their guard.

3. Principal and agent ⇐69(2)—Agent owes utmost good faith to principal, and cannot make secret profits.

One who either for compensation or otherwise assumes to act as an agent is bound to the utmost good faith and cannot make any secret profits or take any advantage of his position for his own benefit.

4. Principal and agent ⇐78(1)—Principal may recover secret profits made by agent without rescinding the contract.

A principal may recover the secret profits made by his agent in a transaction without rescinding the contract.

5. Appeal and error ⇐994(2)—Appellate court held powerless to disturb verdict as being without evidence.

Where the testimony of plaintiff's witnesses was not characterized by any inherent infirmity which characterized defendants' testimony, appellate court held powerless to disturb the verdict for plaintiffs as being without evidentiary support.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Suit by William H. Whitnack and another against Winnifred M. Ellworthy and another.

Decree for plaintiffs, and defendants appeal. Affirmed.

E. L. Randall, of Corning, and W. P. Johnson, of Red Bluff, for appellants.

M. J. Cheatham, of Red Bluff, and L. W. Hughes, of Corning, for respondents.

HART, J. The object of this action is to obtain a decree setting aside and canceling a certain promissory note for \$2,500 and the mortgage given to secure the same. Judgment passed for the plaintiffs, and thereafter, within due time, the defendants Ellworthy and Tracy made a motion for a new trial, which was denied. This appeal, supported by a record prepared in conformity with the alternative method, is by the defendants, Ellworthy and Tracy.

[1] In their brief counsel for respondents set forth a correct statement of the general facts of the case, which is herein adopted as follows:

"During the early part of the year 1921, W. F. Whitnack and his two sons, Bill, or W. H. Whitnack, and Guy Whitnack, each owned land in Canada. W. F. Whitnack, the father, came to Corning, Tehama county, Cal., and moved upon a tract of land in May, 1921, which he had purchased. The defendant Omer Tracy, in the summer and fall of 1921, went to Canada, and there became acquainted with the plaintiff, W. H. Whitnack, and during the harvesting season said Tracy assisted in the threshing on W. H. Whitnack's place, during which time defendant Tracy and W. H. Whitnack became very well acquainted with the lands of said W. H. Whitnack and the personal property thereon. During his stay in Canada Tracy frequently talked with the plaintiff relative to trading said plaintiff's property in Canada for Corning, Cal., property, and represented to plaintiff that he was a real estate agent in Corning. On the 19th of October, 1921, when leaving Canada, it was agreed between plaintiff Whitnack and said Omer Tracy that Tracy would look up a trade for Whitnack, and that his father, W. F. Whitnack, being a resident of Corning, would look over any property that Tracy might find for trade, and report. In the latter part of October or early part of November, after Tracy had returned to Corning, he submitted three propositions to W. F. Whitnack, concerning a trade for W. F. Whitnack's Canada lands. The only proposition that appealed to the father was the trade that was consummated, which was the property of an old English couple by the name of Prentice, and known as the Prentice property. In the consummation of the deal a conveyance was executed by George C. Prentice and Sarah Prentice, his wife, conveying their 10-acre tract at Corning to plaintiffs W. H. Whitnack and Emily Whitnack, his wife. A transfer was made by the Whitnacks, under the Canadian law, of their 320 acres near Veteran, Alberta, Canada, to the said Prentices, the Prentices assuming a \$2,500 mortgage on said tract, and the Whitnacks executing a note and mortgage for \$2,500 covering their newly acquired Prentice property at Corning, in favor of Winni-

fred M. Ellworthy, a young lady who was a member of Tracy's family."

To the above statement it should be added that the Prentices, after agreeing to the exchange of their Corning property for the Canada property of the Whitnacks (plaintiffs), executed an agreement of sale of their property to Tracy. This agreement will later be more fully explained herein.

A brief but accurate statement of the case and the issues as made by the pleadings is contained in the opinion filed by the learned trial judge, giving the reasons for the conclusion embodied in the decision of the court, and this statement, which is as follows, we also adopt:

"The complaint alleges that the plaintiff William H. Whitnack, a few days prior to the 18th of November, 1921, employed the defendant Omer Tracy, as his agent, to negotiate the exchange of certain lands the plaintiffs owned in Canada for some lands near the city of Corning; that said Tracy, pursuant to said employment, entered into negotiations with Sarah Prentice and George Prentice for the exchange of their tract of 10 acres of land, situate in the county of Tehama, state of California, near Corning, and describing it; that the said Prentices agreed with the said defendant Tracy to exchange their 10-acre tract of land free and clear of all incumbrance for the tract of land of the plaintiffs, with an existing mortgage against the same for the sum of \$2,500; that the defendant Tracy represented to plaintiffs that said Prentices would not exchange their 10 acres of land unless said plaintiffs would give a mortgage on said 10-acre tract in the sum of \$2,500; that this representation was false and untrue, and said Tracy knew the same to be false and untrue, but, plaintiffs, believing the same to be true, executed a note and mortgage for \$2,500. The plaintiffs allege that the note and mortgage were made to the defendant Winnifred M. Ellworthy. They allege that said note and mortgage were made because of the fraudulent representations of the defendant Tracy while acting as their agent, and were made without consideration.

"The answer denies the agency of the defendant Tracy; denies he represented to plaintiffs that the said Prentices would not exchange their said 10-acre tract of land unless the plaintiffs gave them a mortgage for \$2,500. The defendant Tracy alleges that he had a contract with the Prentices, dated November 22, 1921, by which they had agreed to sell to said Tracy their said land, being the land described in the complaint, and that, after the making of the said contract by the said Prentices to the said Tracy, they made no transfer of said property except in accordance with the directions of said Tracy, under the provisions of their said contract with him."

The complaint, in addition to the facts stated in the above excerpt, alleged that the deed from the Prentices and the note and mortgage from W. F. Whitnack and wife to the defendant Ellworthy were delivered by the defendant Tracy into the custody of one

W. L. Bransford, with instructions to the latter from said Tracy that he (said Bransford) cause the same to be recorded in the office of the county recorder of Tehama county. In his answer to the complaint said Bransford admitted having possession of the several instruments mentioned, that they were given to him with instructions to cause the same to be recorded, and "that he has no further interest in the above-entitled action, and now delivers the said deed and mortgage to the clerk of this court to abide the decision of said court." The findings accord with the claims of the complaint.

The single point urged for a reversal is that the findings are not supported by the evidence. The specific contention of the plaintiffs is that Tracy, in the transactions resulting in the exchange of the properties, acted as an agent of the plaintiffs upon a distinct and definite agreement that for his services in conducting and consummating the deal he was to be given by the plaintiffs a binder and cultivator of the value of \$200; that the mortgage exacted and received by Tracy from plaintiff on the Prentice property was no part of the consideration for which the Prentices agreed to the exchange, but that the procurement of said mortgage and causing the same to be executed in favor of Miss Ellworthy was part of a fraudulent scheme by Tracy to secure a "secret profit" on the deal.

The defendant Tracy contends that, in the several transactions eventuating in the exchange of properties between the Prentices and the plaintiffs, he was not acting as the agent of the latter, but was acting for himself, the property exchanged for that of the plaintiffs having been taken over by him from the Prentices without regard to a sale or exchange of same to or for the property of any particular person. This position is sought to be supported in part by the fact of the making of the agreement whereby, so it is claimed by Tracy, the Prentices sold their property to him.

There is ample testimony to uphold the findings that W. H. Whitnack, while Tracy was in Canada, authorized the latter to act for him in effecting an exchange of his property in Canada for property situated at or near the town of Corning, this state, and that, as commission for Tracy's services for consummating a satisfactory trade, said Whitnack was to give Tracy a binder and cultivator; that, as above stated, said Whitnack instructed Tracy to submit any bargain in the way of a trade he might be able to make to his (said Whitnack's) father and brother, then residents of Corning, and that Tracy replied that he would do so, and have them (father and brother) "look everything over."

As to what occurred after Tracy's return to Corning, in so far as W. F. Whitnack took any part therein, the latter testified that, in

the month of November, 1921, Tracy called on and submitted to him three different propositions for the exchange for his son's property, one being the Prentice tract; that he (the witness) stated to Tracy that he would look at the Prentice place for the purpose of determining whether, in his judgment, it would amount to a satisfactory deal, but that Tracy protested against the witness going to the Prentices at all, saying: "No, don't go about the place. * * * The less said to them (the Prentices) the better. They want to trade, but they are old, childish people, and they believe anything I tell them; and you just stay away, and I will make the deal all right"—that, notwithstanding this protest by Tracy, he (the witness) nevertheless went to the Prentice land and looked it over; that witness then proposed to Tracy to trade his son's Canada land, subject to the mortgage subsisting thereon, for the Prentice place as it then stood, clear of incumbrances, and Tracy said he thought he could make that kind of a deal; that later Tracy said to witness that the Prentices would not trade unless a mortgage were given on the Corning property to offset that on the Canada property; that the trade was finally made on that basis; that a deed and a bill of sale for certain personal property were sent to his son for execution; that he (witness) did not see the mortgage executed on the Prentice property until after the trade was completed; that he supposed the mortgage was given to the Prentices prior to the time his son arrived in Corning.

Mrs. Prentice testified that she did not receive the note and the mortgage executed by W. H. Whitnack and wife on the Prentice property; that she did not know that the Whitnacks were to give a mortgage. "We had nothing to do with the transaction whatever," she continued. "We turned it all over to Mr. Tracy." She said that she was depending upon the contract she and her husband made with Tracy; that she turned everything over to Tracy to do with as he saw fit; that they turned their place over "free of incumbrance and don't expect any incumbrance on the other, either"; that she "expects Miss Ellworthy will pay off the mortgage in Canada; that is the understanding; we fully trust Mr. Tracy. * * * We have known him and always have known him as an honest man."

Tracy testified that he is the owner of two places in Canada in the neighborhood of W. H. Whitnack's property; that the Prentices stated to him that they would like to go with him to Canada "the following summer"; that he then proposed that they sell their Corning property to him and "trade it off for something in Canada"; that the Prentices agreed to this proposition, and thereupon signed the written agreement with Tracy whereby it was "agreed that said parties of the first part (Prentices) have sold to party of second part

what is known as the Prentice Home, * * * Maywood Colony No. 2 (near Corning, Cal.); it is agreed that party of the second part shall trade the property bought from parties of the first part * * * for Canadian property in the neighborhood where party of the second part now owns property." The agreement further provides that, after the first parties have been in Canada and investigated conditions and decided whether or not they wish to live there, they shall then have their choice of taking the Canadian property or a cash consideration in payment of the Corning property. This agreement was dated November 2, 1921. Tracy testified that, after said agreement was made, the father of plaintiff Whitnack approached him on the proposition of securing a trade of his son's Canadian property for property near Corning; that he (Tracy) called W. F. Whitnack's attention to the Prentice property, and, at the request of Tracy, said Whitnack inspected said property; that, after some negotiations, he (Tracy) and said Whitnack agreed upon the trade and definite terms, which were that the Prentices were to take the Canadian property, subject to the mortgage, and that W. H. Whitnack was to take the Prentice property, upon which, however, as an offset to the mortgage on his property, he was to give a mortgage in the sum of \$2,500. After this agreement was made, Tracy prepared a mortgage to be executed by the plaintiffs on the Prentice property, and he testified that, being compelled to go to Sacramento immediately upon completing the preparation of the instrument, he delivered the same to his wife, with instructions that she forward it by mail to the plaintiffs in Canada. The mortgage and the note for \$2,500 which it was given to secure was, as before stated, to Winnifred M. Ellworthy, as mortgagee, and the instrument was dated November 18, 1921.

Tracy testified that, in the agreement with W. F. Whitnack, he (Tracy) reserved the right to have the mortgage on the Prentice property to be taken in the name of any person whom he elected to choose, and who would take it; that after discussing this feature of the transaction in the presence of Miss Ellworthy, the latter stated that she owned certain Canadian securities and some cattle in Canada, and that she would take the mortgage and agree to pay off the Canadian mortgage; that Miss Ellworthy was willing to do this because she could make a good profit on the deal from the difference between the Canadian and American Exchange. This agreement between Tracy and Ellworthy, so the latter testified, was verbally made at the time of the preparation of the mortgage on the Prentice property, but was not reduced to writing until the 24th day of December, 1921, a trifle over a month after the date of the preparation of the mortgage. Miss Ellworthy corroborated the testimony

of Tracy as to conversations leading to her taking of the Prentice mortgage, the making and the writing of the agreement first referred to, and the fact of the preparation of the mortgage.

The foregoing constitutes a synoptical recital of the salient facts brought out at the trial which directly concerned the real bone of contention between the parties. There was introduced in evidence, however, a letter, purporting to have been written to W. H. Whitnack, in Canada, by defendant Tracy, on the 18th day of November, 1921. This letter, as the trial judge suggests in his written opinion filed in this case, is, as will presently be perceived, particularly important in the matter of determining the weight or credit to be attributed to the testimony of the several witnesses who testified to vital facts in the case. The following is the letter:

"Corning, Calif., Nov. 18, 1921.

"Mr. William H. Whitnack, Veteran, Alta.—Dear Sir: George Prentice and his wife Sarah Prentice, have completed their deed to you and wife, also bill of sale, of personal property, of which you will find a list herewith enclosed. There is one item that was overlooked, and that was the chickens, however I will get a separate bill of sale for them.

"I have now in my possession, the transfer and bill of sale, from you to George Prentice, also the warrantee deed, and bill of sale from George Prentice, to you and your wife in my possession.

"I worked hard yesterday all day; one of them bowed up, because your Ford car was not on the bill of sale, it being on the list of the personal property you sent down here, and I gave them a copy of the list and them being English, they could not get the Ford car out of their heads. And I talked this matter over with your Father and Guy and decided I would have the papers made out, and promised them that you would send them a bill of sale of the Ford.

"I will send to Akhurst in Veteran a Note and Mortgage for \$2,500, for two years from August 1st, 1921, at .06 per cent. as soon as I get one and get it filled out. I will have him phone you, as soon as it arrives you and your wife sign it, as boath of your names is on the deed here. Return it and the bill of sale of the Ford to me and I will turn over your deed and bill of sale, from George Prentice and wife, to you and wife. I will turn those papers over to your Father, and the papers you have made out to Prentices, we will have recorded.

"You can also send me a bill of sale of the 'Deering binder' and the cultivator. I guess your father has explained this, take them over to my place, or get Jim to, and you get the McCormic Binder, the canvasses are in the guarage, that belong to it and leave it with your machinery that Prentices get.

"Yours truly, Omer Tracy."

Miss Ellworthy testified that the foregoing letter was dictated to her by W. F. Whitnack, and that she wrote it as it was so dictated,

and then subscribed thereto Tracy's name; that Tracy was not in Corning on the 18th day of November, 1921, but that, as before stated, he left on the night of the 17th of November, 1921, after preparing the deed to be executed by the plaintiffs to their Canada property, for Sacramento, and was absent from his home for three days; that Tracy, upon returning to Corning and learning that the letter had been written and his name signed thereto, became very angry and reprimanded the witness for signing his name to the letter without his authority. Tracy positively declared that he did not write the letter, nor authorize any one to write or sign his name thereto.

W. F. Whitnack, called in rebuttal, testified that he was at Tracy's house in the forenoon of the 18th day of November, 1921, and met Tracy there; that he also met him on the afternoon of the 18th when he (Tracy) called at the house of the witness; that he (witness) did not write or dictate the above letter, and that he knew nothing about the letter.

Mrs. W. F. Whitnack, wife of the last-named witness, and mother of W. H. Whitnack, testified that she saw Tracy at her home at Corning on the afternoon of the 18th day of November, 1921.

The learned trial judge, in his written opinion herein filed, scrutinizingly examines the contents of said letter, and points out certain statements therein relative to subjects with which W. F. Whitnack could not have been familiar without receiving information thereof from some other person—for instance, matters of which knowledge could not have been obtained except through some one who was in Canada, or had recently been there. Moreover, the learned judge made careful comparison of the handwriting characterizing the above letter with the admitted handwriting of Tracy as the same was exhibited by other letters introduced in evidence, and concluded that the handwriting of the letter in question and Tracy's signature thereto were precisely the same as the handwriting of and his signature to the other letters, admitted to have been written by him. Judge Ellison, in his written opinion, thus sums up his views as to the testimony upon the question of the authorship of said letter, and, furthermore, satisfactorily considers, discusses, and disposes of the whole case as follows, and we adopt the same as a part of this opinion:

"Exhibit 3 (the letter in question), in and of itself, does not seem to be a very important document in the case, but it becomes immensely important as bearing upon the weight to be given to the testimony of the two defendants. Their denial of the authorship of this letter and their testimony that it was dictated by Mr. W. F. Whitnack make it the duty of the court to

view the case they have attempted to present in court with the greatest suspicion and distrust, and to very largely discount their testimony on other matters.

"Viewing the testimony in the case in the light of these preliminary observations, the court is of the opinion that the allegations of the complaint are true; that the testimony of the plaintiffs witnesses to the effect that the defendant Tracy, while in Canada last October, offered and agreed to make a trade for the plaintiff Wm. H. Whitnack of his Canada property for property near Corning is true; that the evidence is equally true that, while occupying such fiduciary relation, the defendant Tracy is attempting to confer upon himself a secret profit to the extent of the note and mortgage in the sum of \$2,500; and that he could have obtained the Corning property for the plaintiffs without a mortgage on it is demonstrated in many ways from the testimony. His first statement to the father of the plaintiff W. H. Whitnack was that he could make such a trade, and his subsequent conduct in the manipulation of documentary evidence shows that, so far as the Prentices are concerned, such trade was made. It does not appear that the Prentices ever requested the giving back of a mortgage on the Corning property, or that they knew anything about there being a mortgage outstanding, until this controversy arose. If it were true that the \$2,500 was to be given to the Prentices as a part of the trade, it is inconceivable that the mortgage and note were not made payable to them, instead of to the defendant Ellworthy. The evidence shows that the defendant Ellworthy is a young woman who has lived in the family of the defendant Tracy for many years, and is a member of his household, and the evidence is equally clear that she is simply acting as a depository of the note and mortgage for the benefit of the defendant Tracy. The pretense—and it is only a pretense—that they intend to use the money obtained from this mortgage to pay off the mortgage on the Canadian property does not impress the court. The Prentices have no written agreement of any kind or description with either of the defendants binding themselves to use this money for their benefit, and the only document is the document executed between the two defendants containing a statement of what they propose to do with the money—a document apparently unknown to the Prentices, or anybody else, until the time this controversy arose, and a document which they can destroy at any time that suits their convenience.

"The note and mortgage of \$2,500 were taken for the benefit of the defendant Tracy as his secret profits to be made on the transaction. A judgment canceling the note and mortgage will not in any way injure the defendant Ellworthy, because from her own testimony she has never invested a dollar in it, in money or property. Nor will it be injurious to the Prentices, who are not parties to the suit. They have a written contract with the defendant Tracy that, when they examine the Canada property, if it does not suit them, they are under no obligations to take it, but he is to find them another property, or pay them the cash value of the Corning property. Perhaps when they see it,

with a \$2,500 mortgage on it, they will exercise their option and decline to accept it, and demand the money, or other property, from the defendant Tracy. They have thus far been willing to trust him, and the court is justified in leaving them rely on the contract they have voluntarily made with the defendant Tracy.

[2] "If the defendant Tracy takes the position that he was not acting as the agent of the plaintiffs, but was selling to them his own property, or property which was in effect his by purchase or contract from the Prentices, then he is in no better position, because it would have been his duty in that event to have told the plaintiff, or his father, frankly that he was not negotiating for a piece of land belonging to some one else, but that he had an interest in the property he was trying to sell the plaintiffs, and they would have been on their guard and would have had to exercise their own judgment as to the value of the property and the fairness of the contracts to be entered into. The Whitnacks both testify that never at any time did he tell them he owned or had an interest in the Prentice property, and I accept their statements as true.

[3, 4] "The law is well settled that one who, either for compensation, or otherwise, assumes to act as an agent for another is bound to the utmost good faith, and cannot make any secret profits or take any advantage of his position as such agent for his own benefit. See *Kevane v. Miller*, 4 Cal. App. 598, 88 Pac. 643; *Ritchey v. McMichael*, 4 Cal. Unrep. Cas. 384, 35 Pac. 151. This last case also shows that a plaintiff can recover the secret profits being made by a defendant without rescinding the contract. In this case it is said: 'The relation of vendor and vendee never existed between them, nor was there ever any contract between them which required a rescission. The defendant could not, * * * so long as he held the relation of agent to the plaintiff for the purchase of these lands * * * acquire any interest therein which he could hold as against his principals, or of which he could become the vendor.'

"In the case of *Laurence v. Kilgore*, 154 Cal. page 310, 97 Pac. 760, it is said: 'Where an agent buys land for his principal and fraudulently represents to him that the purchase price was an amount in excess of the sum actually paid by the agent, an action by the principal against the agent to recover the portion of such excess as was paid to him in money and to cancel a note given for the balance is not one for the rescission of the contract of purchase, and the principal as a condition precedent to maintaining the action is not required to return the land.'

"The further claim is made that W. F. Whitnack, the father of the plaintiff, acted as his agent, and that whatever he did is binding upon the plaintiffs. His father never accepted employment to negotiate a trade of his property. The doing of that work had been placed in the hands of the defendant Tracy. The plaintiffs were not in California to examine any property that was offered to them by the defendant Tracy as their agent, and to determine from an inspection of it whether it was worth the price that was asked. His father was here,

and he was his agent to the extent of either approving or disapproving any transfer that might be suggested by the plaintiffs' agent, Mr. Tracy. The plaintiffs' right to recover is not defeated by the fact that the plaintiff (W. H. Whitnack) or his father acting for him agreed to give the mortgage for \$2,500 on the Corning property. His right of action is based upon the proposition that the note and mortgage were not given to the Prentices as a part of the purchase price of the property, but, unbeknown to either the plaintiff or his father, was given to the defendant Ellworthy for the use and benefit of the defendant Tracy in the action.

"The further allegation of the complaint that the note and mortgage were given without consideration is also sustained by the evidence. The Prentices did not require such note and mortgage, knew nothing about it, they were not made in their name, and so far they have received no benefit from them, and, if they remain uncanceled, there is nothing to show that they ever will receive any part or parcel of the money represented by the note and mortgage."

[5] It may be suggested that, had the judgment gone the other way, upon the record as it stands—that is, if the defendants had been victorious in the controversy—this or any appeal court by which the case might have been properly considered would be in no better position to reverse the judgment upon the ground that the findings were unsupported than we are here. But the question of the credibility of witnesses or the weight or probative value of their testimony is, as is well known, peculiarly one for solution by the trial court or jury, according to the mode of trial. In this case, the judge had the witnesses before him, and thus had an opportunity, not available to courts of review, to observe the manner in which they gave their testimony and so determine whether their stories on the witness stand were true or false. From the judge's written opinion, as also from the court's findings, we are authorized to presume that the testimony of Tracy and Ellworthy was rejected by the trial court as unworthy of belief, while that presented by plaintiffs was accepted as involving a truthful statement of the transaction. There is no inherent infirmity in the stories told by the witnesses for the plaintiffs, while, on the other hand, the trial court, in the performance of a function which is, with manifest wisdom, committed to it, has found that a very serious infirmity characterized the testimony of the defendants—that is, that it was and is untruthful. In such a situation a court of review has no legal right to interfere with the trial court's decision upon the ground that it is without evidentiary support.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

63 Cal. App. 474

In re SMITH'S ESTATE.

PIMENTAL et al. v. JAMES A. CLAYTON & CO. et al.

(Civ. 4608.)

(District Court of Appeal, First District, Division 2, California. Aug. 17, 1923.)

Appeal and error — 69(3)—Order for payment of broker's commission in partition not appealable.

An order of the court directing the payment of commissions to a broker for securing a purchaser of property sold under partition proceedings is not appealable, as it does not fall under Code Civ. Proc. § 963, subd. 3, permitting appeals from orders directing the distribution or partition of an estate, and is not otherwise specified by statute as appealable.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Antone F. Smith, also known as Antone Smith, deceased. From an order directing payment of a broker's commission to James A. Clayton & Co., Manuel Pimental and others appeal. Appeal dismissed.

Owen D. Richardson, of San Jose, or appellants.

Louis Oneal and Wm. F. James, both of San Jose, for respondents.

NOURSE, J. This is an appeal from an order directing the payment out of the funds of the estate of a commission to a real estate broker engaged by a commissioner on partition of real and personal property of the estate. A sale for the purpose of partition was ordered by the court in due form, and, acting under a special order of the court, the commissioner engaged the real estate broker to find a purchaser for the property. Through the aid of this broker the commissioner offered for confirmation a sale of the property for \$70,000, but at the time of the hearing certain heirs of the estate procured a bid of \$77,000 and this offer was confirmed by the court. The matter of the payment of the broker's commission was continued for hearing to a day subsequent to the order of confirmation, and in a special order, made September 24, 1921, the court directed the payment of \$3,500 to the broker. It is from this order that the appeal is taken.

Respondent insists that the order is not appealable. The question seems to have been settled by the order of the Supreme Court in denying a rehearing in Estate of Seng, 52 Cal. App. 149, 152, 198 Pac. 809, 810. In that case the appeal was from a similar order which we are informed is peculiar to the superior court of Santa Clara county, and which as here, bestowed a bounty upon a real estate broker who procured an unsuccessful

bidder. The appeal was taken by the broker who procured the successful bidder complaining of the award made to the broker who was unsuccessful. The appellate court of the first division of this district dismissed the appeal on the ground that the appellant was not aggrieved by the allowance made to the other broker.

In denying a transfer to the Supreme Court the latter court said:

"We are satisfied that the order appealed from is not an appealable order. In probate proceedings appeals lie only as prescribed by our statutes, and an order of the character here involved is not among those specified as appealable. The appeal, therefore, was properly dismissed by the district court of appeal. Our denial of the petition is, of course, not to be taken as indicating any view on our part as to the correctness of the practice of the trial court in the matter of the fixing and apportionment of commissions of real estate agents under section 1559 of the Code of Civil Procedure, or as to the allowance thereunder of a commission to an agent on account of a purchaser to whom the sale is not confirmed."

Appellants insist that their appeal differs from the Seng Case, because the order here under consideration is in effect an order "directing the distribution or partition" of a part of the estate within the meaning of section 963, subdivision 3, Code of Civil Procedure, designating the orders in probate from which an appeal may be taken. We are satisfied that these words are used in the section in their ordinary sense, referring to distribution or partition to the heirs and those entitled to share in the estate, and that they do not refer to the payment of claims or charges against the estate for services rendered in the course of probate.

Appeal dismissed.

We concur: LANGDON, P. J.; STURTEVANT, J.

(63 Cal. App. 388)

NORTON v. OVERHOLTZER et al.
(Civ. 4060.)

(District Court of Appeal, Second District, Division 2, California. Aug. 4, 1923.)

1. **Frauds, statute of** §116(3)—Owner's authorization, giving agent exclusive agency, held not to authorize agent to sign contract in owner's name.

Though an owner's authorization to her agent, reading, "We hereby give to D. the sole agency for the property, * * * to be sold for not less than \$2,800," might be sufficient to constitute D. sole agent to negotiate a sale, it was not sufficient to authorize him to sign contract in the principal's name, which authorization, under Civ. Code, § 1624, must be in writing.

2. **Brokers** §103—Purchaser's contract with vendor's agent held not binding on vendor, where it was subject to vendor's approval.

Where an agent's contract of sale of principal's property with defendant purchasers, provided that defendants' deposit was to be returned in event contract was not approved by principal, agreement was not binding on principal, unless she approved contract, or ratified it, or was estopped from denying its validity.

3. **Frauds, statute of** §116(10)—Ratification of authority to sell principal's land required to be in writing.

Since authority to sign a contract of sale in name of principal must, under Civ. Code, § 1624, be in writing, ratification must also be in writing, under section 2310.

4. **Frauds, statute of** §116(10)—Agent's letters to principal held not to give notice to her that agent had contracted in her name.

Agent's letter to owner in regard to acceptance of payments from prospective buyer held not to disclose that he had made a written contract of sale in the owner's name, or had done anything except to negotiate with a prospective buyer.

5. **Estoppel** §54—Not invoked against party without knowledge of facts on which estoppel is predicated.

One is not estopped when the facts on which estoppel is sought to be predicated are not known, since no one is presumed to have waived that the existence of which he has not known.

6. **Frauds, statute of** §116(10)—Principal, receiving collections from agent under unauthorized contract of sale, not estopped to assert invalidity of contract.

Where plaintiff principal did not know that sums of money collected by her agent represented collections from defendants under their contract of sale of property with agent in plaintiff's name, plaintiff was not estopped to deny the agent's authority to sign the contract in her name, where on discovery of the facts she immediately repudiated the contract and revoked the agency.

7. **Brokers** §100—Principal bound only by acts within agent's scope of authority.

Where defendant purchasers knew that broker acted as plaintiff's agent, it was incumbent on them to ascertain the scope of his authority; Civ. Code, §§ 2316, 2317, 2330, not applying.

8. **Brokers** §94—Contract of sale requiring vendor's approval held not to create rights in prospective vendees until contract approved by vendor.

No rights in favor of defendant prospective purchasers could be predicated on an agent's contract of sale of owner's land until the owner approved it, where the contract provided that the deposit with the agent by defendants was to be returned to the latter if the owner would not approve of the sale.

9. **Landlord and tenant** §118(1, 3)—Entry under void contract creates tenancy at will, but entry without consent does not.

One who enters on land with the owner's permission under a void contract is a tenant

at will, so as to be entitled to one month's notice in writing, under Civ. Code, § 789; but that rule does not apply where the possession is obtained without the permission of the owner.

10. Landlord and tenant § 118(1)—Prospective purchasers, taking possession under contract of sale with agent, held not "tenants at will."

Where defendants entered into possession of plaintiff's property under an unauthorized contract of sale with plaintiff's agent and without plaintiff's consent, *held*, that defendants were not "tenants at will," within Civ. Code, § 789.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tenant at Will.]

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Maisie R. Norton against J. M. Overholtzer and another. Judgment for plaintiff, and defendants appeal. Affirmed.

M. B. Butler, of Pasadena, for appellants.

R. W. Clapp, of Los Angeles, for respondent.

SHENK, Justice pro tem. This is an action in ejectment. Judgment was rendered in favor of the plaintiff for restitution of the premises and for the value of the use and occupation thereof. Defendants have appealed.

The plaintiff is the owner of a parcel of real estate and the improvements thereon situated in the city of Pasadena. The complaint is in the usual form. In their answer the defendants assert a right of possession under an alleged contract of purchase and sale the terms of which will be hereinafter noted. On the 17th day of July, 1919, the plaintiff executed and delivered to M. W. Davis the following written authorization:

"We hereby give to M. W. Davis the sole agency for the property known as No. 150 South Bonnie avenue, Pasadena, Cal., to be sold for not less than \$2,800, \$500 or more cash, balance \$25 or more per month until \$1,800 has been paid on account of principal and 7 per cent. interest. Buyer to secure \$1,000 loan and give to seller trust deed paid on monthly installments as above stated. M. W. Davis is to look after the rentals and collections, and turn same over to G. Grant Stewart until his interests are satisfied or said agency of said M. W. Davis is revoked. [Signed] Maisie R. Norton."

On the 19th day of September, 1919, M. W. Davis, assuming to act as the agent of the plaintiff, signed and delivered to defendants an instrument in writing as follows:

"Agreement of Sale and Purchase. Office of M. W. Davis, Pasadena, Cal., September 19, 1919. Maisie R. Norton, her individual property as seller, agrees to sell to J. M. Overholtzer and M. Catherine Overholtzer, his wife, as

buyers, and said buyers agreed to buy from seller, that parcel of realty, with improvements, being in the city of Pasadena, Los Angeles county, California, described as property known as 150 South Bonnie avenue, Pasadena, California, on the following terms: Buying and selling price to be \$2,800, of which buyer has paid \$25, receipt of which is acknowledged as deposit to M. W. Davis, agent for seller; balance of \$2,775 buyer agrees to pay as follows: \$25 or more on the 19th days of October, 1919, November and December, and January, 1920, at which time buyer is to pay \$1,000 cash on account of principal, unless he desires to surrender this contract and vacate the premises, in which case said monthly payments already made are to be considered as rent money only. In case said \$1,000 is paid as per above, then buyer is to continue said monthly payments of \$25 or more per month until he has paid on account of principal the sum of \$1,800, at which time the property will be deeded to said buyer and a trust deed given to seller for remaining \$1,000, payable in monthly installments as above stated; said monthly payments include interest at rate of 7 per cent. per annum, to be computed monthly, at which time a new principal will be formed. Taxes for fiscal year 1919-20 to be paid half and half by buyer and seller in case buyer makes his \$1,000 as above stated, but if he surrenders contract these payments will apply as rent only and no taxes will be paid by buyer. * * * Seller agrees to pay M. W. Davis the agent's regular commission. * * * If title proves defective, or in case this contract is not approved by the seller, said deposit to be returned. [Signed] J. M. Overholtzer, M. Catherine Overholtzer, Buyer. Maisie R. Norton, per M. W. Davis, Agent Seller."

Pursuant to the foregoing contract the defendants paid to Davis the sum of \$25 on the date of its execution, went into possession, and paid \$25 on the 19th days of October, November, and December, and on January 16, 1920, paid to Davis the sum of \$1,000, which was the amount due on January 19th, in the event the defendants did not desire to surrender the contract and vacate the premises. The trial court decided that the contract of September 19th was not binding on the respondent for the reason that it was not within the scope of the written authority of Davis. Appellants contend that this determination was error. An examination of the documents discloses that there is a wide variance in their terms. The authorization is specific. Assuming that by its terms Davis was vested with power to enter into a contract with a purchaser, such authority was limited to a price of \$2,800 on terms of \$500 or more cash and \$25 or more per month until \$1,800 had been paid on the principal. The agreement signed by Davis provided for a cash deposit of \$25 and a further payment of \$25 or more on the 19th days of October, November, and December, 1919, and January, 1920, "at which time [without doubt meaning January 19, 1920] buyer is to pay \$1,000

cash on account of principal, unless he desires to surrender this contract and vacate the premises, in which case said monthly payments already made are to be considered as rent money only." There is nothing in the contract binding the defendants to pay the purchase price unless at their option they elected to make the payment of \$1,000 on January 19, 1920. As the purchasers were not bound to make any but the \$25 payments prior to January 19th, the agreement amounted to no more than an optional arrangement whereby the defendants could surrender the possession at any time prior to January 19th and be under no further obligation to the seller.

[1] But from the language of the authorization it cannot be concluded that Davis had authority to sign a contract of sale in the name of his principal. An agent's authority to sell real estate must be in writing. Civ. Code, § 1624. In the case of *Stemler v. Bass*, 153 Cal. 794, 96 Pac. 811, it is said:

"The ordinary authority of a real estate agent deputed to sell real estate is simply to find a purchaser, and he has no power to bind his principal by a contract of sale unless it appears that it was intended to confer such additional authority [citing cases]. Whether or not it was intended to confer such additional authority is to be determined from the language used regarded in the light of the surrounding circumstances."

The appellants rely on the case of *Bacon v. Davis*, 9 Cal. App. 83, 98 Pac. 71. In that case the plaintiff had executed a written contract in which he stated:

"I hereby authorize said Laymance Real Estate Company exclusive right to sell for me, in my name."

The property was described and the terms of sale specifically stated. The real estate company obtained a purchaser and executed a contract of sale in the name of the principal, in accordance with the terms of the authorization. The plaintiff repudiated the contract and sought to avoid responsibility under it. After an extensive review of the authorities in this and in other states, it was held that the language of the authorization imputed a clear intent to vest in the real estate company a right to execute a binding contract of sale in the name of the principal and that the contract so signed was within the scope of the agent's authority. We find in the writing of July 17th no authorization from respondent "to sell" the property "for her," or "in her name," nor any language which would impute an intention to confer upon Davis the right to sell "for her," in addition to his appointment as sole agent. The only language upon which the contention of such additional authority is based is as follows:

"We hereby give to M. W. Davis the sole agency for the property * * * to be sold for not less than \$2,800."

That language may be sufficient to constitute Davis the sole agent of the respondent to negotiate a sale, but it falls far short of being sufficient to confer upon him the additional authority to sign a contract for her in her name. The contract of September 19th was therefore signed by Davis wholly without authority. See *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758, and *Duffy v. Hobson*, 40 Cal. 244, 6 Am. Rep. 617.

[2] It should be noted that the agreement provides that "in case the contract is not approved by the seller said deposit is to be returned." Therefore, unless the plaintiff approved the contract, or ratified it, or is estopped from denying its validity, the agreement was not binding on her. *Stemler v. Bass*, supra.

[3] It is not contended by the appellants that the respondent at any time formally approved the contract, but it is insisted that she ratified the same. But when the authorization must be in writing the ratification must also be in writing. Civ. Code, § 2310; *Blood v. La Serena L. & W. Co.*, 113 Cal. 227, 41 Pac. 1017, 45 Pac. 252. The evidence discloses no such writing.

[4] It is contended that the respondent is estopped from claiming that the contract of September 19th is not binding on her. The court found that respondent knew nothing of the contract until the 6th day of January, 1920. It is insisted that this finding is not supported by the evidence, and the argument is based on correspondence between respondent and Davis prior to January 6th. This correspondence has been examined, but in none of the letters from Davis to respondent was it disclosed that an agreement for the sale of the property had been executed, and in none of the letters from the respondent to Davis was there an intimation that the former knew that such a contract existed. This was the situation even until January 13th. The contract was executed on September 19th. On the 29th of the same month Davis stated in a letter to the respondent: "Have a prospect for sale." On November 20th he wrote the respondent concerning a certificate of title and, among other things, said:

"I do not think that there is any doubt that the property is sold under contract, \$1,000 of which will be due, if my memory serves, early in January. I had accepted \$25 a month from the prospective buyer until that payment could be paid at the date above referred to."

The respondent testified that she did not receive the letter of November 20th. But, assuming that she did receive it, there was nothing in it to indicate that Davis had entered into a written contract in her name, or had done anything except to negotiate with a

prospective buyer, with bright prospects for closing the deal. On January 5th he wrote concerning a fire which had partially destroyed the dwelling house on December 20th, in which letter he referred to the property in question and stated:

"I am expecting the man who has been in there since October or November as a prospective purchaser to buy the house. There is \$1,000 due on the place from him, and which was due January 1st, but owing to the fire he has been out of the city, and I have been unable to talk to him. * * * The tenant was taking a bath, and left the heater going full blast, and think the fire took place in the heater."

The letters from Davis to respondent negative the idea that he himself believed that a binding contract of purchase and sale had been entered into. If, however, he did believe that such a contract had been entered into, his letters were so worded as to lead the respondent to believe that the sale was only in contemplation, and that a tenant was occupying the premises who was a prospective purchaser. We find nothing in the correspondence which could be said to communicate to the respondent the fact that Davis had entered into a written contract in her name, and the finding is supported by the evidence. Indeed, the evidence shows that the respondent did not know of the contract until January 13th, when she first saw it in Mr. Davis' office.

[5, 6] It is further claimed that the respondent is estopped for the reason that she authorized Davis to make collections for her and that he took the original deposit and received subsequent payments under the contract. But the evidence shows that respondent did not know that these sums of money had been received by Davis until January 13th, when she immediately refused to approve the contract, repudiated it and revoked the agency of Davis to further act for her. "There can be no estoppel where the facts are not known, as no one can be presumed to have waived that the existence of which he has not known." *Wheaton v. Insurance Co.*, 76 Cal. 429, 18 Pac. 758, 9 Am. St. Rep. 216; *Puterbaugh v. Wadham*, 162 Cal. 618, 123 Pac. 804.

[7] The appellants contend that by the authorization given to Davis he was the ostensible agent of the respondent in the transaction, and sections 2316, 2317, and 2330 of the Civil Code are referred to in support of the contention. But no such question is involved here. It was in evidence without contradiction that when the contract of September 19th was signed Mr. Davis disclosed to the appellants that he was acting for respondent as her agent and had authority to sign for her, and that no request was made by the appellants to ascertain the scope of his authority or to exhibit

to them his written authorization. Under such circumstances Davis could bind his principal only when acting within the scope of his authority, and it was incumbent upon appellants to ascertain the scope of that authority. *Mudgett v. Day*, 12 Cal. 139; *Davis v. Trachsler*, 3 Cal. App. 559, 86 Pac. 610.

[8] The contention is made that as no notice of revocation or repudiation of the contract was communicated to Mrs. Overholtzer the contract is still an obligation in her favor and binding on the respondent. But as we construe the contract the rights of the appellants are limited by its terms. It provides that "in case this contract is not approved by the seller, such deposit is to be returned." The natural effect of this provision was that, unless the respondent approved the contract, no rights could be predicated upon it.

[9, 10] Since the contract was not approved by respondent, was not ratified by her, and she was not estopped to deny its binding effect upon her, what was the nature of the possession of appellants? It is their contention that, assuming the contract of September 19th to be void, they were tenants at will and subject to dispossession only after one month's notice in writing, as provided in section 789 of the Civil Code. They rely upon the case of *Hall v. Wallace*, 88 Cal. 434, 26 Pac. 360, wherein it is said:

"We think the entry and holding of the defendant under a void agreement constituted him a tenant at will."

It is well settled that one who enters upon land with the permission of the owner under a void contract is a tenant at will. *Carteri v. Roberts*, 140 Cal. 164, 73 Pac. 818; 24 Cyc. 1036 et seq.; 16 R. C. L. § 91. But the rule does not apply where the possession is obtained without the permission of the owner. *Jones on Landlord & Tenant*, 981; *Yellow Jacket M. Co. v. Stevenson*, 5 Nev. 224. The broad statement in *Hall v. Wallace*, above quoted, and relied upon by appellants, obviously was not intended by the court to classify every one who takes possession under a void contract as a tenant at will, in the absence of any permission or authority from the owner, but was intended to declare that the defendant, under the circumstances shown in that case, was a tenant at will. The record in that case has been examined. It was alleged in the complaint that the plaintiffs, Hall and Carpenter, entered into an agreement with the defendant under which the latter went into and retained possession at the will of the plaintiffs. The defendant in his answer set up an oral agreement of purchase, with one John Watson as agent of the owner. There was evidence which would justify the jury in finding that Watson was a part owner of the property. The court instructed the jury that, if they

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found from the evidence that the defendant went into possession under permission from the plaintiffs on an invalid contract of purchase, then the defendant was a tenant at will, and the jury so found. In the light of the allegations of the complaint, the evidence, and the instruction, the statement of the Supreme Court, above quoted, is in harmony with the general rule.

We think that the possession of the appellants was not with the permission or under the authority of the respondent, and that the asserted possession under the contract in question was unwarranted. It follows that the written notice required by section 789 of the Civil Code was not necessary. No other points require discussion.

Judgment affirmed.

PER

We concur: FINLAYSON, P. J.; CRAIG, J.

191 Cal. 746

KAFKA et al. v. BOZIO. (S. F. 10235.)(Supreme Court of California. Sept. 7, 1923.
Rehearing Denied Oct. 4, 1923.)**1. Adjoining landowners §9(1)—Contributory negligence not defense to action for abatement of nuisance.**

Where plaintiff placed the superadded weight of his building upon a wall built by defendant on his premises, but which had moved onto plaintiff's premises, thereby causing defendant's building to tip and overhang upon plaintiff's premises, the contributory negligence of plaintiff in so doing is irrelevant in an action for abatement of the nuisance, when the question of damages is waived.

2. Abandonment §7—Wall moving on adjoining premises abandoned by owner held portion of adjoining premises.

A portion of defendant's wall, which moved on plaintiff's premises and has been abandoned by defendant, constitutes a portion of plaintiff's premises.

3. Adverse possession §37—Building overhanging in the air adjoining premises not interruption of possession of adjoining owner.

Encroachment of defendant's building into the air space over plaintiff's premises is not an interruption of possession, within Code Civ. Proc. §§ 318, 319, 320.

4. Limitation of actions §55(6)—Continuing nuisance not barred by limitation so long as it continues.

As respects a suit in equity under Code Civ. Proc. § 731, praying the removal of defendant's building encroaching upon the space above plaintiff's land, the encroachment is regarded as a continuing nuisance, for the abatement of which the limitation does not begin to run from the date of original entry.

5. Adjoining landowners §9(1)—Encroachment of leaning building on space above adjoining land a nuisance, not trespass.

Where defendant's building encroaches on the space above plaintiff's land, and not on the land, the wrong is not a trespass, but a nuisance.

6. Limitation of actions §55(6)—Statute in case of permanent trespass runs from date of original entry.

The statute of limitations in case of a permanent trespass runs from the time of the original entry.

7. Adjoining landowners §9(2)—Presumption is that unintentional encroachment is a nuisance, not permanent trespass.

Where a wrong consists of an unintentional encroachment which is abatable, the presumption is that it is not a permanent but a continuing trespass or nuisance; the theory being that the law will not presume the continuance of wrongdoing.

8. Judgment §606—Continuing nuisance gives rise to successive causes of action.

The continuance of a nuisance or continuing trespass amounts to a new nuisance, and

gives rise to successive causes of action for damages until abated.

9. Nuisance §1—"Continuing nuisance" defined.

Nuisances may be deemed continuing when they are of such a character that they may continue indefinitely or may be discontinued at any time.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Continuing Nuisance.]

10. Trial §404(1)—Finding held in nature of negative pregnant.

The finding "that it is not true that by reason of the negligent or imperfect construction of defendant's building the south wall thereof daily or continually encroaches" on plaintiff's land, held a finding in the nature of a negative pregnant, and not a finding that defendant's building has not encroached on plaintiff's land.

11. Nuisance §33—Burden of proving prescriptive right to encroach on premises by overhanging wall is on defendant.

In action to abate the encroachment of defendant's building on plaintiff's premises, the burden was on the defendant to prove facts supporting the defense of a right of prescription to overhang them.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Action by Simon Kafka and another against Orlando Bozio. From a judgment in favor of defendant, plaintiffs appeal. Reversed and remanded.

Henry B. Lister, of San Francisco, for appellants.

F. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for respondent.

MYERS, J. Plaintiffs appeal herein from a judgment in favor of the defendant in an action to abate a nuisance, and for damages. Upon this appeal appellants waive all claims for damages, and ask that the action be regarded as solely one for the abatement of a nuisance. Plaintiffs and defendant are owners of adjoining lots in the city of San Francisco, the south line of defendant's lot forming a portion of the north line of plaintiffs' lot. Prior to the earthquake and fire of 1906 defendant had erected a five-story building upon his lot upon what is known as a scow foundation, consisting of a scow or raft constructed of heavy timbers and concrete, covering the entire lot, around the borders of which was constructed a concrete wall 17 inches thick, which served as the foundation wall of the building. The building was destroyed by the fire of 1906, leaving the scow and the concrete foundation walls intact. It was then discovered that the entire scow had

moved in a southerly direction so that it and defendant's south wall projected into plaintiff's premises a distance varying from 10 to 14 inches. Plaintiffs then demanded that defendant remove the wall from plaintiffs' premises, and defendant refused, saying that plaintiffs could have it, that he figured that it was more economical than to tear it out. In 1908 defendant proceeded to erect a new building upon his original foundation. The new building of four stories was erected entirely within the boundaries of his own lot, and to do this defendant constructed an additional wall along the north side of the original south wall, which was sealed to the original wall, making the same 25 inches in thickness, which was, roughly speaking, half on plaintiffs' lot and half upon defendant's. Shortly thereafter plaintiffs erected a four-story building upon their lot, which was erected mainly upon a pile foundation, but in part upon walls resting upon the original soil, and where it adjoined defendant's lot was rested upon that portion of defendant's original wall which had encroached upon plaintiffs' premises. As originally constructed both buildings were straight and plumb and within the lines of the respective lots. The northerly portion of the scow foundation upon which defendant's building was constructed rested upon solid ground, but the southerly portion thereof was upon soft filled ground where there had formerly been a creek bed. As the two buildings were originally constructed there was a space of about two inches between them. In December, 1914, it was discovered that the wall along the boundary line between the two lots had sunk, with a resultant tipping of defendant's building toward the south, so that the upper portions thereof encroached about two inches upon plaintiffs' lot, pressing against their building, warping and distorting same, so that plate glass windows therein were broken, plaster was cracked, doors and windows jammed, plumbing connections leaked, etc. Plaintiffs called the situation to defendant's attention at that time, but nothing was done about it. The sinking of the foundation wall has continued, and the encroachment of defendant's building upon plaintiffs' lot has progressively increased, since that time, although the added encroachment during the past three or four years has been but a fraction of an inch. Plaintiffs, being desirous of straightening and repairing their building, and unable to do so under existing conditions, demanded of defendant that he straighten his own building, and abate the nuisance caused by its overhanging, and upon defendant's refusal brought this action.

[1, 2] The theory upon which the trial court rendered judgment for the defendant appears to have been that the sinking of the foundation wall and the resultant encroachment of defendant's building upon plaintiffs' premises were caused, or at least contributed to, by

the act of the plaintiffs in placing the added weight of a portion of their own building upon that portion of the wall which was within their lot, and that because of this circumstance they should be debarred of recovery. Plaintiffs, in their complaint, alleged that the encroachment of defendant's building was due to the negligent manner in which it had been constructed, to which defendant in his answer replied, in effect, that it was due to the negligence of the plaintiffs in superadding the weight of their building to the common wall. The parties thus confused the issues herein by importing into the case questions of negligence and contributory negligence, which are wholly irrelevant to the action, in so far as it seeks an abatement of the nuisance. There may be cases wherein the question whether the maintenance of a given condition amounts to a nuisance depends upon whether or not it is due to negligence, but the maintenance by an owner of a building which overhangs the premises of another is a violation of the latter's rights which amounts in law to a nuisance, regardless of whether or not it is due to any negligent act or omission. *Meyer v. Metzler*, 51 Cal. 142; 29 Cyc. 1155; 1 C. J. 1208. The act of the plaintiffs in building upon that portion of the wall which was within their premises does not make the case one for the application of the rule "*volenti non fit injuria*," as applied in the case of *Churchill v. Baumann*, 95 Cal. 541, 30 Pac. 770. That portion of the wall having been expressly abandoned by defendant, thereafter constituted a portion of plaintiffs' premises, and they were well within their rights in making use of it. This consideration is emphasized by the fact, shown in evidence, that the presence of the wall in that location rendered it impossible for plaintiffs to construct a pile foundation under that portion of their building. Under these circumstances plaintiffs cannot be held, by making use of the wall, to have consented that defendant's building should encroach upon their premises, even though such encroachment may have been due in part to their use of the wall. "But when no right has been violated, it cannot by any process of reasoning, be established that there is a legal injury or damage." *Lamb v. Recl. Dist.*, 73 Cal. at page 129, 14 Pac. at page 627 (2 Am. St. Rep. 775), quoting from *Wood on Nuisances*. Plaintiffs' use of the wall under such circumstances was in no sense a legal wrong or a violation of any duty which they owed to defendant and can form no predicate for an estoppel as to them.

We do not mean to be understood as holding that the evidence herein would not justify a conclusion that plaintiffs were negligent in superadding the weight of their own building to the wall under the circumstances in evidence. Neither are we to be understood as deciding that if such negligence on the part of plaintiffs proximately contributed to cause the tipping of defendant's building and the

resultant injuries to plaintiffs' building, it would not be a defense and bar to plaintiffs' action for damages therefor. That question need not be here determined, for the reason that plaintiffs concede upon this appeal the correctness of that portion of the judgment of the court below which denied their claim for damages. But the fact that plaintiffs were guilty of contributory negligence, if it be a fact, could not confer upon defendant a right to the continued maintenance of his own building in such condition that it obstructs and interferes with the free use and enjoyment by plaintiffs of their own property. The trial court found as a fact that the erection of plaintiffs' building upon the common wall "has caused, accelerated and largely contributed to the settlement of said common wall, and the resulting leaning of said buildings toward each other, and is the cause of any damage to plaintiffs' said building. * * *" This finding would seem to be contrary to the evidence, in view of the admitted fact that there is a space of from one and a half to two inches between the top of the wall and the bottom of the mudsills of plaintiffs' building, thus indicating that no portion of plaintiffs' building is at present resting upon the wall, and that the wall has continued to sink since it was entirely relieved from the weight of plaintiffs' building. However, it is not necessary to determine this question as, for the reasons indicated, we deem it immaterial.

[3-6] The plaintiff pleaded, and the trial court found herein, that plaintiffs' cause of action is barred by the provisions of sections 318, 319, 320, 336, subdivision 2, sections 339, 338, subdivision 2, and section 343 of the Code of Civil Procedure. Sections 318, 319, and 320 are inapplicable because the plaintiffs have at all times been seized and in possession of the premises, subject only to the encroachment of defendant's building into the air space above a small portion thereof. This was not legally sufficient to interrupt the continuity of plaintiffs' possession. *Gillespie v. Jones*, 47 Cal. 259, 263, 264. Section 336, subdivision 2, does not apply, because this is in no sense an action for mesne profits. The applicability of section 339 or of either subdivision thereof is not apparent. It is the theory of respondent, presumably adopted by the trial court, that this is an action for trespass upon real property, and therefore governed by section 338, subdivision 2, the limitation being three years. The wrong here complained of was an encroachment, not upon plaintiffs' land, but upon the space above the land, and therefore was not a trespass but a nuisance. The distinction is pointed out in *Wood on Nuisances* (3d Ed.) at page 33.

The action herein is not an action at law to recover damages for a trespass, but a suit in equity to abate a nuisance, and, as originally instituted, incidentally to recover damages therefor. Code Civ. Proc. § 731; Meek

v. De Latour, 2 Cal. App. 261, 263, 83 Pac. 300, and cases cited. Where a trespass consists of a physical entry upon the lands of another and taking possession thereof under such circumstances as to indicate an intention that the trespass shall be permanent, the law may regard the wrong done in such case as complete at the time of the entry, and allow recovery in a single action of all damages resulting therefrom, including prospective as well as past damages. This is particularly true where the entry and taking possession are for a public use, in connection with which the trespasser might have exercised the right of eminent domain, but omitted to do so. *Robinson v. S. C. Ry. Co.*, 129 Cal. 8, 61 Pac. 947; *Williams v. S. P. Co.*, 150 Cal. 624, 89 Pac. 599. In such a case the statute of limitations runs from the time of the original entry. But where the wrong consists of an encroachment which was not wilful, but unintentional, and which is abatable, the law does not presume that such an encroachment will be permanently maintained. The maintenance of such an encroachment is a continuing trespass or nuisance (1 C. J. 1207, 1208; *Langfeldt v. McGrath*, 33 Ill. App. 158; *Milton v. Puffer*, 207 Mass. 416, 93 N. E. 634, 32 L. R. A. [N. S.] 1010, and note), and every continuance thereof amounts to a new nuisance, for which successive actions will lie.

[7-9] The instant case is not governed by the rules quoted in respondent's brief as applicable to a permanent trespass or nuisance, but rather by the following rules from the same authorities which apply to a continuing nuisance:

"The rule in reference to acts amounting to a nuisance is that every continuance is a new nuisance, for which a fresh action will lie. * * *" 2 *Wood on Nuisances* (3d Ed.) p. 1308.

"Nuisances consisting of acts done or particular uses of property may be properly termed continuing when they are of such a character that they may continue indefinitely, or, on the other hand, may be discontinued at any time." 29 Cyc. 1154.

"The general rule is that every continuance of a nuisance is a new nuisance, for which the person injured may bring successive actions for damages until the nuisance is abated. * * * These principles, however, are applicable only to nuisances which are abatable, or productive of temporary injury only, or which may not result in further injury. They are based upon the theory that the law will presume neither the continuance of wrongdoing, nor the infliction of an injury which is contingent." 21 A. & E. Ency. (2d Ed.) 730, 732.

"Where continuing or recurring injury results from a wrongful act or from a condition wrongfully created and maintained, such as a continuing nuisance or trespass, there is not only a cause of action for the original wrong arising when the wrong is committed, but separate and successive causes of actions, for the consequential damages arise as and when such damages are from time to time sustained; and

therefore, so long as the cause of the injury exists, and the damages continue to occur, plaintiff is not barred of a recovery for such damages as have accrued within the statutory period beyond the action, although a cause of action based solely on the original wrong may be barred." 25 Cyc. 1138.

"Successive actions may be brought if the nuisance continues by the continuous fault of the defendant. In the first action the question whether the acts complained of constitute a nuisance or not is to be determined; and where there is no ground for imputing any wanton or intentional wrong, the damages are confined to the actual injury from the nuisance and its continuance to the date of the writ. If it continues afterwards, the damages resulting therefrom can only be recovered by a new suit, and they may be so recovered, for every continuance of the nuisance is a new nuisance." 4 Sutherland on Dam. (4th Ed.) p. 3849.

"In all cases of doubt respecting the permanency of the injury, courts are inclined to favor the right to successive actions. Otherwise the effect would be to give the defendant, because of his wrongful act, the right to continue the wrong; a right equivalent to an easement. A right to land cannot thus be acquired." Id. p. 3854.

"The apparent discrepancy in the American cases on this subject may perhaps be reduced by supposing that where the nuisance consists of a structure of a permanent nature and intended by the defendant to be so, or of a use or invasion of the plaintiff's property, or a deprivation of some benefit appurtenant to it for an indefinitely long period in the future, the injured party has an option to complain of it as a permanent injury and recover damages for the whole time, estimating its duration according to the defendant's purpose in creating or continuing it; or to treat it as a temporary wrong to be compensated for while it continues. * * * Id. 3874.

It is clear that the plaintiff herein has elected to treat the nuisance, not as a permanent injury to be fully compensated in damages, but as a temporary wrong to be abated.

[10] Of course, the statute of limitations could not be a complete bar in any case where the encroachment had progressively increased up to the time of commencing the action. Respondent contends that the trial court found the fact against this contention of plaintiffs. The finding is:

"That it is not true that, *by reason of the negligent or imperfect construction of defendant's building, the south wall thereof* * * * daily or continually further encroaches thereon." (Italics added.)

This finding does not cover the issue. Being limited by the italicized phrase, it is in the nature of a negative pregnant.

[11] Defendant pleaded that he had gained by prescription the right to overhang plaintiffs' premises, and the trial court made no finding thereon. The burden was upon de-

fendant to prove the facts supporting this defense. This action was commenced April 9, 1919, and there is no evidence that any encroachment occurred prior to December, 1914. If an adjoining landowner could successfully set up the defense of the statute of limitations, or of title by prescription, as a complete bar to an action for relief against a constantly increasing encroachment, he might thus eventually gain the whole of his neighbor's premises.

The judgment is reversed, and remanded for a retrial as to the issues involved in the portion of the action which seeks an abatement of the nuisance.

We concur: WILBUR, C. J.; KERRIGAN, J.; SEAWELL, J.; WASTE, J.; LENNON, J.; LAWLOR, J.

192 Cal. 71

TAYLOR v. TAYLOR. (Sac. 3291.)

(Supreme Court of California. Sept. 14, 1923.)

1. Divorce ⚭322—Respective rights of parties not adjudicated may be enforced in independent action.

If, in an action for divorce, no disposition was made of the community property, and the wife was not estopped to assert an interest in the community property, the respective rights of the parties may be enforced in an independent action.

2. Courts ⚭18—Courts of one state cannot make decree operate on or directly affect title to real property beyond territorial limits.

The courts of one state cannot make a decree which will operate to change or directly affect the title to real property beyond the territorial limits of its jurisdiction.

3. Equity ⚭36—Equity may compel parties to act in relation to property not within its jurisdiction.

By reason of its power over the person of the parties before it, a court of equity may in proper cases compel them to act in relation to property not within the jurisdiction, but its decrees do not operate directly on the property, nor affect the title, and are only made effectual through the coercion of the parties by directing some action on their part, such as the execution of conveyances or the cancellation of instruments.

4. Divorce ⚭331—Court of Nevada held not empowered to adjudicate title to lands in California.

Where the husband procured a divorce from the wife in Nevada, where he was domiciled, such court, although it had jurisdiction to grant a divorce on service by publication against the wife, who was a nonresident, had no power to settle the title to lands in California, and a general finding or decree purporting to bar the rights of the wife in such real property was ineffectual.

5. Judgment ⚡818(1)—Judgment without jurisdiction in one state not within due faith and credit clause.

If jurisdiction does not exist, the enforcement of a judgment rendered in one state is not compelled by the due faith and credit clause of the Constitution.

6. Courts ⚡24—Parties cannot vest court with jurisdiction to which it is a stranger.

In divorce proceedings, the appearance of the parties in a Nevada court, and the allegation and admission as to there being no community property, added nothing to the effect of the Nevada decree on property in California, and neither a party nor parties can vest the court with jurisdiction to which it is a stranger.

7. Pleading ⚡127(2)—Allegation and admission that there was no community property of parties held to refer only to property in state of forum.

A decree of divorce in a Nevada court, where the complaint alleged and the answer admitted that there was no community property of the parties existing at the time the action was begun, should be construed only as an allegation and admission that there was no community property within the state of Nevada, and would not affect community property in another state.

8. Divorce ⚡331—Court will make new division of community property where wife wronged.

If, in a suit for divorce, the parties have agreed on a certain division of the community property, and the wife, relying on false representations of the husband, was wronged in such division, the court in another action in another state will annul the division, though the wife and her attorney had in the first instance the means of knowing the true facts.

9. Divorce ⚡331—Evidence held to sustain finding that division of community property was obtained by fraud.

In an action for divorce, evidence held sufficient to sustain finding that a division of the community property by decree in another state was obtained by fraud.

10. Divorce ⚡331—Only in absence of evidence may presumption be indulged that findings of court in another state sufficiently supported.

Where the evidence in a divorce action in another state bearing upon the issue as to whether a division of the community property was obtained by fraud is before the court, the court may not indulge a presumption that, had findings been made on the subject of fraud, they must have been consistent with other findings actually made and relied on to support the judgment; for it is only in the absence of such evidence that the presumption may be indulged in.

11. Divorce ⚡322—Where decree granted without disposition of community property each party owner of one-half thereof as tenants in common.

Where a divorce is granted without any disposition of the community property, the parties

are each the owner of one-half thereof as tenants in common

In Bank.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Louiana C. Taylor against Harry L. Taylor to reform agreement as to property rights. From a judgment for defendant, plaintiff appeals. Reversed.

Lee Gebhart and Meredith, Landis & Chester, all of Sacramento, for appellant.

Orrin J. Lowell and George W. Hamilton, both of Auburn, for respondent.

WASTE, J. Plaintiff in this case appeals. It appears that the parties to the action intermarried in and were residents of the state of California. After they had been married a number of years the defendant went to Nevada and instituted an action for divorce against his wife, this plaintiff, on the ground of willful desertion, his complaint alleging, among other matters, that there was no community property of the parties. The defendant in that action, this plaintiff, being a nonresident, service upon her was directed to be made by publication, and a copy of the complaint and summons in this action was delivered to her personally in this state. Thereupon an agreement in writing was entered into by the parties settling "the question of alimony and support." In consideration of the sum of \$500 paid by the husband, this plaintiff released him "from all obligations, past, present, or future, support, alimony, or any other obligations of support arising from the marriage contract." Other provisions in the agreement related to the maintenance and support of the minor child of the parties. As part of the same transaction it was agreed that the defendant in the divorce proceedings should, and she thereafter did, appear in the action. In her answer she admitted the allegation that there was no community property. Subsequently the Nevada court gave its decision in favor of the plaintiff, there finding, among other matters, that there was no community property belonging to the parties. Judgment of divorce was thereupon entered in favor of this defendant.

The judgment of divorce was entered March 15, 1916. On March 6, 1920, plaintiff brought this action for partition, alleging that, since "the ——— day of ———, 1916," she and the defendant, her former husband, had been and were tenants in common in equal shares of certain real property in this state. By the prayer of an amended complaint she sought to be let into possession with the defendant, and prayed for an accounting and for one-half of the accrued rents, issues, and profits. Defendant, answering, denied the claim of plaintiff in and

to the property, and, by way of estoppel against plaintiff asserting any right or title therein, pleaded the divorce proceedings and the decree had and rendered in the Nevada court. He also prayed for a reformation of the agreement entered into by the parties pending the divorce action, to include "the property of the marriage," and to have inserted therein provisions to the effect that this plaintiff accepted the sum of five hundred dollars in full payment of all claims for alimony and support, and of "all rights and claims * * * to all property," and remitted, released, discharged, and satisfied all the rights and claims to the property which she might otherwise have. The trial court held defendant to be the sole and exclusive owner of the property. It also held that the plaintiff was estopped from asserting any claim to an interest therein by reason of the divorce proceedings had in the state of Nevada, and that defendant was entitled to have the contract between the parties reformed as prayed for. Judgment was entered in defendant's favor, and plaintiff has appealed.

[1] The first point involved in the appeal is as to the effect of the decree rendered by the district court of the state of Nevada in the divorce action between these parties. It is the contention of the appellant that the decree has no extraterritorial force outside the state of Nevada, and cannot directly affect the title of real estate in California. She also attempts to refute the claim of the respondent that she is estopped by the divorce proceedings from asserting an interest in the community property in this state. Her position is that no disposition of the community property was brought about in the divorce action, and that the parties became and have remained tenants in common therein. If that be true, and appellant be not estopped, their respective rights may be enforced in an independent action. *De Godey v. Godey*, 39 Cal. 157, 163; *Biggi v. Biggi*, 98 Cal. 35, 38, 32 Pac. 803, 35 Am. St. Rep. 141; *Kirschner v. Dietrich*, 110 Cal. 502, 505, 42 Pac. 1064; *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 103. The rule applies where the action is brought in one state and the property is situate in another state. *Buckley v. Buckley*, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900; *Gratton v. Weber*, (C. C.) 47 Fed. 852.

[2, 3] Appellant's first contention is unquestionably correct. That the courts of one state cannot make a decree which will operate to change or directly affect the title to real property beyond the territorial limits of its jurisdiction must be conceded. The doctrine that a court, not having jurisdiction of the res, cannot affect it by its decree is firmly established. *Title Ins. Co. v. Calif. Dev. Co.*, 171, Cal. 173, 197, 152 Pac. 542; *Fall v. Eastin*, 215 U. S. 1, 11, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853;

Fall v. Fall, affirming 75 Neb. 104, 106 N. W. 412, 113 N. W. 175, 121 Am. St. Rep. 767; *Sharp v. Sharp*, 65 Okl. 76, 166 Pac. 175, L. R. A. 1917F, 562; *Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779; 19 Cor. Jur. 367. By means of its power over the person of the parties before it, a court of equity may in proper cases compel them to act in relation to property not within the jurisdiction, but its decrees do not operate directly upon the property nor affect the title. They are only made effectual through the coercion of the parties, by directing some action on their part, such as the execution of conveyances or the cancellation of instruments. *Fall v. Eastin*, supra. The reason for the rule is that jurisdiction to affect the title to real estate by a judgment in rem, or directly against the thing itself, exists only in the courts of the state wherein the land is situated.

"No principle is more fundamental or thoroughly settled than that the local sovereignty, by itself or its judicial agencies, can alone adjudicate upon and determine the status of lands and immovable property within its borders, including their title and its incidents and the mode in which they may be charged or conveyed. Neither the laws of another sovereignty, nor the judicial proceedings, decrees, and judgments of its courts, can in the least degree affect such lands and immovable property." *Bullock v. Bullock*, 52 N. J. Eq. 561, 565, 30 Atl. 676, 677 (27 L. R. A. 213, 46 Am. St. Rep. 528); *Proctor v. Proctor*, 215 Ill. 275, 277, 74 N. E. 145, 69 L. R. A. 673, 106 Am. St. Rep. 168; *Tiedemann v. Tiedemann*, 172 App. Div. 819, 158 N. Y. Supp. 851, affirmed in 225 N. Y. 709, 122 N. E. 892.

[4] It results, therefore, that, while the court in Nevada, in which state the husband was domiciled, had jurisdiction to grant a divorce, upon service by publication, against the wife, who was a nonresident, it had no power to settle the title to lands in California; and a general order, finding, or decree made by it, purporting to bar the rights of the wife in the real property of the parties, or either of them, was ineffectual, so far as the property in this state is concerned. *Rodgers v. Rodgers*, supra.

Respondent argues that the judgment of a foreign court can act in personam, regardless of the locus of the property involved; that, when plaintiff appeared in the Nevada court, and answered, that court had jurisdiction of the parties and the subject-matter of the action; that plaintiff subjected herself and her property rights to the decision of the court. "Certainly, the Nevada court," he continues, "could have determined title to that property and have required a deed if necessary. It must then have had a species of jurisdiction over that property." In this connection respondent invokes the decision of the United States Supreme Court in *Bates v. Bodie*, 245 U. S. 520, 38 Sup. Ct. 182, 62 L. Ed. 444, L. R. A. 1918C, 355; but that case

does not help his position. A wife, in Arkansas, sought a divorce, return of money loaned to her husband, and alimony. She alleged that her husband owned real and personal property, including land in Nebraska. The decree granted the divorce as prayed, and adjudged that the wife recover a stated sum "in full of alimony and all other demands set forth in the cross-bill." It also recited that such judgment was rendered by consent. Later, and after the husband had paid the judgment, the wife sued him in Nebraska to obtain further alimony out of the Nebraska land, claiming that the Arkansas court had no jurisdiction to take it into consideration, and had not done so. The husband set up the decree of the Arkansas court as an estoppel and a complete bar to the wife's right to recover additional alimony under the laws of Nebraska. His plea was denied by the state court. On a writ of error to the Supreme Court of the United States, the court held, in so far as the point we are now considering is concerned, that, while the Arkansas court had no jurisdiction of the Nebraska lands so as to deal with them specifically, it had jurisdiction of the controversy between the parties, and all that pertained to it, including the property resources of the husband, and what part of them should be awarded to the wife, and might require the husband to perform any order it might make, as it actually had done in that case by requiring him to deposit security for payment of the alimony. It appeared from the record under review that the Arkansas decree was rendered by the consent of the husband on condition that no appeal be taken by the wife from the judgment and decree; that the amount had been secured as directed, and had been paid as required to be paid. For these reasons, and it being admitted that consent would give jurisdiction to the state court to render a money judgment for alimony, the court was of the opinion that due faith and credit required by the Constitution of the United States was not given to the decree. The judgment of the state court was reversed.

[5, 6] What respondent terms "a species of jurisdiction," therefore, turns out to be only the jurisdiction of the court over the controversy between the parties, and its power to enforce obedience to its decrees by coercive measures so long as the parties are within its territorial limits. *Title Ins., etc., Co. v. Calif. Dev. Co.*, 171 Cal. 173, 152 Pac. 542, does not aid the respondent. It was very plainly stated by this court in that case that the courts of California cannot make a decree which will operate to change title to property beyond the territorial limits of the state. It was pointed out (page 192 of 171 Cal., page 542 of 152 Pac.) that what the decree did in that case was to direct a sale of property in California, and of shares of stock in the Mexican corporations, held by persons who were within this state, and who had been made

parties to the action. If jurisdiction does not exist, the enforcement of a judgment rendered in one state is not compelled by the due faith and credit clause of the Constitution. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 291, 8 Sup. Ct. 1370, 32 L. Ed. 239; *Andrews v. Andrews*, 188 U. S. 14, 39, 23 Sup. Ct. 237, 47 L. Ed. 366. Consequently, the appearance of the parties in the Nevada court, and the allegation and admission as to there being no community property, added nothing to the effect of the Nevada decree on property in this state. Neither a party, nor both parties, can vest a court with a jurisdiction to which it is a stranger. *King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67, 67 Pac. 10.

[7, 8] The decree in the Nevada action is invoked by the respondent against the appellant as an estoppel upon yet another ground. Starting with the proposition that a judgment is a contract in the highest sense of the term (*Wallace v. Eldredge*, 27 Cal. 498, 499; *London G. & A. Co. v. Ind. Acc. Comm.*, 181 Cal. 460, 465, 184 Pac. 864), respondent, in effect, argues that appellant acceded to the propositions embraced in the divorce complaint, and in her answer admitted and consented to the allegation that there was no community property of the parties existing at the time the action was begun; that, when the judgment was rendered upon such complaint and answer, it became in effect a contract between the parties that the judgment should be final in respect to matters embraced in the allegations of the complaint and the prayer for relief; and, although the decree of divorce was silent as to property, in view of the allegations contained in the complaint and answer, and in the light of the findings, it was tantamount to an adjudication that there was no community property of the parties (*Brown v. Brown*, 170 Cal. 1, 6, 147 Pac. 1168), and now operates as an estoppel in contract. One answer to this contention is, the allegation of the complaint and the answer thereto that there was no community property should be construed only as an allegation and an admission that there was no community property within the state of Nevada, because that was the extent to which such issue could be submitted to the jurisdiction of that state. By way of a further answer, appellant advances the contention that, in so far as relates to any property right involved, it is not binding upon her for the reason that she was induced to enter into the admission that there was no community property through the intentional concealment and deliberate fraud of the respondent, which resulted in withdrawing the issue as to the existence of community property from the consideration of the court and preventing a trial thereon. *Milekovich v. Quinn*, 40 Cal. App. 537, 547, 181 Pac. 256. If, in the course of a suit for divorce, the parties have agreed upon a certain plan of division of the community property, and the wife, relying upon

the false representations of the husband, was wronged in such division, the court in another action will annul the division, and decree another, notwithstanding that the wife and her attorney had, in the first instance, the means of knowing the true state of facts. *Senter v. Senter*, 70 Cal. 619, 11 Pac. 782.

The evidence tending to show that appellant was fraudulently prevailed upon by the respondent to refrain from submitting an issue of fraud relied upon by appellant to nullify to the consideration of the court in the divorce action, and was deceived into accepting the sum of \$500 in full settlement of all claims for support, led Mr. Justice Hart, who wrote the opinion in the District Court of Appeal reversing the case, to say:

"There could be nothing clearer than that the foregoing testimony * * * plainly shows these facts: First, that the plaintiff, when signing the agreement [the alimony settlement], had absolutely no knowledge of the land in dispute or that the defendant owned the same or any land; second, that the defendant purposely concealed from the plaintiff the fact that he bought the land during their married life and owned it when the agreement in question was made; third, that the defendant, with a design to defraud the plaintiff of her community interest in the property, caused the same to be put in the name of his brother and to remain standing in the latter's name until after the Nevada decree divorcing him from the plaintiff was entered.

"That the designed concealment from the plaintiff by the defendant of the fact that the property in dispute belonged to him and to their community, and not to his brother, in whose name the property stood when the plaintiff signed the agreement in question, was in fraud of her rights, cannot, of course, be questioned. Indeed, the conduct of the defendant with reference to said property—his repeated representations to the plaintiff on the occasions when he endeavored to urge her to institute an action for divorce that he owned no property, and allowing the property in dispute to remain in his brother's name until after the entry of the Nevada divorce decree—amounted to positive or actual fraud. Section 1572, subd. 3, Civ. Code."

In the face of these convincing facts, the trial court merely found that the allegations and averments of the answer "pleaded by way of bar and estoppel of the plaintiff" were true. It made no express finding on the issue of fraud established by the evidence offered by the plaintiff. The system of express findings (sections 632 and 633, Code Civ. Proc.), which prevails in this state, requires a finding when there is a material issue. This applies not only to issues raised upon allegations of the complaint, but issues raised upon affirmative defenses in the answer. 2 Hayne on New Trial [Rev. Ed.] § 240, p. 1319, and cases there cited. If a replication were permissible, plaintiff, by such a pleading, could have set up the facts constituting the fraud alleged to have been committed by the

defendant; but, under our system of pleading, a replication to the answer has no place. It is supplied by operation of law through the application of section 462 of the Code of Civil Procedure, which provides that the statement of any new matter in the answer, in avoidance of constituting a defense, must, on the trial, be deemed controverted by the opposite party. Ordinarily, when a cause of action or a defense rests upon fraud, the facts constituting the fraud must be pleaded. But the necessity of proving fraud may appear only after the answer of the defendant is in. In such case, a plaintiff may introduce on the trial evidence which counter-veils or overcomes any new matter as if it were inserted in a replication and pleaded with all the precision and fullness which the strictest rules of law require. *Colton Land & Water Co. v. Raynor*, 57 Cal. 588, 589; *Brooks v. Johnson*, 122 Cal. 569, 571, 55 Pac. 423. When a judgment necessarily rests upon an issue of fraud raised by testimony introduced, controverting the new matter set up in the answer, the party relying upon such fraud is entitled to a finding upon it. *Moore v. Copp*, 119 Cal. 429, 436, 51 Pac. 630. In *Sterling v. Smith*, 97 Cal. 343, 32 Pac. 320, it was urged that certain findings were outside of any issue made by the pleadings, for the reason that the complaint did not contain any allegations of fact constituting fraud of any character, which allegations, it was argued, were absolutely essential in order to admit evidence upon the subject. The court held the contention was not tenable for the reason that the evidence supporting the findings was introduced in response to averments of new matter in the answer.

[9, 10] The finding of the trial court that the allegations and averments of the special defense, which merely set up the divorce proceedings and the rendition of the judgment by the Nevada court, were true, did not, in the remotest sense, dispose of the issue of fraud relied upon by appellant to nullify such judgment in so far as it related to the existence of community property. The evidence bearing upon such issue has been brought here. Therefore the court may not indulge in a presumption that, had findings been made on the subject of fraud, they must have been consistent with other findings actually made and relied on by respondent to support the judgment. It is only in the absence of such evidence that the presumption may be indulged in. In this case, if a finding favorable to the defendant on the issue of fraud had been made, it would have been contrary to the evidence.

The trial court decreed a reformation of the agreement entered into by the parties prior to the Nevada divorce proceedings by inserting a provision whereby appellant not only accepted the sum of \$500 in full payment of temporary and permanent alimony and

support, but in like payment of all rights and claims to property, and released and satisfied all right and claim to property she might have. Of this portion of the decree the District Court of Appeal correctly said:

"It necessarily results from the foregoing considerations that the finding to the effect that the agreement in question was intended by the parties to settle all their property rights of whatsoever nature is, in so far as the property described in the complaint is concerned, wholly without evidential justification and, therefore, that portion of the decree declaring that the agreement does not express the true intention of the parties and that the same should be so reformed as to embrace within its scope a provision whereby the plaintiff expressed an intention to release to the defendant her community interest in the real property involved in this controversy is entirely without support."

No other conclusion would be warranted. We are unable to perceive how it can be seriously contended that the appellant intended by the contract to surrender her claims to community property, the existence of which it is conceded she had no knowledge, and which the evidence, without contradiction, shows was purposely concealed from her.

[11] If it be contended that any of the findings tend to support the conclusion of law that the defendant is the sole and exclusive owner of the land in controversy, they are contrary to the undisputed evidence, and to the admissions of respondent here, that whatever interest he had in the property at the time of the Nevada divorce was obtained from money acquired after his marriage with appellant. If no other facts can be developed upon a retrial, it would seem to necessarily follow that, the divorce of the parties having been granted without any disposition of the community property, appellant is the owner of one-half of such property as tenant in common with respondent. *Estate v. Brix*, 181 Cal. 667, 676, 186 Pac. 135.

The judgment is reversed.

We concur: WILBUR, C. J.; MYERS, J.; KERRIGAN, J.; SEAWELL, J.; LENNON, J.; LAWLOR, J.

192 Cal. 144

WESTERN SHORE LUMBER CO. v. RILEY,
State Controller. (S. F. 10793.)

(Supreme Court of California. Sept. 21, 1923.)

States 132—Specific appropriations held unaffected by Budget Amendment to constitution and enactments pursuant thereto.

The Budget Amendment to the Constitution and St. 1923, c. 121, enacted pursuant thereto, do not repeal previous statutes making specific appropriations for public use, such as St. 1917, p. 1281, providing a fund for the enlargement of California Redwood Park, particularly in

view of section 1 of chapter 121, expressly declaring that such statutes shall be unaffected.

In Bank.

Application by the Western Shore Lumber Company for a writ of mandate directed to Ray L. Riley as Controller of the State of California. Writ granted.

John T. Pigott and McCutchen, Olney, Mannon & Greene, all of San Francisco, for petitioner.

H. C. Lucas, of San Francisco, James L. Atteridge, of Sacramento, and Dion R. Holm, of San Francisco, for respondent.

RICHARDS, Justice pro tem. The petitioner herein applies for a writ of mandate to compel the respondent as state controller to draw his warrant upon the state treasurer for \$3,840, in payment of the petitioner's claim for said sum arising out of the purchase by the state of California, through the California Redwood Park commission, of a certain tract of land, pursuant to the provisions of an act of the Legislature approved May 28, 1917, entitled "An act providing for the enlargement of the California Redwood Park," making an appropriation for the purchase of additional land therefor, and granting power to the California Redwood Park commission to purchase the same. The petitioner avers and the respondent admits that, acting under the authority of said act and in conformity with the terms thereof, the California Redwood Park commission on August 23, 1920, contracted to purchase from the petitioner herein certain lands for the purchase price of \$38,400, payable in certain installments as set forth in said agreement of purchase, payable out of the appropriation provided for such purpose in said act, and that pursuant thereto the petitioner herein conveyed to the state of California said lands; that one of said installments, amounting to the sum of \$3,840, became due and payable on July 1, 1923, whereupon the petitioner duly presented its demand in writing to the respondent herein as state controller that he issue and deliver to petitioner the warrant or said sum of \$3,840 drawn upon the state treasurer in payment of said installment upon the purchase price of said property, pursuant to said contract of purchase and to the terms of the said act of 1917, but that the respondent as such state controller has neglected and refused to issue said warrant for said sum or any portion thereof, and the same remains and is still due, payable, and unpaid, notwithstanding the fact that there has been and still is in the state treasury an unexhausted portion of said appropriation amply sufficient to meet the payment of said sum, had such warrant been drawn. The answer of the respondent, while admitting the facts regarding the adoption of said act of the Legislature and the making of said agreement

for the purchase of said lands pursuant thereto and the conveyance thereof to the state of California by the petitioner and of the due presentation of the claim and demand of the petitioner for issuance of said warrant for the installment due and payable on July 1, 1923, pursuant to the purchase and conveyance of said lands, denies the existence of the specific appropriation referred to by the petitioner as the existing fund from which the petitioner's said claim should be paid or upon which said warrant should be drawn, and in support of said denial sets forth the fact of the adoption by the electors of the state of California at the general election of 1922 of the amendment to section 34 of article IV of the Constitution of the state of California, known as the "Budget Amendment," and the further fact that pursuant thereto the Governor of California submitted to the state Legislature thereof, on or about February 1, 1923, a certain document entitled "Budget Recommendations and Estimated Revenues" (accompanying said document was the form of a budget bill covering the matters therein contained and recommended), and that thereafter and on or about May 7, 1923, the state Legislature adopted an act known as the "Budget Bill" making certain appropriations for the support of the government of the state of California in accordance with the terms and requirements of said budget amendment, and that thereafter the Governor submitted to the state Legislature a certain document entitled "Executive Message Regarding Appropriation Bill," wherein he approved or disapproved certain portions of said budget bill. Copies of these various documents are made by reference a part of the respondent's answer herein. In the budget bill, as finally adopted by the Legislature, appears the following item:

"For purchase of land California Redwood Park such sum or sums as are provided in chapter six hundred ninety statutes of nineteen seventeen." Stats. 1917, p. 1281.

The Governor in his executive message, filed May 7, 1923, approving and disapproving certain items of the budget bill, objected to the foregoing item therein "for the reason that this appropriation is provided for by existing statute and is also authorized by the provisions of section 1 of this bill." The provision in section 1 of said budget bill to which the Governor thus referred reads as follows:

"Appropriations for purposes not otherwise provided for herein which have been heretofore made by any provision of the Constitution or of any existing statute shall not be affected by this act but shall continue to be governed by the constitutional or statutory provisions applicable thereto."

As to the effect generally of the adoption of the budget amendment to the Constitution, and of the enactment by the Legislature of

the budget bill (Stats. 1923, chap. 121) pursuant to its provisions, this court has recently decided that neither said constitutional amendment nor said budget bill operated either expressly or by necessary implication to repeal previous statutes making specific appropriations for various public purposes, and designating specific funds in the state treasury to which such appropriations should be transferred and out of which the moneys thereof should be drawn to meet and satisfy the purposes for which such appropriation had been made. *Railroad Comm. v. Riley* (Cal. Sup.) 218 Pac. 415. Aside, however, from that conclusion, but in entire harmony with its effect, it appears that the state Legislature, in the aforesaid budget bill, not only did not attempt nor intend to work a repeal of the act of 1917 above referred to, but on the other hand expressly retained the provisions of said act relating to the appropriation for the purchase of lands increasing the area of California Redwood Park in full force and effect, as appears from the foregoing excerpt from said budget bill. It further appears that the Governor, in disapproving the special item in the budget bill above referred to, correctly interpreted the provision in section 1 of said budget bill above quoted, as continuing in force the provisions of the act of 1917 providing for the aforesaid appropriation.

We concur: WILBUR, C. J.; LENNON, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.; LAWLOR, J.

192 Cal. 147

RECLAMATION DIST. NO. 1500 v. RILEY,
State Controller. (Sac. 3509.)

(Supreme Court of California. Sept. 25, 1923.)

1. Levees and flood control $\S$ 9—Purchase of levees by drainage district from reclamation district held authorized.

Where an assessment by the state reclamation board, in which the management of the drainage district created by St. 1913, p. 252, was vested by section 5 of part of the costs of levees constructed by a reclamation district therein, pursuant to section 13, as part of the flood control plan adopted by St. Ex. Sess. 1911, p. 117, on landowners in other reclamation districts within the assessment district, was sustained by the Supreme Court, the drainage district had power, under St. 1913, p. 268, § 12, as amended by St. 1915, p. 1343, § 9, and St. 1921, p. 1481, § 1, to purchase the levees.

2. Mandamus $\S$ 109—Reclamation board's approval of warrants for purchase of levees from reclamation district not conclusive on courts on issue whether claim should be paid by state controller.

Whether the reclamation board acted without jurisdiction or in excess of its jurisdiction under St. 1919, p. 1129, § 33, as amended by St. 1921, p. 472, in paying the total purchase price for levees purchased by a drainage dis-

trict from a reclamation district therein, instead of merely the excess over assessments due from landowners, being a question of law, the board's approval of warrants issued does not preclude the Supreme Court from considering whether the claim should be paid by the state controller; the board's approval being only a finding of facts, which is final as to the compensation due if the statute is constitutional and applicable.

3. Statutes $\S$ 71—Law applying equally to all in class founded on natural or constitutional distinction not unconstitutional.

The Legislature may classify in order to legislate, and a law applying equally to all in a class, founded on some natural, intrinsic, or constitutional distinction, does not contravene the constitutional provisions as to uniformity of operation of general laws and special privileges and immunities.

4. Constitutional law $\S$ 48—Legislative discretion assumed properly exercised.

Unless a statute is plainly and palpably unconstitutional, it will be assumed that the legislative discretion has been reasonably and properly exercised.

5. Constitutional law $\S$ 48—Sufficient reasons for creating class assumed.

Though the Legislature's reason for creating the class may not appear from the law, it will be assumed that good and sufficient reasons existed until the contrary is shown.

6. Statutes $\S$ 73(2)—Grouping of reclamation districts having bonded and warrant indebtedness into separate class held not unconstitutional.

The grouping of reclamation districts having bonded and warrant indebtedness into a separate class by St. 1919, p. 1129, § 33, as amended by St. 1921, p. 472, to permit payment directly to such districts for levees purchased from them by drainage districts, instead of crediting the amount due on unpaid assessments, held not so palpably unreasonable and arbitrary as to contravene the constitutional provisions as to uniformity of operation and special privileges and immunities.

7. Levees and flood control $\S$ 2—Statute changing method of payment for levees purchased from reclamation district held not invalid.

That an assessment for levees constructed by a reclamation district was approved by the reclamation board while St. 1919, p. 1129, § 33, providing for the purchase of such levees by drainage districts by crediting the amount paid on unpaid assessments, was in force, did not deprive the Legislature of its power to change the method of payment by St. 1921, p. 472, providing for actual payment of the entire purchase price directly to the reclamation district in the form of warrants issued by the drainage district.

8. Levees and flood control $\S$ 33—Reclamation board need not provide for payment of interest before drawing draft in part payment of cost of levees purchased.

The reclamation board need not definitely agree on the total amount, including interest, if

any, to be paid for levees purchased from a reclamation district by a drainage district before drawing draft in part payment of the "actual reasonable cost" (St. 1921, p. 1129, § 33), as the question whether interest should be included may be determined when a warrant for payment thereof is drawn or refused.

In Bank.

Mandamus by Reclamation District No. 1500 against Ray L. Riley, as State Controller. Writ granted.

Devlin & Devlin, of Sacramento (A. C. & H. L. Huston, of Woodland, and Edward F. Treadwell, of San Francisco, amici curiæ), for petitioner.

U. S. Webb, Atty. Gen., and R. T. McKisick, Deputy Atty. Gen. (Ralph Smith, of Sacramento, of counsel), for respondent.

LENNON, J. This is a proceeding in mandamus brought by the petitioner, reclamation district No. 1500, to compel the state controller, as ex officio custodian of the funds of the Sacramento and San Joaquin drainage district, to issue and deliver to petitioner his warrants drawn against the funds of said Sacramento and San Joaquin drainage district for the sum of \$1,000,000 as part payment of the purchase price of certain levees originally constructed and owned by said reclamation district No. 1500. The levees referred to were sold pursuant to the provisions of a contract of sale made and executed between said reclamation district No. 1500 and said Sacramento and San Joaquin drainage district, wherein the former agreed to sell and the latter agreed to buy said levees.

Reclamation district No. 1500 was created pursuant to the provisions of an act entitled "An act creating a reclamation district to be called and known as 'reclamation district No. 1500,'" Stats. 1913, p. 130. This statute declares that—

"It shall be the duty of said reclamation district No. 1500 to construct a levee, forming the south side of Tisdale by-pass, and a portion of the westerly side of the Sutter basin by-pass. * * * Section 1.

These by-passes were a part of a comprehensive plan known as the report of the California Débris Commission, adopted by legislative enactment for the flood control of the Sacramento river in its entirety and the reclamation of lands which had been formerly inundated by the flood waters of the river. Stats. Ex. Sess. 1911, p. 117. As a governmental agency to carry out the plan of flood control and reclamation there was created the Sacramento-San Joaquin drainage district, which embodied within its confines reclamation district No. 1500 and other reclamation districts not necessary to be enumerated here. Stats. 1913, p. 252. The

management and control of the drainage district was vested in the state reclamation board. Stats. 1913, p. 266, § 5. The statutory plan as adopted contemplated that the flood waters of the Sacramento river would be led through certain weirs and by-passes into one main by-pass, which would ultimately, through the medium of other and intermediate by-passes, empty into San Francisco Bay. In order to facilitate the expedient carrying out of the plan it was provided that the entire work should be divided into separate projects by the state reclamation board, which should then be constructed as separate units. Stats. 1913, p. 269, § 13. Each project was to be designated by a number and a name, and the project of which the levees in controversy are a part is known as the "Sutter-Butte by-pass project No. 6."

It was provided by section 18 (Stats. 1913, p. 275, as amended by Stats. 1915, p. 1354, § 15) that reclamation districts and other agencies interested in reclamation might construct levees in accordance with the general plan in advance of the general carrying out of the work, and by section 12 (Stats. 1913, p. 268, as amended by Stats. 1915, p. 1343, § 9, and Stats. 1921, p. 1481, § 1) it was provided that the work so constructed might be taken over and purchased by the drainage district in order that the drainage district might be the owner in fee of all the works of the general plan. Section 18 as it existed in 1915 provided that, in case the reclamation district or other agencies should convey a perpetual easement to the drainage district, it should have "a claim against the said drainage district for the reasonable value or cost of such * * * levees, cuts, canals," etc., "and an assessment shall be levied upon the lands in said drainage district benefited thereby so that the same may be paid, or such cost may be included as one of the items in any assessment that may be levied in the said drainage district." Stats. 1915, p. 1355. By the same section it was provided that the works purchased should be conveyed by the reclamation district selling them to the drainage district upon the making of compensation at the actual reasonable cost thereof. It will thus be seen that two alternative methods of payment were provided. The transfer might precede the receiving of compensation for the conveyance of the works by the reclamation district to the drainage district, in which event a claim arose against the drainage district in favor of the reclamation district, or payment might precede the conveyance of the works.

In 1919 section 33 was enacted, which provided that any compensation that should be made to any reclamation district by virtue of section 18 of the Reclamation Board Act should be applied and credited pro rata upon the payment of the balance remaining un-

paid upon the assessment levied by the state reclamation board against the lands situated in such reclamation district, and that, in the event the compensation should exceed the total amounts of such credits, the excess should be paid to the district itself. Stats. 1919, p. 1129. This section was amended in 1921 by adding a provision that, in the event any reclamation district had warrants outstanding or a bonded indebtedness, or both, the whole of such compensation should be paid by the drainage district directly to the reclamation district. The reclamation district was thereupon to apply such compensation to the payment of the warrants, and after payment of the warrants to the discharge of its bonded indebtedness. Stats. 1921, p. 472. If this method of payment be followed the reclamation district would, of course, remain liable for the payment to the drainage district of the assessment levied by the reclamation board against the lands within the reclamation districts as the installments on such assessment would become due.

The levees in question, which, as before indicated, were a part of the whole general plan of flood control of the Sacramento river, were built and financed by reclamation district No. 1500. The reclamation board included in the plans, specifications and estimates of cost of the proposed work to be done under assessment No. 6 of the Sutter-Butte by-pass project items providing for the construction of these same levees. In spreading Sutter-Butte by-pass assessment No. 6, the assessors appointed by the reclamation board charged approximately 88 per cent. of the estimated costs of these levees to the reclamation benefits payable exclusively by the owners of land within reclamation district No. 1500, and the remaining 12 per cent. to flood control benefits, of which 7 per cent. was payable by the owners of land within reclamation district No. 1500 and the remaining 5 per cent. payable by owners of land in other reclamation districts located within the boundaries of assessment district No. 6, but, however, wholly exterior to reclamation district No. 1500. It will thus be seen that the landowners within said reclamation district were assessed for 95 per cent. of the total cost of the levees.

It was claimed by the landowners exterior to the boundaries of reclamation district No. 1500 that the duty of constructing the levees was by statute cast wholly upon reclamation district No. 1500, and consequently that the burden of paying for them should be borne wholly by the owners of lands within the district. The validity of this assessment against the landowners exterior to reclamation district No. 1500 was directly attacked by the contesting landowners in the action brought in the superior court of Sutter county for the purpose of validating the Sutter-Butte by-pass assessment No. 6 of the Sac-

ramento and San Joaquin drainage district.

In the meantime, the state reclamation board had entered into an agreement with reclamation district No. 1500, whereby the Sacramento and San Joaquin drainage district was to take over the levees, the drainage district agreeing to buy said levees for the sum of \$2,876,556.55, exclusive of interest thereon, "the amount of interest to be hereafter considered and fixed by the drainage district." It was stipulated in the said agreement that the drainage district should "pay immediately one million dollars (\$1,000,000.00) in warrants against assessment No. six of the Sacramento and San Joaquin drainage district, as a part payment of the above purchase price," to the reclamation district. Pursuant to this agreement, a claim against the drainage district for said sum of \$1,000,000 was prepared, and, having been approved by the reclamation board, was presented to the respondent with a demand that he draw in payment thereof 10 warrants for the sum of \$100,000 each against said assessment No. 6. The demand was refused, and reclamation district No. 1500 brought the present proceedings to compel the issuance of the warrants.

[1] The decision in the case of the proceeding to validate the assessment No. 6 of the Sacramento and San Joaquin drainage district (218 Pac. 27) necessarily disposes of the objection presented by the respondent that the drainage district has no power to purchase from reclamation district No. 1500 the levees forming a part of the flood control project of the Sacramento river. In that proceeding one of the objections presented to the validation of the assessment was that a duty had been cast upon reclamation district No. 1500 by statute to construct the levees in question, and that the owners of land within the district should have borne the entire burden of their cost. The assessment levied by the drainage district included within its total the cost of these levees, and the sustaining of the assessment covering these costs necessarily upheld the validity of the purchase of these levees by the drainage district. The power of the drainage district to purchase the levees having been upheld, the sole question for consideration is whether or not the reclamation board, as governing agency for the drainage district, had the power and authority to provide for the payment of the purchase price of these levees in the particular manner in which it did, that is to say, by the issuance of warrants to the reclamation district covering the total purchase price.

[2] On behalf of the petitioner it is urged that this court is bound by the approval of the warrants issued in accordance with the terms of said contract by the reclamation board. If this be true, it is, of course, the end of the controversy. But the approval of

a claim by the reclamation board does not necessarily preclude and foreclose to this court the consideration of whether or not such a claim should in fact be paid. The only effect of the approval of the reclamation board is a finding as to the facts upon which the claim is based; it does not, and cannot, determine the legality of the claim, if such legality depends not upon a question of fact, but upon a question of law. It is not disputed in the case before us but that the drainage district did enter into the contract in question, and did attempt by such contract to purchase the levees of the reclamation district. It is disputed, however, that the reclamation board had the power and the jurisdiction to enter into such a contract and to provide for the payment of the levees in the manner in which it did. The determination of this question depends upon the construction and interpretation of the statute from which the reclamation board derived its power to enter into the contract, and therefore involves the question of whether or not the reclamation board acted without jurisdiction or in excess of the jurisdiction conferred by the statute. This is a question of law, and it is, of course, obvious that the mere fact that the claim was allowed by the reclamation board did not invest it with a validity which it did not theretofore possess. *Jacks v. Taylor*, 24 Cal. App. 667, 142 Pac. 121; *Phelan v. San Francisco*, 6 Cal. 531; *Santa Cruz v. Broderick*, 113 Cal. 628, 45 Pac. 863; *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31. If it be a fact that the contract was illegal, it follows as a necessary consequence that the claim based thereon was also illegal, and the controller was not bound to issue the warrant to cover such claim. *Power v. May*, 114 Cal. 207, 46 Pac. 6; *Linden v. Case*, 46 Cal. 171; *Merriam v. Board of Supervisors*, 72 Cal. 517, 14 Pac. 137. The question of whether or not the reclamation board was acting without jurisdiction or in excess of jurisdiction cannot be finally settled and determined by the reclamation board itself beyond the power of the review of such determination by this court. In the event that the statute of 1921, giving the reclamation board the power to pay the total purchase price for the works directly to the reclamation district, be unconstitutional, or for some good reason not applicable to the facts of the present case, then the reclamation board is limited to a paying of the excess over the assessment due from the landowners within district No. 1500 upon assessment No. 6 and, this excess being considerably less than \$1,000,000, the reclamation board would have no power or authority to issue the warrant for that amount. If, on the other hand, it be found that the statute is constitutional, and that the reclamation board was entitled

to act in accordance with its provisions, then the approval of the reclamation board is final as to the amount of compensation due. *Carmichael v. Riley*, 56 Cal. App. 409, 205 Pac. 478.

The cases cited by the petitioner all involve claims which were approved by the board of supervisors as to which no questions of law were raised, but simply questions of fact as to whether the claimant had or had not performed the work for which the claim was made. The approval of these claims was admittedly within the jurisdiction of the board of supervisors, and the finding of that board that such work had been performed was final, and could not be attacked in the absence of fraud. These cases, however, have no applicability where the claim, as here, is urged that the board was without jurisdiction because the claim in controversy is founded upon a contract which it is claimed is in effect illegal.

Admittedly the reclamation board, in allowing the claim in controversy, was acting under and in pursuance of the provisions of section 33, as amended in 1921. Stats. 1921, p. 472. Section 33 as it existed in 1919 provided that in making compensation for levees purchased from reclamation districts the reclamation board should apply the purchase price of the levees upon the balance remaining unpaid by the owners within the reclamation district upon the assessments levied by the drainage district and that only the excess should be paid by the drainage district directly to the reclamation district. Stats. 1919, p. 1129. In other words, by section 33 it was provided, in effect, that, for the taking over by the drainage district of works previously constructed by a reclamation district, compensation therefor should be made by offsetting the amount found to be due against the assessments theretofore levied by the drainage district upon the lands within the reclamation district, and that the excess only of such compensation over and above the aggregate amount of the assessments should be paid over to the reclamation district by the drainage district.

The amendment of 1921 (Stats. 1921, p. 472) re-enacted the provisions of section 33 as it existed in 1919, and then added the proviso that, if a reclamation district was burdened with an indebtedness represented by bonds or outstanding warrants, compensation for levees purchased in accordance with the provisions of section 18 of the same act might be made, not by crediting the amount due upon the unpaid assessments, but by actually paying over the money to the reclamation district in the form of warrants issued by the drainage district.

It is argued on behalf of the respondent that this provision for this method of payment is special legislation, inasmuch as it attempts to grant an immunity of privilege,

through a wholly unreasonable classification, and in this connection it is contended that, by permitting the payment directly to the districts having a bonded indebtedness, or an indebtedness represented by warrants and not permitting similar payments to be made to other reclamation districts, having other forms of indebtedness, the former districts are granted the privilege to the exclusion of other reclamation districts of extension of time for payment of assessments.

[3-5] It is, of course, well established that the Legislature may classify in order to legislate, and that, if a class is founded upon some natural, intrinsic, or constitutional distinction, a law which applied equally to all in that class does not contravene the provisions of the Constitution which provide that all general laws shall have uniform operation and prohibit the granting by the Legislature of special privileges and immunities.

It was said in *Application of Miller*, 162 Cal. 687, 696, 124 Pac. 427, 429:

"The power of the court to declare a statute unconstitutional is 'conceded to be always one of the utmost delicacy in its exercise, and never to be exerted except when the conflict between the statute and the Constitution is palpable and incapable of reconciliation.' See *Stockton v. Stockton*, 41 Cal. 159."

The principle thus enunciated has become the basis of the well-established rule that, unless the statute in controversy is plainly and palpably subversive of the constitutional inhibitions, it will be assumed by the courts that the legislative discretion has been reasonably and properly exercised. In *re Spencer*, 149 Cal. 396, 400, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; In *re King*, 157 Cal. 161, 164, 106 Pac. 578. And, furthermore, although the reason actuating the Legislature in creating the class may not appear from a reading of the law, it will be assumed by the court that reasons good and sufficient did exist until the contrary is shown. *Cooley on Constitutional Limitations* (7th Ed.) p. 228. In short, it must clearly appear, before the courts will intervene, that there was no sufficient reason warranting the Legislature in making the classification. In *re King*, supra; *Grumbach v. Leland*, 154 Cal. 679, 98 Pac. 1059.

[6] The reasons which influenced the Legislature in its classification of reclamation districts having bonded or outstanding warrant indebtedness are not disclosed on the face of the statute, but the mere absence of such disclosure will not justify this court in assuming that no valid and appropriate reason did in fact exist for the classification complained of. *Arkansas Natural Gas Co. v. Arkansas R. R. Com. et al.* (October, 1922) 43 Sup. Ct. 387, 67 L. Ed. —. Moreover, we know of no good reason why it may not be

safely said that those reclamation districts having a bonded or outstanding warrant indebtedness are not in a class by themselves. And we are not prepared to say that the grouping of reclamation districts having bonded and outstanding warrant indebtedness into a class by themselves is so palpably unreasonable and arbitrary as to be in contravention of the constitutional provisions. It must, therefore, be held that the Legislature, in enacting the statute, was acting within its constitutional powers.

[7] It is also urged that the reclamation board cannot look to section 33 of the statutes of 1921 for authority to make the payment of the entire purchase price directly to the district, because of the fact that the assessment was approved by the reclamation board on March 25, 1921, and the statute did not take effect until July 29, 1921. The assessment had been approved prior to the enactment of the statute, but it was not validated, nor did it become a lien upon the land, until the judgment of the statutory court validating the assessment was rendered in April, 1922, some little time after the enactment of the statute. It was held in *Reclamation Board v. Chambers*, 46 Cal. App. 476, 189 Pac. 479, that, even after the assessment had been started, the Legislature could change the method of raising money. In that case it was said:

"The fact that the law in force at that time contemplated that the moneys necessary to do this public work should be raised in a certain manner, to wit, by taxing the landowners within the district, did not, in our opinion, deprive the Legislature of the power to change this mode of taxation and to provide other or different methods to raise the whole or part of the funds necessary to carry on and complete such work."

So we do not see any reason why the fact that the assessment had been approved should deprive the Legislature of power to change the method of payment for the works within the reclamation district.

[8] With reference to the final objection made on behalf of respondent, we cannot see any good reason why it was necessary for the reclamation board to enter into a definite agreement as to the total amount to be paid for the levees in question, including interest, if any, before it could legally draw a draft in part payment of the cost. Whether or not the drainage district will be required to pay interest on the warrants and bonds issued by the reclamation district to pay for the cost of construction or will be required only to pay for the cost of the material and the cost of labor to build the levees will depend upon the construction given the provisions of the statute which provide that the drainage district may acquire the works upon the payment as compensation of

the "actual reasonable cost thereof." It is a matter which can be definitely determined at a time in the future. This present claim is for a part payment on the principal, and the question of whether interest should be paid can well be disposed of when a warrant is drawn or refused to be drawn for the payment thereof.

The reclamation board having the power and authority to enter into a contract for the purchase and sale of the levees in question, and having the power and authority to provide for the payment in the manner in which it did, this claim, based, as it is, upon such contract, and having been properly allowed and approved by said reclamation board, is a legal claim against assessment No. 6, and should be paid.

Let the writ of mandate issue.

We concur: WILBUR, C. J.; SEAWELL, J.; LAWLOR, J.; WASTE, J.; MYERS, J.; KERRIGAN, J.

63 Cal. App. 438

Ex parte APAKEAN. (Cr. 1149.)

(District Court of Appeal, First District, Division 1, California. Aug. 15, 1923.)

1. Criminal law ⇨576(5)—Court not required to dismiss prosecution for delay unless defendant demands it.

Where Pen. Code, § 1382, provides that the court must order the prosecution dismissed when the defendant is not brought to trial within 60 days after the filing of the information, unless good cause to the contrary is shown, there is no duty incumbent on the court to order a dismissal unless defendant demands it.

2. Criminal law ⇨576(5)—Dismissal for want of prosecution within 60 days cannot be demanded after jury has been impaneled.

When the jury had been impaneled, petitioner could not then move for a dismissal under Pen. Code, § 1382, for want of prosecution within 60 days after filing of the information, since he had already been "brought to trial," and had waived the right of dismissal for failure to claim it in proper season.

Application by James Apakean for writ of habeas corpus. Writ discharged.

Vincent W. Hallinan, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Alden Ames, Deputy Dist. Atty., both of San Francisco, for respondent.

R. M. J. Armstrong, of San Francisco, for respondent sheriff.

ST. SURE, J. The petitioner, charged with the crime of felony, to wit, grand larceny, seeks his discharge upon a writ of habeas corpus. He alleges in his petition that

he was arraigned upon said charge upon the 4th day of May, 1923; that, upon the 17th day of May, 1923, he entered a plea of not guilty; that thereafter, and on June 16, 1923, the cause was set for trial for the 25th day of July, 1923; that on said 25th day of July, 1923, when the cause was called for trial, petitioner appeared with his counsel, and answered "Ready"; that the district attorney requested and obtained a postponement of the trial to the 1st of August, 1923, over the objection of petitioner's counsel, who protested against a postponement of the trial beyond the 60-day period prescribed by the statute (section 1382, Pen. Code); that on August 1st said cause was again called for trial; that petitioner appeared with his counsel and answered "Ready"; that the district attorney also answered "Ready"; that thereupon a jury was regularly examined by respective counsel, was accepted and sworn to try the case; that the district attorney then read the information to the jury, and made his opening statement; that thereupon the district attorney offered in evidence a transcript of the testimony of one Jack Graham, taken on the preliminary examination of the petitioner, and that, for the purpose of laying the foundation for the introduction thereof, the district attorney called a police officer as a witness, and said witness was examined by the district attorney and cross-examined by counsel for petitioner; that the trial court sustained an objection made by counsel for petitioner upon the ground that no proper foundation had been laid for the introduction of the transcript; that the district attorney thereupon requested the trial court "for a continuance of the trial to enable him to search anew for said Graham, and either produce him as a witness or lay the proper foundation for the admission of said transcript; that the court thereupon, and over the objection of the petitioner and his counsel, granted said motion and discharged the jury, and continued the trial of said case to September 6, 1923"; that petitioner then moved for a dismissal of the cause upon the ground that the same had not been brought to trial within 60 days after the filing of the information.

When the cause was first called for trial on July 25th the 60-day period had not run, and a motion to dismiss under the rule prescribed by paragraph 2 of section 1382 of the Penal Code was not in order. When the case was again called the 60-day period had run, and a motion to dismiss was in order; but it would appear petitioner failed to avail himself of his statutory right at the proper time. His motion for a dismissal under section 1382 of the Penal Code came too late.

[1, 2] The Constitution gives to a defendant a right to a speedy trial, and the Penal Code expressly provides that the court must

order the prosecution dismissed unless good cause to the contrary be shown wherein a defendant is not brought to trial within 60 days after the finding of the indictment or filing of the information; yet there is no duty incumbent on the court to order a dismissal under section 1382 unless the defendant demands it. *Ex parte Fennessy*, 54 Cal. 101. The right to a dismissal, like other statutory privileges of the accused which do not affect the jurisdiction of the court, may be waived. The impaneling of the jury is part of a trial (*Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297). The legal jeopardy of the defendant has attached when a jury has been "charged with his deliverance," and the jury stands thus charged when its members have been impaneled and sworn. *Cooley's Constitutional Limitations* (7th Ed.) p. 467. When the petitioner moved for dismissal for want of prosecution he had been already "brought to trial," and was upon trial. He therefore waived the benefit of the statute by failure to claim it in proper season (*People v. Hawkins*, 127 Cal. 372, 59 Pac. 697; *People v. Fitzgerald*, 137 Cal. 546, 70 Pac. 554).

The writ is discharged, and petitioner remanded.

We concur: TYLER, P. J.; RICHARDS, J.

63 Cal. App. 481

Ex parte APAKEAN. (Cr. 1150.)

(District Court of Appeal, First District, Division 1, California. Aug. 20, 1923.)

Criminal law  576(5)—Accused present when cause set for trial 60 days after filing of information, consent presumed, and right of dismissal for failure to prosecute waived.

Where petitioner was brought to trial more than 60 days after the filing of the information, and was present in court when the cause was so set for trial, and made no objection, consent will be presumed to have it tried beyond the 60-day limit, and the privilege of dismissal accorded by Pen. Code, § 1382, was waived.

Application by James Apakean for writ of habeas corpus. Writ discharged.

Vincent W. Hallinan, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Alden Ames, Deputy Dist. Atty., both of San Francisco, for respondent.

R. M. J. Armstrong, of San Francisco, for respondent sheriff.

ST. SURE, J. Petitioner asks our indulgence for a presentation of this matter anew, stating that we were in error in assuming as a fact in our opinion (Cr. 1149) heretofore delivered on August 15, 1923 (218 Pac. 767), that, when the cause was called for trial on

July 25th, the 60-day period, prescribed by subdivision 2 of section 1382 of the Penal Code had not run. Petitioner now says that through inadvertence he neglected at the hearing to call our attention to the fact "that 60 days had expired from the filing of the information to the 25th day of July, 1923." The facts presented in the matter are correctly set forth in our former opinion, but it does not appear therein, as petitioner now admits, that, when on June 16, 1923, the cause was set for trial for the 25th day of July, 1923, petitioner was present in court and made no objection to setting the trial of the cause beyond the 60-day limit. Consent will therefore be presumed. *People v. Rongo*, 169 Cal. 71, 73, 145 Pac. 1017. Indeed, petitioner alleges in this behalf that when the cause was called for trial on July 25th he was ready and willing to proceed. We think the conclusion reached by us in our former opinion, that petitioner has waived the privilege accorded to him by the statute, is correct, and the petition for a writ is therefore denied.

We concur: TYLER, P. J.; RICHARDS, J.

63 Cal. App. 453

BEDELL v. MORRIS et al. (Civ. 4438.)

(District Court of Appeal, First District, Division 1, California. Aug. 16, 1923.)

1. Partnership ⚡35—Acts rendering one liable as partner need not be actuated by intent to deceive.

Under Civ. Code, § 2444, declaring that "any one permitting himself to be represented as a partner, general or special, is liable, as such, to third persons, * * *" the representations or acts need not be actuated by the intent to deceive; it being sufficient if the course of conduct is such as to induce a reasonably prudent man to believe that which the conduct implied.

2. Partnership ⚡55—Evidence held to sustain finding that partnership existed.

Conflicting evidence as to acts or representations relating to partnership business held sufficient to sustain finding that a copartnership existed.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by George P. Bedell, assignee, against Jacob C. Morris and Irving Morris. From a judgment for plaintiff, the first-named defendant appeals. Affirmed.

Goldman, Nye & Surr, of San Francisco, for appellant.

Marvin C. Hix, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff upon two assigned accounts for goods, wares, and merchandise alleged to have been furnished to the firm of J. Morris & Co., of which firm it is alleged that the appellant herein had held himself out to the assignors of the plaintiff herein as being a member. Upon the trial of the cause the court sustained by its findings plaintiff's assignors, in this regard, and rendered its judgment accordingly in plaintiff's favor. Upon this appeal the appellant contends that the evidence does not sustain the findings of the trial court in this regard.

The evidence in the case discloses that one J. Morris, prior to his death in 1919, had conducted a brush and broom business in the city and county of San Francisco, under the name and style of J. Morris & Co. He purchased brooms and brushes from William James and Walter Rueger, the latter doing business under the name and style of Sunset Broom & Brush Company. Shortly before his death J. Morris took his son Irving Morris with him and called on James and Rueger, informing them that he intended taking Irving in as a partner later on, after he had learned the business. After the death of J. Morris, Irving Morris and Jacob C. Morris, an elder brother, called on James and Rueger with regard to the conduct of the business. It appears that J. Morris had left some bills unpaid to both James and Rueger and at these conferences they were assured by Jacob C. Morris that the bills would be paid. There is a sharp conflict in the evidence as to just what was stated at these conferences, appellant insisting that no representation that Jacob C. Morris would be identified with the business was made. On the other hand James and Rueger testified that they were led to believe that the bills would be paid; that the business would be conducted as J. Morris & Co., Jacob C. Morris handling the financial end, and Irving Morris attending to the selling. The business was continued with its office at the place of business of Jacob C. Morris under the name of J. Morris & Co., checks were signed by Jacob C. Morris as J. Morris & Co., the books of the firm were kept by him, and orders for brooms and brushes were given by both of them. The amounts due and owing by the firm at the time of the death of J. Morris were paid off after the business was again continued, and further credit was extended, as testified by James and Rueger, on account of the fact that they knew Jacob C. Morris to be a successful business man and financially responsible, and notwithstanding the fact that they knew Irving Morris lacked experience and was financially irresponsible. The account with James ran from July 19, 1920, to December 15, 1920, and the unpaid balance amounted at the latter date to \$534.13; the account with Rueger,

doing business under the name and style of Sunset Broom & Brush Company, ran from November 23, 1920, to June 17, 1921, the unpaid balance amounting to \$842.96. Suit was brought for these amounts by plaintiff as assignee of James and Rueger. The court found that said business had been carried on as a copartnership under the name and style of J. Morris & Co.; that the goods had been sold them at their instance and request, and as conclusions of law therefrom decided that plaintiff was entitled to judgment for the amounts prayed and interest. Judgment was accordingly rendered in favor of plaintiff and against defendants and each of them in amount of \$1,506.35. From this judgment Jacob C. Morris appeals.

[1] Appellant relies mainly on the ground that the evidence is insufficient to support the finding that appellant held himself out or permitted himself to be held out as a partner of Irving Morris. This is summarized in two points: (1) There was no intention of appellant to represent himself as a partner in J. Morris & Co. or to mislead respondent's assignors. (2) There was no representation by appellant which amounted to a representation that he was a partner in J. Morris & Co. In support of his contention appellant urges that to create a liability on his part the law requires intentional or deliberate deception or fraud, or gross negligence amounting to culpability as the basis of an equitable estoppel, and in explanation of his acts and conduct states that his action in identifying himself with the business was simply that of lending a helping hand to members of his family and that he in no way intended or expected to be a partner. Appellant seems to rely upon the proposition that it requires a course of conduct with the actual intent to deceive or defraud, or gross negligence amounting to culpability. Section 2444 of the Civil Code reads as follows:

"Any one permitting himself to be represented as a partner, general or special, is liable, as such, to third persons to whom such representation is communicated, and who, on the faith thereof, give credit to the partnership."

[2] That is precisely the case at bar; the only thing remaining to be proven was whether appellant "permitted" himself to be represented as a partner and the reliance by third parties upon such representation. Representations or acts need not be actuated by the actual intent to deceive; it is sufficient if the course of conduct is such as to induce a reasonable and prudent man to believe that which the conduct would imply. The proposition is well supported by decisions and learned text-writers. *Seymour v. Oelrichs*, 156 Cal. 782, 166 Pac. 88, 134 Am. St. Rep. 154; *Carpv v. Dowdell*, 115 Cal. 677, 47 Pac. 695; *Dickerson v. Colgrove*, 100 U. S. 580, 25 L. Ed. 618; 2 *Pomeroy's Equity Juris.* (4th

Ed.) p. 1645. It does not seem to be questioned but that James and Rueger extended further credit to the company in view of the fact that Jacob C. Morris was identified with the business. They so testified, and we have nothing in contradiction thereof. This being so, the only question remaining is whether or not the acts and conduct of Jacob C. Morris were sufficient to lead James and Rueger to believe he was a copartner and assumed responsibility as such. This was a question of fact to be determined by the trial court upon the hearing. The court found that Jacob C. Morris represented and held himself out as a copartner of Irving Morris in the carrying on of the business as J. Morris & Co. The conflict in evidence having been resolved in favor of plaintiff and being amply supported by the record, we are not disposed to disturb the findings of the trial court in that regard.

The judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

63 Cal. App. 471

PINKERTON et al. v. MORTON et al.
(Civ. 4605.)

(District Court of Appeal, First District, Division 2, California. Aug. 17, 1923.)

1. Vendor and purchaser ⇨339—Vendees desiring to recover payments must tender balance due.

Vendees desiring to recover payments made should tender the balance due and demand performance.

2. Vendor and purchaser ⇨334(3)—Mutual rescission entitles vendee to recover payments.

Mutual rescission of a land contract excuses performance by either party and entitles the vendee to recover moneys paid.

3. Vendor and purchaser ⇨341(2)—Mutual rescission held not pleaded by allegation of vendor's forfeiture.

In vendee's action to recover payments made, mutual rescission was not pleaded by allegation in the complaint that vendors "claim that they have rescinded," followed by the allegation that they had "forfeited all of plaintiff's rights," for rescission cannot be predicated upon an allegation of forfeiture for vendee's default, since in insisting upon forfeiture the vendor is not treating the contract as at an end, as in rescission, but is standing on its terms.

4. Vendor and purchaser ⇨341(2)—Mutual rescission held insufficiently pleaded by allegation that vendors took possession.

In vendee's action to recover payments made, a mutual rescission is insufficiently pleaded by mere allegations that vendors took possession of the premises, where, so far as ap-

pears, plaintiffs were not in possession and were not entitled to possession until the purchase price was paid.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Parl L. Pinkerton and others against A. W. Morton and another. From an adverse judgment, plaintiffs appeal. Affirmed.

R. T. Quinn, of Los Angeles, and Elmer E. Robinson, of San Francisco, for appellants.

Sullivan & Sullivan and Theo J. Roche, of San Francisco, for respondent.

NOURSE, J. Plaintiffs sued to recover \$3,714.10 alleged to have been paid defendants on account of the purchase of a piece of real property in San Diego county. A demurrer to the fourth amended complaint was sustained without leave to amend, and from the judgment following plaintiffs appeal.

The amended complaint alleged that on April 10, 1913, the parties entered into a written contract for the purchase of the property for the full sum of \$7,164.60 under the following terms: \$3,250 to be paid upon execution of the agreement, \$978.65 before April 10, 1915, and a like sum on or before April 10th of the years 1916, 1917, and 1918, with interest on the deferred payments at 7 per cent. a year payable annually. Upon the completion of these payments defendants were to deliver their deed conveying the property to plaintiffs. It was alleged that the first payment of \$3,250 was made upon the execution of the contract, and that two payments of interest were made—on April 10, 1914, and on April 10, 1915. On April 10, 1915, the defendants executed and delivered to plaintiffs their agreement in writing extending the time of payment of the installment due April 10, 1915, for a period of one year. "During the year 1916" the defendants, without notice, took possession of the premises and refused to recognize any rights of plaintiffs in said land or in said contracts, and "assert and claim that they have rescinded said contract of sale and forfeited all of the plaintiffs' rights therein, and in and to all of the money paid by plaintiffs." The allegation that plaintiffs performed all the covenants and conditions of the contract is immediately followed by the allegation that before the commencement of the action plaintiffs demanded from defendants the return of the sum of \$3,714.10, "the amount of money paid by plaintiffs to defendants under and by virtue of the said contracts." In this connection it should be stated that the amended complaint was verified on November 28, 1919, and filed December 2, 1919, over a year and a half after the

last payment should have been made under the contract.

The demurrer to the amended complaint is both general and special, but it will be necessary to consider merely the grounds upon which it is asserted that the complaint fails to state a cause of action. Though the time of the rescission, if it was such, is indefinitely pleaded, the appellants concede in their brief that the acts of the respondent looking to a forfeiture occurred after appellants' default on April 10, 1916. As to the allegation of performance, appellants assert that we must treat this as mere surplusage, "because plaintiffs are not relying upon a compliance, upon their part, of the terms of the contract."

[1] The Supreme Court said in *Schwerin Estate Realty Co. v. Slye*, 173 Cal. 170, 172, 159 Pac. 420, 421:

"We cannot escape from the conclusion that by failing to prove their readiness, ability, and willingness to perform their part of the contract within the time limited therein the defendants utterly failed to establish their right to any relief."

Again, in the same case it was said:

"If the vendees had desired to consummate the contract or to recover back their deposit they should have made a tender of the balance due and should have demanded performance by the vendor. Not having done this they are not in a position to demand the relief for which they have prayed. *Griesemer v. Hammond*, 18 Cal. App. 535-540, 123 Pac. 818; *Oursler v. Thacher*, 152 Cal. 739-745, 93 Pac. 1007; *Skookum Oil Co. v. Thomas*, 162 Cal. 539-544, 123 Pac. 363; *List v. Moore*, 20 Cal. App. 616-622, 129 Pac. 474."

[2-4] Appellants insist that there is something different in this case from those cited because their complaint alleges that the "defendants assert and claim that they have rescinded said contract." From this it is argued, inferentially, that performance was excused. It is true that mutual rescission of a contract of this nature excuses performance by either party and entitles the vendee to a return of the moneys paid. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 13, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Gaume v. Sheets*, 181 Cal. 119, 123, 183 Pac. 535. But this complaint fails to allege mutual rescission. The allegation that the respondents "claim that they have rescinded" is followed by the wholly inconsistent allegation that they had "forfeited all of the plaintiffs' rights therein, and in and to all of the money paid by plaintiffs." It is essential to a rescission that the parties be put in statu quo, and that the consideration received by the party rescinding must be restored. Rescission cannot be predicated upon an allegation of forfeiture as a result of the default of the vendee. In insisting upon the forfeiture the vendor is not

treating the contract as at an end as in rescission, but is standing upon its terms. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 14, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. Furthermore, the allegations that the respondents took possession of the premises do not plead a rescission. So far as this complaint is concerned the appellants were not in possession and were not entitled to possession until the purchase price was paid.

Construing the pleading against the pleader, we must assume that, when the respondents took possession, the appellants were in default for both principal and interest. No excuse for nonpayment of the interest is pleaded, and the case comes squarely within the rule of *Schwerin v. Slye*, supra.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

63 Cal. App. 434

MONTEZUMA IMPROVEMENT CO. v. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO, et al. (Civ. 4589.)

(District Court of Appeal, First District, Division 1, California. Aug. 11, 1923.)

1. Appeal and error — 388 — Bond for costs filed within proper time may be withdrawn and money deposited in lieu thereof during proceedings for justification of sureties.

A deposit of money under Code Civ. Proc. §§ 926, 981, by an appellant in lieu of the undertaking for payment of costs under section 978, need not be made within the five-day period following the filing of the notice of appeal prescribed for the filing of the undertaking by section 978a, but an appellant may file an undertaking within such period and withdraw the undertaking and make the deposit pending the proceedings for justification of the sureties, under section 978a, providing that adverse party may except to the sufficiency of the sureties within five days after filing of undertaking and requiring the sureties therein named or other sureties to justify within five days thereafter.

2. Appeal and error — 381 — Sureties on appeal bond may justify on day set for hearing.

Under Code Civ. Proc. § 978a, providing that an undertaking on appeal must be filed within five days after the notice of appeal, and that adverse party may except to sufficiency of sureties within five days after filing of undertaking, and that, unless they or other sureties justify within five days thereafter, the appeal must be regarded as if no undertaking had been filed, the entire proceedings need not be determined within ten days from the filing of notice of appeal, for the right to justify can be properly exercised upon the day set for the hearing.

Application for writ of prohibition by the Montezuma Improvement Company against

the Superior Court, City and County of San Francisco, and Thomas F. Graham, Judge. Writ denied.

Frank McGowan and Blaine McGowan, both of San Francisco, for petitioner.

George Rosen, of San Francisco, for respondents.

TYLER, P. J. The superior court refused to dismiss an appeal in an action brought in the justice's court against the petitioner herein by one Rudolph Haak. The action was one to recover the sum of \$150. The case was tried on the 30th day of September, 1922, and judgment was rendered in favor of the defendant on the 10th day of November of the same year.

Thereafter and on the 9th day of December, 1922, and within the time limited by the statute, plaintiff served a notice of appeal from such judgment on questions of both law and fact, and at the same time filed an undertaking for the payment of costs as provided for by section 978 of the Code of Civil Procedure. On December 15th following defendant filed a notice of exception to the sufficiency of the sureties, whereupon plaintiff gave notice to the defendant that they would justify on their undertaking on December 18, 1922. They did not justify on the day noticed, but plaintiff again notified defendant that they would do so two days later. On that day, December 20th, plaintiff abandoned the justification of the sureties upon the undertaking, and in lieu thereof he deposited with the court the sum of \$100, together with the costs required by section 981, Code of Civil Procedure, as permitted by section 926 of said code. The clerk thereupon transmitted to the superior court the papers, pleadings, and files in the case, and the matter was duly assigned by such court for trial, where the case is now pending.

Defendant moved to dismiss the appeal on the ground that the undertaking was ineffectual for any purpose. The motion was made upon the ground that the deposit made on the 20th day of December was too late to give the court jurisdiction, as it was made eleven days after the date of the filing of the notice of appeal. The court made an order denying and overruling the motion, and petitioner alleges that it is about to proceed to a trial of the cause, and this proceeding is instituted to restrain it from so doing.

The contention here presented involves the time within which an applicant may file a deposit of money for the purpose of perfecting his appeal.

[1] The right to make a deposit of a sum of money in lieu of an undertaking, as permitted by section 926 of the Code of Civil Procedure, is not questioned by petitioner,

but it claims that the deposit, in order to be the equivalent of an undertaking on appeal, must be made within five days after the notice of appeal is filed; in other words, as we understand petitioner's contention, a party taking an appeal is put to his election to file either an undertaking or make a deposit of a sum of money in the first instance, and that when an undertaking is relied upon and the sureties fail to justify, the appeal lapses, and cannot be kept in force by a deposit made within the time allowed for justification, where the deposit is substituted more than five days after the notice of appeal is filed.

We are of the opinion that there is no merit in this contention.

The notice of exception to the sureties having been given on December 15, 1922, plaintiff had until December 20th following to justify. Had the sureties done so there is no question but that the appeal would have been properly effected. The mere fact that a deposit of money in lieu of an undertaking was not made in the first instance did not deprive the plaintiff of the opportunity to thereafter avail himself of this statutory privilege, even though five days had elapsed since the filing of the notice of appeal; it being made within the time in which the sureties might justify under the undertaking given.

In the case of *Laws v. Troutt*, 147 Cal. 172, 81 Pac. 401, there was in the first instance an undertaking filed, and exception was made to the sufficiency of the sureties, and proceedings were had for justification. There, as here, these proceedings were abandoned, and the sum of \$100 was deposited in lieu of the undertaking. While the facts in that case do not show at what precise stage of the proceedings the substitution was made, and the record which would enlighten us upon the subject is not available, it must have been from the very nature of the proceedings at a period later than five days after the filing of the notice of appeal. Nor do we think, as claimed, that the statute contemplates a complete determination of the proceedings within ten days from the filing of notice of appeal. Section 978a, Code of Civil Procedure, relating to the subject in question, provides in substance that the undertaking on appeal must be filed within five days after the filing of the notice of appeal, and notice of the filing of the undertaking must be given to respondent. The adverse party may then except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify within five days thereafter the appeal must be regarded as if no undertaking had been filed.

[2] The statute cannot be construed to mean that the entire proceedings shall be

determined within ten days from the filing of the notice of appeal, for the right to justify can be properly exercised upon the day set for the hearing.

In *Budd v. Superior Court*, 14 Cal. App. 256, 111 Pac. 628, it is expressly held that where exception is taken to the sufficiency of the sureties on an undertaking given in a justice's court appeal, and other sureties justify in place of the original ones, and such justification takes place within five days after the filing of the exception, the substitution of new sureties and their justification is within due time, even though more than seven days have elapsed after service of the notice. See, also, *Clay v. Superior Court*, 32 Cal. App. 189, 162 Pac. 416.

We are of the opinion, therefore, that the plaintiff in the case below had the right under the statute to substitute the deposit, and that such substitution was made in time; it being accomplished during the pendency of the proceedings for the justification of sureties.

The writ is denied.

We concur: RICHARDS, J.; ST. SURE, J.

63 Cal. App. 362

ARP v. BLAKE et al. (Civ. 4044.)

(District Court of Appeal, Second District, Division 2, California. Aug. 2, 1923. Rehearing Denied Aug. 31, 1923.)

1. Judgment ⇨847—Assignee takes subject to existing rights of parties.

Under Code Civ. Proc. § 368, as to assignment of a "thing in action," defined by Civ. Code, § 953, assignee of judgment takes it subject to existing rights of judgment debtor against judgment creditor.

2. Contribution ⇨6—Actual payment necessary to complete right.

Right to contribution is not complete, so as to be enforceable, till there has been an actual payment of the common obligation by the party seeking contribution.

3. Subrogation ⇨28—Only actual payment raises the right.

It is not liability to pay, but actual payment, which raises the right.

4. Judgment ⇨847—Assignee does not take subject to inchoate rights of contribution and subrogation.

Assignee of a judgment does not take subject to mere inchoate rights of contribution and subrogation, which have not become complete by payment before the assignment.

5. Judgment ⇨883(10)—Right to equitable set-off held to exist at time of, and so to attach to, assignment of judgment.

At the time of assignment to C. of judgment of B. against A., A. had the right to an equi-

table set-off against B., which attached to the assignment in the hands of C., judgment, which became final before said assignment, having been obtained against A. and B. by a third person; B. in equity and good conscience as between her and A. being chargeable with payment of the whole of said judgment, and B. being then insolvent, it not being necessary that A.'s equitable right should have been adjudicated prior to the assignment.

6. Estoppel — 121—Findings must be on all the essential elements.

For a finding of estoppel, all the essential elements thereof, including the facts that the party claiming it relies on the statements and would not have done as he did but for them, must be found.

7. Appeal and error — 863—Error in part of judgment not appealed from not reviewable.

Plaintiff having appealed only from the portion of the judgment ordering that he take nothing from one defendant, the question of whether he was not entitled to judgment for a greater amount against the other defendant is not open to review.

8. Appeal and error — 1040(4)—Error on demurrer held harmless in view of finding.

Though it was error to sustain a demurrer to one cause of action, since it alleged that an assignment of a judgment to defendant was for purposes of security only, it was harmless; the court on another cause of action having found that said judgment was bought outright.

9. Garnishment — 39, 44—Claim for damages in tort not subject to garnishment till reduced to final judgment.

Claims for damages in tort, being unliquidated, are not such debts or credits as are contemplated by the attachment laws to be subject to garnishment, but after such a claim has been reduced to a fixed sum by a final judgment it is subject to such process.

10. Garnishment — 44 — Pending appeal from judgment on claim for damages in tort, claim not subject to garnishment.

Pending appeal from a judgment on a claim for damages in tort, the claim is not subject to garnishment; the effect of the appeal being to deprive the judgment of its finality, and to operate to keep alive the claim as it existed before the judgment.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by James Arp against Elizabeth S. Blake and another. From the part of the judgment in favor of defendant Charles Cohn, plaintiff appeals. Reversed in part, and new trial granted.

Alfred Siemon and W. W. Kaye, both of Bakersfield, and L. E. Nathan, of Los Angeles, for appellant.

Edward Brittan, of Bakersfield, for respondent Cohn.

SHENK, Justice pro tem. This is an action in equity to enforce contribution and subrogation and for a set-off of alleged mutual debts. The complaint is in three counts. As to the first cause of action the court rendered judgment in favor of the plaintiff against the defendant Blake and in favor of respondent Cohn. Demurrers to the second and third causes of action were sustained without leave to amend. The plaintiff has appealed only from that portion of the judgment ordering that plaintiff take nothing as against the defendant Cohn and awarding to the latter his costs of suit, and is taken on the judgment roll as to the first count and on a bill of exceptions as to the second and third counts. The defendant Blake has not appealed, and the judgment as to her has become final.

The sufficiency of the findings and admitted facts to support the judgment in favor of the respondent on the first cause of action will first be considered. In response to appropriate allegations and proof, it is found that on the 24th day of December, 1914, the defendant Blake commenced an action in the superior court of Kern county against the plaintiff to recover damages for the alleged breach of an agreement to sell real estate; that a judgment in her favor and against the plaintiff, in the sum of \$2,100, interest and costs, was entered on October 25, 1915, and after appeal became final on April 5, 1919 (Blake v. Arp, 180 Cal. 144, 179 Pac. 683); that on June 3, 1919, that judgment was sold and assigned to the respondent Cohn for a valuable consideration and not for the purpose of security.

It is further found that on March 17, 1916, Jay Ransch brought an action, also in the superior court of Kern county, against the defendant Blake, plaintiff Arp and one Hewitt to recover the value of the use and occupation of real property; that a judgment in that case was rendered in favor of the plaintiff against all three of the defendants for the sum of \$1,050, interest and costs; that said judgment was entered on April 11, 1916, and became final after appeal by Arp on June 1, 1919 (Ransch v. Arp, 39 Cal. App. 580, 179 Pac. 694); that execution was issued, and, under compulsion of a threatened levy, Arp, on July 1, 1919, paid that judgment in full, amounting to \$1,330.-30; that the use and occupancy of said real property was solely and exclusively that of defendant Blake and that as between Arp and Blake in equity and good conscience Blake was chargeable with the payment of the whole of that judgment. Judgment was accordingly rendered against her in the present action for contribution.

[1] It is contended by the appellant that, on the findings and the admitted facts, judgment should have been rendered against the

defendant Cohn for the full amount of the Ransch judgment. The first question presented is: Did the defendant Cohn take the assignment subject to any right of set-off, contribution, or subrogation in favor of the plaintiff at the time of the assignment? It is the general rule, as contended by appellant, that the assignee of a judgment acquires no better right than the assignor had at the time of the assignment. Section 368 of the Code of Civil Procedure reflects the principle involved in the general rule. That section provides as follows:

"In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before, notice of the assignment."

A thing in action is a right to recover money or other personal property by a judicial proceeding. Civ. Code, § 953. Inherent in an unsatisfied judgment is this right. *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786. At the time of the assignment, to wit, June 3, 1919, the Blake judgment was final and unsatisfied. The effect of section 368, as applied to the present case, is that Cohn took the assignment of the judgment subject to whatever rights the appellant had against Blake at the time of the assignment.

[2-4] It is contended by respondent that, as the appellant had not paid the Ransch judgment prior to the assignment a right of set-off, contribution or subrogation had not accrued against Blake prior to the assignment. As to the alleged rights of contribution and subrogation, the respondent's position is well supported. Section 1432 of the Civil Code provides:

"A party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportional contribution from all of the parties joined with him."

The right given by this section of the Code to a joint obligor is based upon the principle of equity that when he has paid money which in equity and good conscience should be paid by another he should be reimbursed therefor. *Backer v. Grummett*, 39 Cal. App. 101, 178 Pac. 312.

"A party acquires a right to contribution as soon as he pays more than his share, but not until then." *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077; *Enscoe v. Fletcher*, 1 Cal. App. 659, 82 Pac. 1075; *Bell v. Walsh*, 7 Cal. 84.

In the early case of *Sherwood v. Dunbar*, 6 Cal. 53, it was held that in an action for contribution between joint obligors the statute of limitations does not begin to run until the payment of the debt by the party seeking to enforce contribution. The right to contribution is inchoate from the date of the cre-

ation of the relation between the parties, but it is not complete so as to be enforceable until there has been an actual payment, in whole or in part, of the common obligation, or until something is done equivalent to a discharge thereof. 13 Corpus Juris, 821, 823, and cases cited. See, also, *Los Angeles National Bank v. Vance*, 9 Cal. App. 57, 98 Pac. 58.

The right of subrogation can arise only in favor of one who has, under some duty or compulsion, paid the debt of another. It arises where one having a liability in the premises pays the debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid. The doctrine of subrogation requires that the person seeking its benefit must have paid a debt due to a third person before he can be substituted to that person's rights and it is not the liability to pay, but an actual payment to the creditor, which raises the equitable right. *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; 25 R. C. L. 1312, 1315. See, also, *Matzen v. Shaeffer*, 65 Cal. 81, 3 Pac. 92; *Darrough v. Herbert Kraft Co. Bank*, 125 Cal. 272, 57 Pac. 983.

The right of contribution or subrogation, therefore, did not accrue in favor of the appellant until his payment of the Ransch judgment on July 1st.

[5] But we think the contention of the appellant that prior to and at the time of the assignment he had the right to an equitable set-off against Blake, and that such right attached itself to the assignment in the hands of Cohn, must be sustained. The right of set-off exists when the parties hold cross-demands under such circumstances that in equity they should be applied one against the other and only the balance be recovered. *Russell v. Conway*, 11 Cal. 93; *Machado v. Borges*, 170 Cal. 502, 150 Pac. 351.

"A purchaser and assignee of a judgment, even for a valuable consideration and without notice, takes subject to a right of set-off existing at the time of the assignment, for an assignee takes subject to all equitable as well as legal defenses which can be urged against the assignor." *Porter v. Liscom*, 22 Cal. 430, 83 Am. Dec. 76; *Haskins v. Jordan*, supra.

The appellant's liability to pay the Ransch judgment became fixed on June 1st by final judgment. Execution could have issued immediately, and appellant could have urged no defense to the enforcement thereof. The defendants Blake and Hewitt were admittedly insolvent. When the party against whom a set-off is asserted is insolvent the rights of the party claiming the set-off are of especial equitable cognizance. *Coonan v. Loewenthal*, 147 Cal. 218, 81 Pac. 527, 109 Am. St. Rep. 128; *Hobbs v. Duff*, 23 Cal. 626. Because of such insolvency it was certain that the appellant would be required to pay the obliga-

tion of Blake which, according to the finding of the court, was solely her obligation. If Blake had sought to enforce her judgment against Arp prior to the assignment Arp unquestionably could have set off the amount of the Ransch judgment, the payment of which for Blake's benefit he, as the only solvent judgment debtor, could not escape. It is of no moment that Arp's equitable right had not been adjudicated prior to the assignment, if the facts forming the basis of such equitable right were in existence prior to that time. Those facts were so in existence, and Cohn took the judgment subject to that right.

[6] It is contended by respondent that the appellant is estopped from asserting any right as against him by reason of the allegations of his affirmative defense and the finding of the court thereon. The respondent alleges that about the time of the purchase by him of the Ransch judgment, and prior thereto, the plaintiff "represented and held out to the said defendant Chas. Cohn that he, the said James Arp, was about to pay off the said judgment owing to the said Elizabeth Blake, and that if he, the said defendant Chas. Cohn, would purchase said judgment, that the said James Arp would shortly thereafter pay the said Chas. Cohn the amount of said judgment, and defendant Chas. Cohn, believing him and relying upon said James Arp, did purchase said judgment and obtain an assignment thereof, and pay the sum of \$2,550 to the said defendant Elizabeth Blake therefor; that he would not have purchased the same if the said James Arp had not made said representation to him, and that therefore the said plaintiff James Arp is and should be estopped of claiming contribution or right to subrogation or contribution against this defendant, Chas. Cohn." In response to the issue joined on these allegations the court found that before Cohn purchased the judgment from Blake the plaintiff "did agree to pay said judgment to the said Charles Cohn if the said Charles Cohn would purchase the said judgment from the said Elizabeth S. Blake, and that the said Charles Cohn purchased the said judgment after said representation and statement had been made to him by said James Arp, and that the said statements and representations of the said James Arp were not made for the purpose of deceiving the said Charles Cohn, but were made by the said James Arp at a time when he had not been compelled to pay and had not paid the judgment in favor of said Ransch and against the said Arp, Hewitt, and Blake."

The sufficiency of the allegations charging estoppel is not questioned, but it is contended that the court did not find on all of the essential elements of the alleged estoppel. Particularly that it is not found that the respondent relied upon the statements attrib-

uted to the appellant and purchased the judgment in reliance upon such statements, and that it is not found that he would not have purchased the judgment but for such statements. We think the findings are deficient in the particulars indicated. For aught that appears the respondent may have purchased the assignment, notwithstanding the alleged representations. All essential elements of estoppel must be alleged (*Davis v. Davis*, 26 Cal. 39, 85 Am. Dec. 157), and must be found upon (*Fritz v. Mills*, 12 Cal. App. 113, 106 Pac. 725), and from such facts estoppel must be clearly deducible therefrom (*Wheaton v. Ins. Co.*, 76 Cal. 429, 18 Pac. 758, 9 Am. St. Rep. 216).

The refusal of the court to allow the plaintiff to amend the second and third causes of action is assigned as error. In the second cause of action it is alleged that an action for damages was commenced by Hochheimer & Co. against the defendant Blake on July 8, 1915, in which action a judgment was entered on the following day against Blake for \$458.39 and costs. It is further alleged that on November 3, 1915, an execution was levied on all "debts, choses in action, and demands of every kind" in the hand of the plaintiff Arp; that on October 29, 1920, a second execution was issued and served on Arp, and that on the 3d day of November, 1920, in response to such levy, Arp paid the Hochheimer judgment, and took an assignment thereof from the judgment creditor. On information and belief it is alleged that Charles Cohn claims to own the judgment in the case of Blake v. Arp by an assignment dated June 3, 1919; that Charles Cohn paid no consideration for said assignment, and that the assignment made to him by Blake was made for the purpose of security and not otherwise, and plaintiff prays that he be subrogated to the rights and to the place of Hochheimer Company in and to the judgment in that action.

[7] At the time that plaintiff responded to the levy of execution in the Hochheimer Case, to wit, November 3, 1920, the judgment in the original case of Blake v. Arp had become final and was unsatisfied. Upon the payment of such judgment Arp had the right of subrogation as against Blake. But that question is not now open to review, for the reason that plaintiff has taken no appeal from his judgment as against Blake. The notice of appeal recites:

"This appeal is taken from that portion of the judgment ordering that the plaintiff take nothing against the defendant Charles Cohn and that said Charles Cohn recover his costs against the plaintiff, but is not from that portion of said judgment ordering and adjudging that plaintiff recover of and from the defendant Blake the sum of \$1,050 with interest," etc.

If plaintiff were dissatisfied with the amount of his judgment against Blake in this action, he should have appealed from

that portion of the judgment also. The only question which concerns us on this branch of the case is whether or not the second count states a cause of action against Cohn. In order to decide that question it must first be determined whether the second count states facts which would charge Blake with subrogation on June 3, 1919, and impose upon Cohn that burden under his assignment. It must be concluded, upon the authorities above cited, that the second count does not state such facts. The plaintiff did not pay the Hochheimer judgment until November 3, 1920, and the right now asserted did not accrue until that date.

[8] For the purposes of the demurrer, however, it must be assumed that the allegations that Cohn paid no consideration for the assignment and took it only for the purposes of security are true. With such an assumption the plaintiff would have the right to consider Blake as the owner of the judgment against him, subject only to its assignment for security, and the allegations referred to were good as against the demurrer. It was error to sustain the demurrer in the face of those allegations. But, if the second count does not state a cause of action except for those allegations, how can it now be said that the order sustaining the demurrer was prejudicial to the plaintiff's rights, in view of the fact that the court tried the issues tendered by the same allegations in the first cause of action and found that Cohn bought the judgment outright for \$2,550? It cannot be assumed that the court having found in favor of the respondent on those issues in the first cause of action would find against him on the same issues in the second cause of action.

In the third cause of action it is alleged that on November 10, 1916, an action was commenced by the Colonial Hospital Company against the defendant Blake in the justices' court of the 6th township of Kern county to recover the sum of \$34, interest and costs. It is further alleged that a writ of attachment was issued in that case and was levied on all debts, credits, and other personal property in the possession of the plaintiff Arp and belonging to the defendant Blake, with the instruction that Arp do not pay over the same to any one except the constable. All of the facts with reference to the action of Blake v. Arp are also alleged, and plaintiff prays that he be allowed to pay a sufficient sum into court to satisfy any judgment that may be rendered in favor of the Colonial Hospital Company.

There was no prejudicial error in the order sustaining the demurrer. In the first paragraph of the first cause of action it is alleged that --

"On December 24, 1914, the defendant Elizabeth S. Blake, commenced an action in the above entitled court against this plaintiff for

the recovery of damages for the alleged breach of an agreement to sell real property," etc.

This allegation is by reference incorporated in the second and third causes of action. In the plaintiff's application to amend, his counsel stated as follows:

"I ask leave to amend the second and third causes of action, and the purpose of amending it is this: I notice in the first paragraph of the complaint I allege that Elizabeth Blake commenced an action in the above-entitled court against the plaintiff for the recovery of alleged damages for the breach of an agreement to sell real property. That paragraph is made a part of the second and third causes of action. I want to amend that by saying that she commenced an action for the rescission of an agreement to sell real property."

After some discussion the court inquired of counsel: "You are only asking to amend the second and third causes of action?" to which counsel replied: "That is right." The evident purpose of appellant's counsel was to amend the second and third causes of action so that the same might show upon the face thereof that the action of Blake v. Arp was an action in rescission, and not an action for damages, and thereby escape the rule, which was successfully urged against him on demurrer, that the claim of Blake against Arp was unliquidated prior to judgment and therefore not subject to garnishment. The position taken by appellant places him in a position of insisting upon an amendment to the second and third causes of action at variance with allegations on the same subject in the first cause of action. Appellant does not attempt to justify this inconsistent position. Furthermore, if the application had been made to apply to all three causes of action, we have the record of the Blake Case before us, which shows that the case was prosecuted on the theory that it was an action for damages, and we also have the opinion of the Supreme Court classifying the action as follows:

"The complaint is framed upon the theory of an action to recover damages for the fraudulent representation of defendant that he had title. * * * It is not an action to rescind, or for breach of contract to convey real estate." Blake v. Arp, supra, 180 Cal. 146, 179 Pac. 684.

This declaration of the Supreme Court was made under date of March 10, 1919, and must have been known to appellant's counsel at the time of the preparation of the complaint in this action, about November 4, 1920. No good reason has been suggested why the plaintiff should not be bound by the final determination of the case to which he was a party.

[9] It is well settled that claims for damages in tort, being unliquidated, are not such debts or credits as are contemplated by the attachment laws to be subject to garnish-

ment process. But after the claim has been reduced to a fixed sum by a final judgment it is then subject to such process. Until then the claim maintains its character as an unliquidated claim. *Shinn on Attachment and Garnishment*, vol. 2, §§ 482, 483; *Waples-Platter Grocer Co. v. Tex. & P. Ry. Co.*, 95 Tex. 486, 68 S. W. 265, 59 L. R. A. 353, and cases cited in the note. See, also, *Hassie v. G. I. W. U. Congregation*, 35 Cal. 378; *Redondo Beach Co. v. Brewer*, 101 Cal. 322, 35 Pac. 896.

[10] The garnishment mentioned in the third cause of action as having been served on Arp in 1916 was served pending the appeal in the case of *Blake v. Arp*. In the case of *Waples-Platter Grocer Co. v. Tex. & P. Ry. Co.*, supra, the complaint sounded in unliquidated damages. Garnishment was served pending appeal, and we think the court correctly stated the rule under such circumstances as follows:

"The effect of the appeal was to deprive the judgment of its finality, and it operated to keep alive the case as one of tort as it existed before the judgment was rendered."

The judgment is reversed as to the first count, and a new trial is granted on the issues involved in the plea of estoppel raised by the answer of respondent to that cause of action.

We concur: FINLAYSON, P. J.; CRAIG, J.

63 Cal. App. 440

In re HEWITT'S ESTATE.

BOTCHER et al. v. HEWITT.

(Civ. 4570.)

(District Court of Appeal, First District, Division 2, California. Aug. 15, 1923.)

1. Wills ⚡326—Denial of nonsuit on issue of execution raised by contestant where he offers no evidence held error.

In an action to contest a will, where contestant has offered no testimony in support of issues relating to the execution of the will, denial of a motion for nonsuit as to those issues or refusal to withdraw them from the jury held error.

2. Wills ⚡333—General verdict in action to contest will improper.

Under Code Civ. Proc. § 1314, a general verdict either for or against a will in a proceeding to contest it is improper.

3. Trial ⚡252(18)—Instruction in proceeding to contest will erroneous when not supported by evidence.

In an action to contest a will, an instruction as to the presumption or inference arising from mutilation of the will when found among

deceased's private papers after death held erroneous when based upon a state of facts which were not in evidence in the case.

4. Wills ⚡331(2)—Instruction as to "presumption" to be drawn from mutilation of will held erroneous in not using the word "inference."

An instruction to the effect that, when a will is found immediately upon the death of the testator among his private papers or in his depository in a mutilated condition, having been continuously in testator's possession, the presumption is that it was mutilated by the testator himself, with intent to revoke, held defective in the use of the word "presumption" rather than "inference."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Presumption; Inference.]

5. Wills ⚡329(4)—Instruction held erroneous as to measure of proof required to overcome presumption from mutilation of will while in possession of testator.

An instruction as to the presumptions arising from the mutilation of a will found among deceased's effects after his death, stating that such presumptions could be overcome only by "positive evidence that it was not done by the testator" with an intent to revoke, and which stated that "an inference that any other than testator mutilated such will can be raised only by direct and positive evidence" held erroneous as to the measure and quality of proof required to overcome such presumptions.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Augusta M. Hewitt, deceased. Aimee Botcher and Florence B. Towle, proponents of the will of said Hewitt, appeal from a judgment in favor of Kenneth Hewitt, contestant. Judgment reversed.

Vincent W. Hallinan, of San Francisco, for appellants.

O. C. Wilson, of San Francisco, for respondent.

NOURSE, J. This is an appeal from a general verdict in favor of contestant in a proceeding for the probate of a will. Mrs. Hewitt died on March 17, 1921, leaving an estate valued at about \$250,000. She left surviving her Kenneth Hewitt, a son, the contestant herein, and Aimee Botcher and Florence B. Towle, sisters, the proponents herein, and a brother, Fred McCune. On January 26, 1909, she executed the will offered for probate, wherein she left approximately two-thirds of her estate to her son, and the remainder, less some minor bequests, to her two sisters. The will consisted of four typewritten pages, bound together and backed. It was apparently executed in due form in the presence of two witnesses, and

signed by the testatrix at the bottom of the first three pages, as well as at the end of the final clause on the fourth page. It was found some four or five weeks after the death of the testatrix in a small bag belonging to the deceased which was hanging on the knob of a door which had been removed from its hinges and stood in a hall clothes closet on the first floor of the home where the testatrix and her son resided at the time of her death and for some ten years prior thereto. The will was found by one of the proponents while the two were clearing up that portion of the house during the absence of the contestant, but under his sanction. The bedrooms on the upper floor of the house were under lock and seal, having been so left by the contestant before his departure. One of these sealed rooms contained a secretary belonging to the deceased, in which she had kept her papers and other valuables. Prior to the death of the testatrix the will had been kept in a safe deposit box to which the testatrix and her son had joint access. No testimony was offered to show when or by whom it was removed from this depository, and no witness was called to testify that he had ever seen the will before its discovery by these proponents. When discovered it showed signs of mutilation, the signatures had apparently been cut away from the first three pages, and the clause naming executrices had been cut away from the third page. The pieces containing this clause and the three signatures were missing, but the attesting signature and the attestation clause, with the signatures of the witnesses on the last page, had been carefully preserved and attached in the proper place and folded in with the rest of the instrument.

Contestant laid out his case on the theory that, the will having been found in a mutilated condition, the presumption immediately arose that it had been mutilated by the testatrix, and that from this presumption followed the other that the testatrix had mutilated it with the intention of revocation. The theory of the proponents was that the mere fact of mutilation was not proof of revocation, but that the jury was to draw its inferences from all the facts and circumstances in evidence.

On this appeal the proponents have presented many grounds for reversal, of which consideration need be given only to the following: (1) Error in denying the proponents' motion for a nonsuit on certain issues and in receiving a general verdict; (2) errors of the trial court in giving instructions and in refusing to give instructions requested by the proponents.

[1] 1. The contestant opposed the probate of the will upon six separate assignments of contest. The first four grounds related to the execution of the will, including the subscription, acknowledgment, and publication thereof by the testatrix and the attaching of

the signatures thereto by the witnesses. The fifth and sixth grounds related alone to the mutilation or cancellation of the will. Upon the conclusion of contestant's case the proponents moved for a nonsuit upon the issues relating to the execution of the will upon the ground that no evidence had been offered to sustain them. The trial court denied the motion, and required the proponents to proceed with their proof. They very properly refrained from offering any proof on the issues because the contestant had offered no evidence of any nature to support these grounds of contest. The motion for nonsuit should have been granted, or, more properly, these issues should have been withdrawn from the consideration of the jury, and the one issue relating to revocation of the will should have been submitted to the jury in such a way that the jury could have returned a special verdict upon that issue. Section 1314, Code Civ. Proc. This was not done, but the whole cause was left with the jury under an instruction which called for a general verdict in favor of contestant or proponents. The jury returned its verdict upon the form given it by the trial judge, and which read:

"We, the jury in the above-entitled cause, find a verdict in favor of the contestant [plaintiff]."

[2] That such a verdict is not permissible under our probate practice seems well settled. Section 1314, Code Civ. Proc.; *In re Langan*, 74 Cal. 353, 355, 16 Pac. 188; *Estate of Benton*, 131 Cal. 472, 474, 63 Pac. 775; *Estate of Gould*, 188 Cal. 353, 365, 205 Pac. 457. In the latter case it is said:

"The law requires a special verdict in a will contest * * * and a general verdict is unauthorized."

In the *Langan* matter the court, at page 355 of 74 Cal., at page 189 of 16 Pac. said:

"The general verdict was not authorized, and consequently furnished no support for the judgment. * * * We have, then, a case where there was simply a mistrial, and where there was no lawful authority to enter any judgment. * * * A judgment entered under such circumstances is void, and may be set aside on motion."

In *Estate of Benton*, *supra*, the issue involved was whether the proponent had been guilty of fraud in procuring the execution of the will. Numerous questions were submitted to the jury purporting to bear upon this issue and as a result of the answers returned the will was denied probate. The judgment was reversed upon the ground that these questions called for answers upon probative facts only, and that the ultimate fact, whether the mind of the decedent, at the time of the execution of the will, was free from fraud practiced upon him by the proponent, was not submitted to the jury. In this con-

nection the court said (131 Cal. 480, 63 Pac. 778):

"The case then presents itself exactly as a case where there is no finding of fact upon a material issue, and the judgment must be reversed for that reason."

In *Holler v. Western Union Telegraph Co.*, 149 N. C. 336, 63 S. E. 92, 19 L. R. A. (N. S.) 475, the Supreme Court of North Carolina, in construing a similar statute, held that it was the duty of the trial judge to submit such issues to the jury as will enable it to dispose of the controversy and proceed to judgment, and that this was true even though the parties did not tender the issue for submission to the jury. The theory of the case is the same as that of the early California cases cited above that, when the statute requires a special verdict, a judgment based upon a general verdict is like a judgment without findings. The reason for the rule seems to be that, when a will is offered for probate and is accompanied by all the necessary proofs of due execution, it is the duty of the court to admit it to probate. To deny probate some legal ground must appear, and the proponent is entitled to a specific finding of the ultimate facts constituting such ground. Where the statute is mandatory, the right to a special finding is not waived by a failure to request it.

[3] 2. The attack upon the instructions is based mainly upon the contention that too great a degree of proof was required of proponents, and that they were seriously prejudiced by the court's refusal to give their proposed instruction relating to the issue of the testatrix's intention to revoke the will. Upon the first point the court, after instructing the jury as to the meaning and effect of conclusive and disputable presumptions, gave the following instruction upon the request of the contestant:

"Where a will remains in the testator's possession until his death, and is then found among his papers with erasures, alterations, cancellations, or tearings the presumption is that such act manifest upon the will was done by the testator with the intention of revocation, and this presumption must be overcome by positive evidence that it was not done by the testator or was not done with such intention.

* * * A will executed by an individual is without any effect until the death of the individual making such will, and during the entire lifetime of the maker it is his for the purpose of doing with it as he pleases; he can alter it, modify it, or revoke it at pleasure, and if it has remained in the maker's possession, and is destroyed or mutilated, unless there is positive proof tending to show that the mutilation or destruction was accidental or done by another, then the presumption is as stated before, that the maker mutilated or destroyed his own will, and there is a further legal presumption that he did it *animo revocandi* or with intent to revoke. * * * Where a will is shown to have remained con-

tinuously in the possession of the party who made it, no inference can be raised as to its mutilation or destruction by a third party by mere expressions of suspicion, but such an inference can only be raised by direct evidence as to the ability of the third party to so mutilate or destroy the will and, where it appears from the testimony that no third party ever had custody of the will, then an inference that any one other than the testator mutilated such will can be raised only by direct and positive evidence as to the act of a third party."

The preliminary objection to the foregoing instructions is that the jury was told that certain presumptions arose under a certain state of facts which were not in evidence in this case. For instance, there was no evidence that the will remained in the testatrix's possession until her death, that it was then found among her papers, or that no third party ever had custody of the will. The uncontradicted evidence was that for some time prior to the testatrix's death the will was kept in a safe-deposit box to which the testatrix and her son, the contestant herein, had joint access; that she died from tuberculosis after a long illness, during which time her son alone was able to enter the place of depository, and that a few days before her death he went to the deposit box at her request and took out some of her papers which he brought to her home. The evidence as to the time and place of discovery of the will was also uncontradicted. It was that the will was discovered some four or five weeks after the testatrix's death, and not at the time of her death, as inferred in the instruction. It was found in an open hall closet which was used by contestant, and was not found among the testatrix's papers, as stated in the instruction. The evidence was that the testatrix had in her room a secretary in which she kept many of her private papers; that a few nights before she died she handed the contestant certain papers, directing him to place them in this secretary; that she requested him to examine all her papers in the presence of the two proponents after her death, but that, on the night following her death, the contestant secretly went to the secretary, removed therefrom papers belonging to the deceased, and burned them; that he always refused to let either of the proponents examine any of the papers as directed by his mother.

[4] On the facts, therefore, the case is not similar to those upon which the rule of law, however correct it may be, has been laid down, that, when a will is found immediately upon the death of the testator among his private papers, or in his depository, and in a mutilated condition, having been continuously in the testator's possession until his death, the presumption is that it was mutilated by the testator himself *animo revocandi*. It is hardly necessary to point out the error in the use of the word "presumption"

instead of "inference." The Code defines a presumption as "a deduction which the law expressly directs to be made from particular facts." (Emphasis ours.) Section 1959, Code Civ. Proc. An inference is "a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." Section 1958, Code Civ. Proc. The word "presumption" is employed in the statement of the rule by the careless disregard of this distinction. But some cases imply that it is a proper use of the term by first invoking the presumption mentioned in subdivision 1 of section 1963 of the Code of Civil Procedure "that a person is innocent of crime or wrong," and then, having assumed the innocence of all third parties, it is said that, the testator being the only one who could have rightfully canceled or mutilated the will, it must be presumed that he did so. But this, of course, overlooks the important elements of accident and mistake. Here the trial court defined a presumption for the jury, and instructed it that in cases involving the mutilation of a will there were certain presumptions which must be overcome by evidence of the proponents. In the instructions under consideration the jury was then told that the mutilation of the will must be presumed to have been the act of the testatrix, and that this act must be presumed to have been done with the intention of revocation.

[5] But more serious than all this was the measure of proof which the court required of the proponents. The jury was told that these presumptions could be overcome only by "positive evidence that it was not done by the testator or was not done with such intention." And, again, "unless there is positive proof tending to show that the mutilation or destruction was accidental or done by another." And "where it appears from the testimony that no third party ever had custody of the will, then an inference that any one other than the testator mutilated such will can be raised only by direct and positive evidence as to the act of a third party." (Emphasis ours.) The vice of these instructions is in the use of the words "direct" and "positive" as designating the character of proof which the proponents were required to make. Its prejudice to the proponents relates particularly to the issue of the intention of the testatrix to revoke the will, assuming that she alone had altered it. The effect of the instruction was to advise the jury that, unless it found direct and positive evidence that some third party had mutilated the will, it must find that the testatrix did so with the intention of revoking it. Putting it in another way, the jury was in-

structed that it must find for the contestant unless it found direct and positive evidence that the mutilation "was not done by the testator or was not done with such intention."

Direct evidence is defined as "that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact." Section 1831, Code Civ. Proc. Positive evidence is the direct proof of a fact, and like direct evidence is unaided by presumptions or inferences. Both the terms "direct" and "positive" are distinguished from indirect or circumstantial evidence, which is defined as that evidence "which tends to establish the fact in dispute by proving another" (section 1832, Code Civ. Proc.), and includes both presumptions and inferences (section 1957, Code Civ. Proc.).

The proponents proved that within one month of the testatrix's death she declared that she had a will in which she left some of her property to the proponents, and that she had executed no other will than the one offered for probate. Thus the presumption found in subdivision 32 of section 1963 of the Code of Civil Procedure that a thing once proved to exist continues would arise to rebut the presumption of revocation. Estate of Sweetman, 185 Cal. 27, 33, 195 Pac. 918. Proponents proved that no essential part of the will had been eliminated, but that, after the clause appointing executrices had been clipped out, the testatrix's signature, attestation clause, and witnesses' signatures had been carefully preserved. They proved that the will had not been in the exclusive custody of the testatrix; that it had not been found among her papers or in the usual depository for her papers, but that it was found long after her death in a closet belonging to and used by the contestant. Undoubtedly the proponents were entitled to have the jury consider these circumstances as tending to rebut the presumption of intentional revocation by the testatrix.

Proponents also assign as error the refusal of the trial court to give to the jury the instruction they proposed relating to the effect of the declarations of the deceased regarding the existence of a will. While the proposed instruction cannot be commended in its entirety, the proponents were undoubtedly entitled to an instruction relating to the use of indirect evidence in view of what had already been given relating to the presumptions in favor of contestant. The refusal to give such an instruction was highly prejudicial to proponents' cause.

Judgment reversed.

I concur: STURTEVANT, J.

63 Cal. App. 489

**DAWSON TERMINALS CO. v. ROSENBERG
IRON & METAL CO. et al. (Civ. 4621.)**

(District Court of Appeal, First District, Divisions 2, California, Aug. 20, 1923. Re-hearing Denied Sept. 19, 1923.)

1. Account stated $\Rightarrow$ 6(2)—Mere demand, not objected to, without indebtedness, creates no liability.

Where plaintiff made a demand on defendant for charges and expenses paid on defendant's account, when there was no indebtedness, and there had been no previous transaction between the parties, such demand, although not objected to, could not of itself create a liability, nor give rise to an account stated, on which plaintiff could recover.

2. Account stated $\Rightarrow$ 19(3)—Evidence held to show no indebtedness.

Evidence held not to show that any sum had been paid for defendant's account, nor that the conditions of defendant's promise to pay had been complied with.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Dawson Terminals Company against the Rosenberg Iron & Metal Company and others. From a judgment for plaintiff, defendants appeal. Reversed.

Brownstone & Goodman, of San Francisco, for appellants.

Nathan H. Frank, Irving H. Frank, and Sydney Schlesinger, all of San Francisco, for respondent.

NOURSE, J. This is an action upon an account stated for \$484.40. The appeal is upon a bill of exceptions, which omitted a specification of particulars. This, however, was supplied by order of court, made, on motion, prior to the submission of the cause. The defendants had made a contract with the Parr-McCormick Steamship Company to transport iron for defendants from Los Angeles to Seattle by boat. After the delivery of the iron at Seattle, the plaintiff made demands upon defendants for charges and expenses which it claimed it had paid the transportation company for defendants' account. Up to that time plaintiff and defendants had had no business relations of any kind. On February 2, 1920, defendants wrote plaintiff, agreeing to pay these advances, if plaintiff would furnish an "itemized paid expense bill for advance charges." The plaintiff did not meet this condition at any time. On May 29, 1920, it mailed a letter to defendants, inclosing a corrected bill, which, however, did not itemize the advance charges and contained no evidence of payment. On June 14, 1920, plaintiff sent another letter to defendants, inclosing a copy of what purported to be an

advance charge bill; but the bill inclosed was an account between defendants and the Outer Harbor Dock & Wharf Company and also failed to show payment by plaintiff. On these facts plaintiff sued upon an account stated. The defendants rely upon the plea that their promise to pay was always conditional upon production of evidence that these charges had been in fact advanced by plaintiff, and that this condition was never met. The defendants also showed that full payment had been made to the Parr-McCormick Steamship Company, with whom the original contract was made.

[1] At the opening of the trial the court took the position that, if one party should send to another a statement or claim, with a demand for payment, and the demand is ignored, an account stated is created, upon which the sender could recover, even though there was no indebtedness and no previous transactions between the parties. We do not so understand the rule as to the creation of an account "stated." In 1 R. C. L. p. 215, it is said:

"The rule that an account which has been rendered, and to which no objection has been made within a reasonable time, is to be regarded as admitted by the party charged as prima facie correct, assumes that there was some indebtedness between the parties; for there can be no liability on an account stated, if no liability in fact exists, and the mere presentation of a claim, although not objected to, cannot of itself create a liability."

In *Stimson Mill Co. v. Hughes Mfg. Co.*, 8 Cal. App. 559, 561, 97 Pac. 322, it was said:

"An account stated must be founded on previous transactions of a monetary character. * * * It cannot be made the instrument to create a liability, where none before existed."

[2] Here the demand of respondent was for moneys claimed to have been paid for the account and benefit of appellants. In answer to the demand the appellants promised to pay when respondent produced an itemized expense bill showing that the same had in fact been paid by respondent. The two subsequent letters containing copies of bills in connection with the transaction fell far short of meeting the conditions imposed by appellants. The respondent has not at any stage of the controversy given any evidence tending to show that any sum had at any time been paid for appellants' account, and hence there is no proof of any indebtedness between the parties. On the other hand, the appellants proved that the account had been fully paid to the original creditor.

Judgment reversed.

We concur: **LANGDON, P. J.; STURTEVANT, J.**

63 Cal. App. 482

WILLIAMS v. WILLIAMS.. (Civ. 4533.)

(District Court of Appeal, First District, Division 1, California. Aug. 20, 1923. Hearing Denied by Supreme Court Oct. 18, 1923.)

1. Marriage ⚡60(7)—Evidence held to sustain finding as to mental incapacity of husband.

In action by husband's guardian to annul marriage, evidence held to sustain finding as to mental incapacity of the husband at the time of the marriage.

2. Appeal and error ⚡101(1)—Findings on substantially conflicting evidence not disturbed.

The findings of the trial court on substantially conflicting evidence will not be disturbed on appeal.

3. Appeal and error ⚡105(2)—Admission of evidence held harmless in view of other evidence supporting findings.

In an action to annul a marriage for the husband's mental incapacity at the time of the marriage, the admission in evidence of the husband's army medical record, if error, held harmless, where there was ample evidence outside such record to support the findings and conclusions of the trial court as to the mental incapacity of the husband.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Ruth Williams, as guardian of the person and estate of John Joseph Williams, an incompetent person, against Nora Maguire Williams. Judgment for plaintiff, and defendant appeals. Affirmed.

Hearing denied; all concur except SEAWELL, J., and RICHARDS, Justice pro tem, not participating.

R. M. Barrett and C. W. Anderson, both of Santa Rosa, for appellant.

Geary & Geary, of Santa Rosa, for respondent.

RICHARDS, J. Appeal from a judgment of the superior court of Sonoma county annulling the marriage of John Joseph Williams and Nora Maguire Williams.

The undisputed evidence shows the following facts: Upon the entry of this country into the recent World War, Williams enlisted in the infantry, was in due time sent to France with the First Division, and took part in some of the active service in which that division was engaged. On or about the 8th day of June, 1918, he was wounded in the head by shrapnel, received treatment for said injury, and later returned again to active service. Williams was again wounded on or about the 20th of July, 1918, and as a result thereof it was necessary to amputate his right foot. He was given treatment at various hospitals until, under date of September 7, 1918, he

was admitted to the Walter Reed Hospital, Washington D. C., for observation, at which hospital he remained until September 9, 1919, and was then transferred to the Letterman General Hospital, San Francisco. Under date of November 21, 1919, the army medical board recommended Williams for discharge as "unfit for service as a soldier because of (1) amputation of right leg just above ankle joints; (2) dementia praecox, paranoid type," and made the further statement that—

"Soldier cannot be released from military control without danger to himself or others. Soldier to be discharged at this post and turned over to his sister, Mrs. B. F. Clark, who will assume responsibility for his care and treatment."

Williams was discharged from the army December 1, 1919, and delivered into the custody of Mrs. Clark, who resided in Oakland, Alameda county, Cal. On or about January 15, 1920, Williams, without making known his intention, left the home of Mrs. Clark, went to Washington, D. C., and under date of February 15th was there married to Nora Maguire. He remained in Washington until about April 4, 1920, when he returned to California, going to Santa Rosa, Sonoma county, where he became noisy and obscene, destructive, impulsive, and suffered from hallucinations, was removed to a city hospital, and on the 30th of April was by the superior court of Sonoma county found to be afflicted with dementia praecox, paranoid type, and was committed to the state hospital at Talmadge, Mendocino county, Cal., May 1, 1920. The medical staff at said state hospital diagnosed the case as dementia praecox, paranoid type, and pronounced the patient incurable. Under date of May 10, 1920, at the hearing had upon the petition of Ruth Williams to be appointed his guardian and alleging him to be incompetent, the said superior court adjudged that John Joseph Williams was mentally incompetent and incapable of taking care of himself and managing his property, and thereupon appointed Ruth Williams as the guardian of the person and estate of the said incompetent. Thereafter and on November 10, 1920, Ruth Williams, as said guardian, commenced this action, alleging that at the time of the marriage heretofore referred to, John Joseph Williams was mentally incompetent and was incapable of contracting said marriage, and praying that the marriage be annulled and the bonds of matrimony dissolved. The case came on for hearing, and upon the conclusion thereof the court filed its findings of fact wherein it recited with much of detail the foregoing facts, and found therefrom that at the time of the marriage, "at all times since, and is now, mentally incompetent and of unsound mind," and as conclusions of law therefrom "John Joseph Williams is entitled to have the said

marriage * * * annulled." Judgment was entered accordingly. From said judgment defendant prosecutes this appeal.

[1] The first point made by appellant is that the evidence is insufficient to support the finding that Williams was incompetent and of unsound mind at the time of the marriage. In support of this contention the plaintiff relied upon the following facts, as adduced at the trial of the cause: Williams met appellant in the early part of 1919 at Washington and frequently thereafter prior to his removal to the Letterman Hospital at San Francisco. Shortly after his discharge Williams returned to Washington, D. C., again met Miss Maguire, proposed marriage, was accepted, and they were married. In support of the sanity of Williams at the time of the marriage, appellant produced no medical experts, but relied entirely upon the testimony of herself and lay witnesses who were more or less intimately acquainted with him. These witnesses were Mrs. Martin, who, it is stated, saw Williams every day for eight months, at whose home he called to participate in social activities; a Mrs. Morton, who had an extensive acquaintance with him when he was in the hospital; a Mrs. Munn; and the priest who performed the ceremony. Mrs. Martin had a floral business across the street from the Reed Hospital in Washington and had a great interest in the welfare of the soldiers and reconstruction aides serving at the hospital. Nora Maguire was employed by her as a maid. When Williams returned to Washington, he went to Mrs. Martin's home and found that Miss Maguire was no longer with her, but he saw her within three or four days and regularly thereafter. Williams was given employment by Mrs. Martin in her greenhouses, and shortly after his arrival Williams and Miss Maguire announced their intention of getting married. Mrs. Martin helped Williams procure an engagement ring, was present when he procured the marriage license and also at the marriage. Her testimony in substance was that at this time Williams seemed to be normal in practically every way and in all his dealings, and that she considered him sound mentally. The testimony of Mrs. Munn and Mrs. Morton was to the same effect, although they had much less opportunity to observe him. The priest who performed the ceremony testified that:

Before a marriage ceremony is performed it must first be ascertained that the people are perfectly competent in every way to contract marriage and that it is necessary they have the proper mental qualifications. "Questions are asked in regard to their relationship, etc., and whether they are Catholics or non-Catholics, and where they had been baptized, the names of their parents, the securing of the baptismal certificate, etc., when possible. I asked the questions of Nora Maguire, because she was the Catholic party. All I could ascertain of John Williams was that he had been baptized, but not a Catholic."

[2] The lay witnesses called for plaintiff were Elizabeth Henderson, a reconstruction nurse in the medical department serving at the Reed Hospital, who had met Williams at Mrs. Martin's house and later in Letterman Hospital at San Francisco. In her opinion, based upon her frequent observation of him before his marriage, when in the Reed Hospital at Washington, he was of unsound mind. She testified that he had a far-away look in his face and would talk to no one. She also observed him at Letterman Hospital and testified that his condition was just the same as at the Reed Hospital. Another witness was John E. True, a fellow soldier, who testified that Williams was peculiar even when he was an occupant of the Walter Reed Hospital, and that he was the butt of the jokes of the other boys in the ward at said hospital by reason of his actions, and that he considered him of unsound mind. Both Williams and True were afterward transferred to Letterman General Hospital at San Francisco, and True testified that while there in October, 1919, Williams was accompanied by an attendant and showed the same symptoms as at Washington, but milder. When both men had been discharged, and prior to his marriage, Williams visited True at the latter's home and place of business in Vallejo, Cal., and, according to True, he had peculiar actions and was irrational at that time. Congressman Clarence F. Lea, who interviewed Williams during the time he was in the Walter Reed Hospital, testified that he had a 15-minute talk with him, but that he gave no evidence of having any reasoning power. The plaintiff called four doctors who qualified as experts and testified in substance that their examination indicated that the patient was suffering from dementia praecox, that his condition was such that their opinion was that at the time of his marriage it would have been impossible for him to have appreciated the solemnity of the marriage vows, as his judgment would have been too impaired for him to understand the nature, obligations, and responsibilities of marriage. We do not deem it necessary to go further into the testimony of the experts. Suffice to say that their conclusion, uncontradicted by any medical expert, was that Williams must have been insane at the time of his marriage. This testimony is in harmony with the conclusions already given in the testimony of the plaintiff's lay witnesses. It is not necessary to further review the evidence for the purpose of showing that there is substantial conflict therein with relation to the competency of Williams at the time of his marriage with the appellant herein and that, this being so, this court will not disturb the findings and conclusion of the trial court in that regard.

[3] The only other question presented is as to the admission in evidence of the army medical record of Williams. The foregoing

review of the evidence shows that there is ample evidence, outside of the record objected to, to support the findings and conclusions of the trial court, even though it may have been in error in admitting this particular bit of evidence. We do not, therefore, deem it necessary to discuss the question of its admissibility.

Judgment affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

63 Cal. App. 450

WRIGHT v. SALZBERGER & SON et al.
(two cases). (Civ. 4452, 4453.)

(District Court of Appeal, First District, Division 2, California. Aug. 16, 1923. Hearing Denied by Supreme Court Oct. 15, 1923.)

1. Appeal and error ⇐1005(3)—Where evidence conflicting, granting motion for new trial not disturbed.

Where there is a conflict in the evidence as to material facts, the granting of a motion for new trial will not be disturbed on appeal.

2. Municipal corporations ⇐705(10)—Violation of ordinance is negligence per se, precluding recovery if proximate cause of injury.

Violation of an ordinance is negligence per se, and will bar recovery if it is the proximate cause of an injury.

3. Municipal corporations ⇐706(7)—Whether coasting on streets was violation of ordinance, and therefore negligence per se precluding recovery, held for jury.

Whether a boy who was injured by an automobile while coasting on the city streets was violating an ordinance providing that "coasting on public highways is prohibited when dangerous," and was therefore negligent, was a question of fact for the jury, depending on all the circumstances, the grade of the street, speed, traffic, etc.

Appeals from Superior Court, Alameda County; A. F. St. Sure, Judge.

Actions by Thomas Osborne Wright, a minor, by Joseph S. Wright, his guardian ad litem, against Salzberger & Son, a copartnership consisting of Julius Salzberger and others, and by Joseph S. Wright against the same defendants. From orders granting plaintiff's motions for a new trial in each case, after verdicts for defendants, defendants appeal. Affirmed.

W. M. Abbott, K. W. Cannon and J. E. Reardon, all of San Francisco, for appellants. Ostrander & Carey, of Oakland, for respondent.

LANGDON, P. J. The record in this matter presents two consolidated appeals. Two actions were brought against defendants, one by Thomas Osborne Wright, a minor, suing by

his guardian ad litem, and the other by Joseph S. Wright, the father of said minor, for medical and hospital expenses incurred by him in treating the injuries sustained by his minor son. After a trial before a jury, a verdict in each case was rendered in favor of defendants. A motion for a new trial was made, thereafter, by the plaintiff in each case. These motions were granted, and orders granting new trials were made as follows:

"It is by the court ordered that said motion for new trial herein be and the same is hereby granted on the ground of the insufficiency of the evidence to sustain the verdict herein, and on the other grounds as set forth in said plaintiff's notice of intention to move for a new trial on file herein."

[1] Appellants concede the well-recognized rule that a motion for a new trial is addressed to the sound, legal discretion of the trial judge and is not to be reversed upon appeal unless an abuse of discretion exists. However, this case is sought to be removed from the operation of that rule by the argument that the discretion of the trial court in granting a new trial is to be exercised upon the facts of the case and that when the record presents a situation where the defendant is entitled to a judgment in his favor as a matter of law, and not upon questions of fact, then there is no room for the exercise of discretion by the trial court.

Appellants' proposition is a correct statement of the law. If it be true as a matter of law, that no judgment could be rendered against the defendants under the facts in evidence, and they are entitled to a directed verdict, then, obviously, the motions for new trials after judgments for the defendants should have been denied. But we do not think the record presents such a question of law. Regardless of what we may think of the weight of the evidence, it is apparent from a reading of the transcript of testimony, that a conflict exists therein with regard to the material facts surrounding the accident—such facts as the portion of the street upon which the boys were riding in the "coaster" when it was struck by defendants' automobile; the visibility of objects upon the street and similar matters. Under such circumstances the granting of a motion for a new trial will not be interfered with upon appeal. *Domico v. Cassassa*, 101 Cal. 411, 35 Pac. 1024; *De Vall v. Perrin*, 34 Cal. App. 676, 168 Pac. 584; *Walker v. Beaumont Land, etc., Co.*, 15 Cal. App. 726, 115 Pac. 766.

[2, 3] Appellants also make the point that the evidence shows that the plaintiff who was injured was, at the time of his injury, "coasting" upon the streets of the city of Berkeley, in violation of a municipal ordinance. There can be no question about the fact that in this state violation of an ordinance constitutes negligence per se, and will

bar recovery if the proximate cause of an injury, and were it conclusive from the record that the plaintiff Thomas Osborne Wright, at the time of the accident, was violating an ordinance and that such violation was the proximate cause of the injury, the judgments should have been for the defendants as a matter of law, and the motions for new trials should have been denied. But we do not think the record presents such a situation. The ordinance relied upon is section 44 of ordinance 448, new series, city of Berkeley, which reads as follows: "Coasting on public highways is prohibited when dangerous." This ordinance is so vague in its terms that the question of its violation merely presents another question of fact, dependent for its solution upon all the surrounding circumstances, and which, necessarily, must be passed upon by the jury under proper instructions from the court, as must also the question of proximate cause. Whether Thomas Osborne Wright was guilty of violation of this ordinance would depend upon the nature of the grade, the speed at which he was traveling, the amount of traffic, the amount of light and many other elements. Upon these questions of fact there was also conflicting evidence in the record and the trial court had the right to take that into consideration in passing upon the motion for a new trial.

This appeal merely presents a case where the trial court has exercised a discretion vested in it, and with the exercise of such discretion we are neither empowered nor disposed to interfere.

The orders appealed from are affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

63 Cal. App. 495

AVERDIECK v. BARRIS. (Civ. 4581.)

(District Court of Appeal, First District, Division 2, California. Aug. 21, 1923.)

1. Municipal corporations §705(4) — Facts held to show negligence of automobile driver.

Where plaintiff was injured at a street intersection after having alighted from a street car, passed behind it, and proceeded part way across the street, and defendant's automobile was cutting the intersection in violation of the Motor Vehicle Act, the automobile driver's negligence was established.

2. Municipal corporations §705(10) — Pedestrian injured by automobile held not negligent.

That plaintiff, after alighting from a street car and seeing defendant's automobile approaching, passed behind the car and had reached the opposite side of the street before being struck by defendant, who was cutting the intersection, did not show contributory negligence; plaintiff being entitled to presume that

defendant would not depart from his legal and ordinary course of travel.

3. Municipal corporations §705(10) — One crossing street may not openly disregard threatened danger, on the presumption that another will use care and obey traffic laws.

One crossing a street in front of an approaching vehicle cannot close his eyes to threatened danger, and rely only on the presumption that the other party will use reasonable care and prudence, and obey the traffic laws, though he is entitled, where there is nothing in the situation to warn him of impending danger, to rely on such assumption.

4. Appeal and error §1004(1) — When court may set aside award as excessive stated.

It is only when an award of damages is so grossly disproportionate to the injuries sustained as to shock the sense of justice and indicate that the verdict was the result of passion and prejudice that the court can set it aside as excessive.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Richard Averdick against F. L. Barris. Judgment for plaintiff, and defendant appeals. Affirmed.

Knight, Boland, Hutchinson & Christin, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

NOURSE, J. This defendant appeals from a judgment following a verdict in favor of the plaintiff in the sum of \$2,500 for personal injuries caused by the plaintiff being struck down by the defendant through the careless operation of the latter's automobile. No question arises from the pleadings or the conduct of the trial before the jury. The only points raised on the appeal are that the evidence is insufficient to show negligence on defendant's part, that it affirmatively shows contributory negligence on plaintiff's part, and that the verdict is excessive.

[1] The accident occurred at the corner of Lincoln way and Thirty-Seventh avenue in the city and county of San Francisco. Lincoln way runs east and west, and Thirty-Seventh avenue runs north and south, intersecting Lincoln way on the south, but does not cross the street to the north. Two street car lines run along Lincoln way located approximately at the center of the street. Plaintiff was a passenger on an out-bound street car going westerly. The car stopped in what might be termed the middle of the intersection, with the rear of the car at the extension of the easterly line of Thirty-Seventh avenue. Plaintiff alighted from the rear platform of the car, following another passenger, and walked southerly towards the curb at the southeast corner of

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Thirty-Seventh avenue and Lincoln way, on his way to his home. As he alighted from the car he looked east, and saw the lights of defendant's automobile approaching on the north side of Lincoln way about 100 or 200 feet distant. After he had crossed the inbound or southerly street car track, and was close to the sidewalk, and still east of the easterly line of Thirty-Seventh avenue, he was struck by defendant's automobile which had cut the corner, turning off the northerly side of Lincoln way, and running southwesterly to the southeasterly corner of the two streets. The mere statement of the facts is in itself a sufficient answer to the claim that the evidence is insufficient to show negligence on defendant's part. In thus cutting the intersection of the two streets, he was driving contrary to the express provisions of the Motor Vehicle Act (St. 1915, p. 397, as amended by St. 1917, p. 382), and it was this negligence that was the proximate cause of the injury.

[2, 3] On the issue of contributory negligence, the evidence is that the plaintiff was walking across the street through what is often termed the "safety zone," so far as vehicles approaching from the east were concerned. He looked for approaching vehicles before he started across the street, and saw that he had a clear path. He was not required to assume that the defendant would depart from his legal and ordinary course of travel.

"A person crossing a street in front of an approaching vehicle cannot close his eyes to threatening danger, relying upon the presumption that the other party will use reasonable care and prudence and obey the traffic laws; but, if there is nothing in the situation to warn him of impending danger, he is not guilty of negligence in relying upon such assumption." *Simonsen v. L. J. Christopher Co.*, 186 Cal. 786, 787, 200 Pac. 615.

"The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person." *Harris v. Johnson*, 174 Cal. 55, 58, 161 Pac. 1155, 1156 (L. R. A. 1917C, 477, Ann. Cas. 1918E, 560).

[4] On the question of the amount of the verdict, defendant seeks to convince this court that the character of the injuries sustained does not justify a verdict in the amount returned by the jury. This, of course, is the precise question which the jury was called on to determine. It is only when the award is so grossly disproportionate as to shock the sense of justice and indicate that the verdict was the result of passion or prejudice that the court can set it aside as excessive. *Harrison v. Sutter Street*

Ry. Co., 116 Cal. 156, 164, 47 Pac. 1019; *Martin v. Shea*, 182 Cal. 130, 139, 187 Pac. 23.
Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

191 Cal. 724

GREAT WESTERN POWER CO. OF CALIFORNIA v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 10490.)

(Supreme Court of California. Sept. 7, 1923.
Modified and Rehearing Denied Oct. 5,
1923. Amended Oct. 22, 1923.)

1. Master and servant §417(5) — Question whether different award called for by law on the facts found may be reviewed.

Under Workmen's Compensation Act, § 67 (a), authorizing review by certiorari of lawfulness of order of Industrial Accident Commission, the question whether on the facts found the law called for different award than that made may be reviewed.

2. Master and servant §417(6)—Contention as to reasonableness of award held to raise question of lawfulness.

Contention on certiorari that workmen's compensation award was unreasonable as being greater in amount than was legally allowable went beyond question of reasonableness and amounted to claim that the award was unlawful, and hence it was immaterial whether reasonableness was reviewable.

3. Master and servant §414 — Rehearing before Commission held not limited to reconsideration of award to those held dependent.

Under Workmen's Compensation Act, § 64, subds. (e) and (f), where Commission held parents of decedent dependent, but held that brothers and sisters were not dependent and petitioner moved for rehearing on specified grounds without limiting issues raised by such request, the whole subject-matter was reopened and issues raised were as broad as those raised on the original application, and were not limited to reconsideration of the award in favor of the parents, but extended to reconsideration of question of dependency of the brothers and sisters.

4. Master and servant §416—Proper to provide for payment of entire award to deceased's father for benefit of all dependents.

Under Workmen's Compensation Act, § 14 (e), authorizing Commission to award death benefit among dependents in just and equitable manner, it was not improper, where parents, brothers, and sisters were found dependent, to order payment of entire award to the father to be used for support of all dependents.

5. Master and servant §386(2)—Amount of family expenses paid by decedent to be reduced by amount expended for support of himself and others not dependent.

In determining annual amount devoted to support of those partially dependent on decedent under the Workmen's Compensation Act, amount of general family expense paid by him must be diminished by deducting such portion thereof as went to his support and to support of others in the family who were not dependent.

6. Master and servant §417(7)—Finding that all members of family were partially dependent on deceased not disturbed under the evidence.

Finding that decedent's parents, brothers, and sisters were partially dependent on him

cannot be disturbed in view of evidence that all his money, earnings, wages, and profits went into common fund used for support of all members of the family.

7. Master and servant §386(1) — Existence and degree of dependency of parents, brothers, and sisters determined in accordance with fact at time of injury.

There is no conclusive presumption as to dependency of parents, brothers, and sisters of a minor, and under Workmen's Compensation Act, § 14 (b), the fact of dependency and degree thereof must be determined in accordance with fact existing at time of injury.

8. Master and servant §386(1)—Compensation to partial dependents measured by rate of contributions at time of injury.

Under the Workmen's Compensation Act compensation to those partially dependent is not measured by gross amount contributed to their support during any period of time, but by the rate at which he was contributing to such support at the very time of the injury.

9. Master and servant §386(1)—Services of one employed away from home in milking cows mornings and evenings held not contribution to family's "support."

Where minor employed elsewhere, but living at home, milked the cows mornings and evenings when no other member of the family did it, arbitrary valuation placed on such services could not be considered in determining amount devoted by him to family support, as "support" means that which furnishes a livelihood; a source or means of living; subsistence, sustenance, or living.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Support.]

10. Master and servant §386(1)—Disregard of fact that one member of family became self-supporting shortly before injury held not warranted.

Where one member of family which deceased's earnings helped to support became self-supporting shortly before injury, disregard of the change in her condition, on theory that rate of contribution devoted to support of the rest of the family was thereby increased, held not warranted.

11. Master and servant §386(1) — Commission should find amount devoted to support of those partially dependent, and not merely amount contributed for their support.

Under Workmen's Compensation Act, § 9 (c) (2), amount to be awarded to those partially dependent is not measured by amount of contributions to their support, but by amount actually devoted or applied to that purpose, and Industrial Accident Commission should find such amount.

In Bank.

Proceeding under the Workmen's Compensation, Insurance, and Safety Act by James Savercool and others, for compensation for the death of Lorin L. Savercool, opposed by the Great Western Power Company of California, employer. Compensation was award-

ed by the Industrial Accident Commission, and the employer brings certiorari. Award annulled, and cause remanded.

Guy C. Earl, W. H. Spaulding and Cooley & Crowley, all of San Francisco, for petitioner.

A. E. Graupner, of San Francisco (W. F. Beem, of counsel), for respondents.

WASTE, J. This a proceeding in certiorari to review an award of the respondent Industrial Accident Commission upon the ground that the Commission rendered an unlawful award and one in excess of its authority. Lorin L. Savercool, while employed as a millhand by the petitioner, Great Western Power Company, the employer and employee being then subject to the provisions of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), sustained an injury occurring in the course of, and arising out of, his employment. His right hand and arm were caught in the moving machinery of an edger, resulting in lacerations and other injuries which proximately caused his death.

At the time of his decease the injured employee was only 20 years old. For many years he and his father had jointly supported the father's family, consisting, besides himself, of the father, mother, and nine children. In addition to these members of the family, the employee's grandfather, aged 73 years, resided with them part of the time. On application filed with the Industrial Accident Commission for a death benefit on account of the injury, the Commission found that the entire family, other than the grandfather and one sister, were partially dependent on the injured employee for support. His annual contribution for that purpose, it found, amounted to \$1,366.66. On that sum as a basis of computation, it made an award in the sum of \$4,099.98, which it directed to be paid to James Savercool "in his own right to be used for the support of all the dependents." This award petitioner seeks to have annulled. The situation thus presented is one of partial dependency, in which case the dependents are entitled to recover the reasonable expense of the deceased employee's burial, not to exceed \$100, and, in addition thereto, a death benefit which shall be equivalent to three times the annual amount devoted by the deceased to the support of the person or persons so partially dependent. Workmen's Comp. Act, § 9 (c) (2). Petitioner's contention is that the respondent exceeded its jurisdiction in making the award here under review, in that it made an allowance greatly in excess of the statutory limitation. It does not question the right of the respondent to award some compensation to the dependents of the deceased employee, but raises an issue as to the lawfulness of the award made.

[1] The respondent's first line of defense to the attack of the petitioner is that there is evidence to support the findings of fact it made on the hearing, and therefore its action cannot be reviewed in this proceeding. It relies, of course, upon the provision of the statute which declares that the findings and conclusions of the Commission on questions of fact shall be conclusive and final, and shall not be subject to review. Workmen's Comp. Act, sec. 67 (c). Its position, in effect, is that the power of this court to annul and set aside an award of the Commission is confined to those cases wherein the Commission has made a finding as to some jurisdictional fact which is not supported by the evidence, and that it does not go to a case where, upon the facts found, the Commission has authority to make an award, but has made one contrary to what the law calls for upon those facts. In passing upon the same contention in an earlier case, the court said:

"Section 67(a) of the Workmen's Compensation Act says that any party affected by a final order of the Commission 'may appeal to the Supreme Court of this state * * * for a writ of certiorari * * * for the purpose of having the lawfulness of the original order * * * inquired into and determined.' It is the lawfulness of the award in question that is now under consideration. Upon the facts found the statute prescribed the amount to be allowed as a death benefit, and the Commission in allowing a different amount rendered an unlawful award and one in excess of its authority." *Spreckels Sugar Co. v. I. A. C.*, 186 Cal. 256, 260, 199 Pac. 8, 10.

[2] The petitioner also contends that the award is unreasonable as being greater in amount than is legally allowable in this case. Such contention goes beyond the question of reasonableness of the amount allowed as compensation, and is, in effect, a restatement of the claim that the award was unlawful. Therefore, whether or not respondent is correct in its position that the alleged unreasonableness of the award is not a ground of review by this court does not require further consideration in this connection.

[3, 4] We note, first, a contention of petitioner which fails of meritorious support. After what appears to have been a full and comprehensive hearing before the Commission, it found that the brothers and sisters of the deceased employee were not dependent upon him for their support, but that he, being a minor, was contributing and paying to his parents his entire earnings. An award was thereupon made in favor of James and Lillian Savercool, father and mother of the decedent. On application of the petitioner, and on alleged grounds that the Commission acted in excess of its powers, that the evidence did not justify the findings, and of newly discovered evidence,

the respondent granted a rehearing. After another full and exhaustive hearing, the Commission found that the deceased employee left surviving him, besides his father and mother, eight minor brothers and sisters, who were partially dependent on him for support, and one sister concerning whom the respondent found the evidence was insufficient to establish that she was dependent upon the decedent at the time of the injury. The award was therefore amended and directed to be paid to the father, in his own right, to be used for the support of all the dependents. In taking this action, petitioner asserts, the Commission exceeded its powers. There is involved, it argues, "the question as to the power of the Commission to amend an award where, by the original award, the sisters and brothers were held not to have been dependents and the rehearing was granted with reference to the award made in favor of the father and mother 'in order that the proper amount of the death benefit should be reconsidered,' without giving notice of the intention to reopen the case as to the dependency of the brothers and sisters." What, if any, notice of the rehearing was given by the Commission does not appear in the record, neither does it contain a copy of the order granting a rehearing. The petitioner made a general application for a rehearing, on the grounds already enumerated, and without in any way limiting the issues raised by such request. Under such an application the whole subject-matter was reopened for further consideration and determination, and the issues thus raised were as broad as those raised on the original application for compensation. Under subdivision (e) of section 64 of the Workmen's Compensation Act the Commission has broad powers in the matter of rehearings. *Pruitt v. I. A. C.* (Cal. Sup.) 209 Pac. 31. If it were of the opinion, as it apparently was, that the original award was unjust as first made, it had plenary power to modify it. Section 64 (f) of the act so provides. At the outset of the first hearing James Savercool, father of all the minors, had been appointed their guardian ad litem, and the minors, by such guardian ad litem, were joined as parties applicant. At all times they were properly before the Commission. Section 14 (e) of the act authorizes the Commission to award the death benefit among the dependents in such manner as may be in proportion to their respective needs, and just and equitable, even to the total exclusion of one or more of them. *Perry v. I. A. C.*, 176 Cal. 706, 710, 169 Pac. 353. It was under this provision that the action of the Commission was taken in the case at bar. It found that it was for the best interest of all parties that the entire award be paid to James Savercool, in his own right, to be used for the support of all the dependents. It would seem "just and

equitable" that in such a case as this the entire award, if one be made, should be paid to the husband and father of a large family for the common support of all (*Woodcock v. Walker*, 170 App. Div. 4, 155 N. Y. Supp. 702; *People's Hardware Co. v. Croke*, 66 Ind. App. 340, 118 N. E. 314), where the finding of fact as to who were the dependents in the case finds support in the evidence.

[5-7] It makes a very material difference to this petitioner whether or not the amended finding of the Commission, that not only the father and the mother, but eight of the minor brothers and sisters of the employee were dependent upon him, is to stand, or whether the original finding, that only the father and the mother were dependent upon the employee, shall be the basis of the award. In determining the annual amount devoted to the support of partial dependents, the amount of the general family expense paid by the decedent must be diminished by deducting the fair proportion thereof that went, not only to the support of the decedent, but to others in the family who were not dependent upon him. *Federal Mutual Liab. Ins. Co. v. I. A. C.*, 186 Cal. 517, 519, 199 Pac. 796. Under the statute of this state, however, we are of the view that we cannot disturb the finding as to who were the dependents. The Workmen's Compensation Act, § 14, after providing who shall be conclusively presumed to be wholly dependent for support upon a deceased employee, states:

"(b) In all other cases, questions of entire or partial dependency, and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee."

The father, mother, brothers and sisters of a minor are not included in any of the classes in which dependency is conclusively presumed by the terms of the act. The fact of their dependency on the earnings of the employee, and the degree thereof, must therefore be determined in accordance with the existing fact at the time of the injury. In *re Peters*, 65 Ind. App. 174, 116 N. E. 848; *Havey v. Erie R. Co.*, 88 N. J. Law, 684, 96 Atl. 995, 996; *Bylow v. St. Regis Paper Co.*, 179 App. Div. 555, 166 N. Y. Supp. 874, 877; *O'Flynn's Case*, 232 Mass. 582, 122 N. E. 767, 768; *Walz v. Holbrook, etc., Corp.*, 170 App. Div. 6, 155 N. Y. Supp. 703. In view of the evidence that all of the money, earnings, wages, and profits of the deceased employee went into the common family fund, which was used for the support of the members of the family, we are of the opinion that the finding of the Commission as to who were partial dependents in this case cannot be disturbed. *Fuller v. Inman*, 10 Ga. App. 680, 74 S. E. 287.

From the evidence taken before the Commission it appears that Lorin L. Savercool, the employee for whose death compensation was sought, lived with his father and mother, who were the original applicants for the compensation in this case. In addition to Lorin there were nine other minor children. The family lived on a farm, owned by the father, which consisted of possessory mining claims held in the name of the mother. There were several claims in the group, some of which were regarded as claims of Lorin. The house in which the family lived, according to the testimony of James Savercool, the father, belonged to himself and Lorin. He testified, "we sawed the lumber in our own mill and built the house." In addition to working this home place, the father and Lorin worked on another piece of land in Tehama county, the title to which was in the United States government, but which had been homesteaded by Lorin's grandfather. The relation of the deceased to that property was described by the father as follows:

"My father, who is a very old man, had it understood with my son that if he would take care of him in his old age, at the time that he received a patent to this claim, the property would be deeded to Lorin L. Savercool, and my connection with it was that I was simply helping along to improve the property and the small bunch of cattle and horses which we have on the ranch. It was a kind of family arrangement as to the acquiring of title to the ground."

Concerning what seems to have been another piece of property, the father testified:

"He [Lorin] had an interest, that is, I never deeded him any interest but it stood this way, that as long as he was able to help me, I considered that, and so did he, that he owned a half interest in that property, and that in time I would deed half of it to him."

The father and Lorin engaged in certain joint enterprises, such as buying and raising cattle and hogs. With another person, they appear at one time to have been joint owners in a truck, by the use of which they made considerable money. At one time, also, they leased a mine in Plumas county, in the working of which venture they cleared, according to the father, \$5 a day each while working the property, the larger amount of which, we may judge from the testimony, they expended in developing the mine. When not engaged in work on either of their properties, the father, who is a carpenter, worked for wages for various people. The boy, Lorin, within a year and a half prior to his injury, was engaged, at one time in doing some contracting work, at another time for the county of Plumas, and for some months prior to his death, he had been in the employ of petitioner. All the money he received from his share of the profits in the joint enterprises in which he

was engaged with his father or others, and all the wages paid to him by the county of Plumas and this petitioner, were deposited by Lorin in bank in the joint names of his father and himself. This money, so the father testified, was used for the maintenance of the entire Savercool family, and for such other expenses as from time to time were incurred by Lorin and his father. The cattle which they bought were also paid for out of this fund. In running the household, all the bills, according to the father, were paid out of this same deposit. There was no separation of funds between Lorin and his father. According to the latter, it took everything both made "to keep the family." It was all given to the wife and mother, who attended to paying out the money for the house, and bought the necessary supplies and needed clothing. Bills for the house were made out in the names of Lorin L. and James Savercool. This arrangement existed as far back as the inquiry before the Commission went. In describing the relation between himself and Lorin, and how it came about, the father said:

"There was no understanding at all; he [Lorin] just from his babyhood up had drifted along that way, and as he became older and could do things and could go ahead, we simply worked along as partners, and whatever he said went, and whatever I said went. * * * We just sort of double-teamed on it together, the main object in view being for the two of us to take care of the family."

As a result of the joint endeavors of Lorin and his father, they deposited in bank during the year preceding Lorin's death \$2,815.21. Of this amount the record indicates that \$600 was derived from rent of the Ohio valley ranch; \$214.86 was a balance due upon the sale of hogs; \$250 was for a boiler sold by the father; \$44.60, balance due from this petitioner for team hire of father and son; and about \$200 from the hire of the Ford truck. It seems reasonably certain, also, that some \$300 of the amount deposited in bank was derived from the sale of cattle, and there were several items of bank deposits which are unexplained. During a period of little more than a year preceding his death Lorin actually earned \$1,056.59, consisting of \$792.23 wages and wagon hire paid by petitioner, \$117 for wages and team hire paid by Plumas county, and \$147.36 from sale of furs from animals trapped by him. The Commission found that Lorin's "annual contribution" for the support of the partially dependent family was \$1,366.66, or \$310.07 more than he earned during the year preceding his death, and awarded compensation in three times that amount. It is the contention of the petitioner that the record shows certain sums that can be definitely eliminated as not having been "devoted to the support" of the dependents. Payments shown to have been made by Lorin,

or by Lorin and his father, for purposes other than support of the family, and which are objected to by the petitioner, include hospital dues, \$5; purchase of cattle, \$255; purchase of a Ford truck, \$66.66; cash spent on development of Mill creek ranch, including maintenance of W. W. Savercool, Lorin's grandfather, \$200. Other items included by the Commission in arriving at the "annual contribution" made by the employee will be referred to later.

We do not agree with the respondent's contention that the only issue in the case is: Who are the dependents and the extent of the dependency? After a review of the record we are convinced that respondent adopted an erroneous method in arriving at the amount devoted by the decedent to the support of the dependents in this case. The record covers a 3-year period—from October 1, 1917, to and including September 17, 1920, the date of Lorin Savercool's death. The respondent says that, owing to the fact that no absolute record was kept, it is not practical to go back and cover the contributions over this entire time, and that in deciding the case it worked with two distinct periods: A period of one year immediately preceding the injury, and the period during which Lorin was employed, beginning May 1, 1920, and up to the date of his injury, September 17 of the same year. It then proceeds to set out two schedules "wherein it will specifically appear," it says, "that the reasonable value of Lorin's support was deducted from the annual amount devoted." In Schedule A, under a general heading "Support at Mill Creek Ranch," it included the following items: "Value of Lorin's work roofing the house, \$100; value of Lorin's work splitting 50 or 60 tiers of wood, \$60; 30 days in garden at \$4.50, \$135; 10 days making fence, \$45; 30 days splitting rails, \$135; clearing land and planting alfalfa, \$54; 32 days running pack train \$5 a day, \$160; 6 days taking family to ranch, \$30." The item of "32 days running pack train" has reference to transporting the family supplies from the nearest point of transportation to the ranch. To the aggregate amount of these items, \$719, it added as "contributions received from various sources" all the wages received by Lorin during the year from this petitioner and the county of Plumas; two items for furs from animals trapped in the winter season and sold by him; an item for milk sold; four different items for Lorin's share in profits from sales of cattle and in "butchered hogs"; and \$150, at \$1 a day, for the greater part of the time he was actually engaged in working for this petitioner for "furnishing milk and butter for the family." From the aggregate sum of these "contributions," \$2,180, the Commission deducted for Lorin's individual support, estimated at \$30 per

month for 12 months, the sum of \$360, leaving what it terms "annual contribution for support \$1,821.81." In Schedule B, which the Commission says "covers a period of 4½ months, beginning May 1, 1920, to the date of the injury, the period during which Lorin was working for wages, there are included the following items: "Stone & Webster, \$586.40; Plumas county, \$117; Shubert Co. [for furs] \$147.16; furs, other than sold Shubert, \$45; milk, \$37.50; steer, \$26.25; sow, \$27.50; in addition to the above cash items the value of Lorin's services at Butte Valley, furnishing milk and butter for the family, \$150"—making a total contribution of \$1,136.81. From this aggregate amount respondent deducted \$135 for 4½ months, support of Lorin at \$30 per month, leaving a remainder of \$1,001.81. This sum it divided by 4½, the number of months taken into account, the result being \$222.62. This last amount multiplied by 12, the number of months of the year, gives as a result the sum of \$2,671.44. We do not know by what method or process of reasoning the respondent arrived at the sum of \$1,366.66 in its computation, but, referring to the sum of \$1,821.81, which, according to Schedule A, was the "annual contribution for support," it says:

"As the award found an annual amount devoted to support of \$1,366.66, even by taking the highest estimate in the entire record on the cost of Lorin's support which is \$60 higher than that found in the first finding and award, a balance is left of \$454.15, which was not allowed by the Commission. This is in petitioner's favor and shows how liberally the Commission reduced the applicant's estimated values as testified to in the record, and made allowances for other matters in petitioner's favor."

Respondent also deducts the sum of \$1,366.66 from \$2,671.44, the result obtained in Schedule B, the remainder being \$1,304.78, which it designates as "excess annual amount devoted over and above amount allowed."

"Under Schedule B," it says, "which is entirely logical and seems to be consistent with petitioner's argument, there is such a large surplus over the amount allowed by the Commission that it is apparently unnecessary for the court to read the record to trace out a matter of \$40 or \$50."

In this offhand way the Commission relies upon this court to sustain its action and affirm its award. Did we feel it incumbent upon the court to search the record for evidence which is not pointed out, and which may or may not be found, we would still be unable to sustain the award made in this case. Respondent assumes that the court will accept its proposition that it reduced the applicant's estimated values of the support contributed by Lorin, and make allowances for other matters in petitioner's favor. We do not doubt that it may have done so, but it has not point-

ed out wherein, how, or why it did so, or the amounts of any such reductions. The findings are of a stereotyped form and are confined to a few ultimate facts. The brief of respondent supplies but little in the way of assistance in arriving at a solution of the financial question of support, other than the two schedules referred to.

[8, 9] From what does appear in the briefs of the contesting parties, however, it is apparent that respondent, in seeking to arrive at the "annual amount devoted by the deceased to the support of the persons partially dependent" on him, did not follow the method suggested by this court in *Spreckels v. I. A. C.*, 186 Cal. 256, 199 Pac. 8. That was a case of partial dependency, and the Commission computed the death benefit by taking as the annual amount of the decedent's contribution the amount he had actually contributed during the year immediately preceding his death. The employer contended on certiorari to this court that this was an erroneous computation; that the annual amount of which the statute speaks is not the amount actually contributed in the last, or any other, year of the decedent's life, but is the annual amount of the rate at which the decedent was contributing at the time of his injury, regardless of whether that rate had existed for a year or more, or for less than a year. The court held that the employer's contention was correct, saying:

"The whole theory of the Compensation Act as to death cases is that the dependents of the employee killed through some hazard of his employment shall be compensated for the loss of the support they were receiving from him at the time of his injury. This necessarily means that the death benefit must be computed on the rate of contribution at that time. It is the rate which is the measure of the loss, not the gross amount which the decedent has happened to pay through any past year, or through any other period of time." 186 Cal. 258, 199 Pac. 9.

Clearly, then, any computation in this case based on Schedule A, which admittedly sets out the employee's gross earnings, and many other items of alleged "contributions" for one year prior to his death, is erroneous and must be disregarded. Schedule B, which covers an exact period of 4½ months, is open to the same general objection just pointed out in relation to Schedule A. It has an additional infirmity. It includes the amount paid Lorin for himself and his team of horses. Such earnings were certainly disconnected from and far disassociated from his employment and earnings at the time of his death. The two items for furs sold were returns of sales of furs from animals trapped during the previous winter. The item for "milk" relates to one-half of the amount realized from sales of milk during the summer of 1920. Lorin and his mother milked the cows, jointly owned by Lorin and his father. Mrs. Savercool made out the bills; the money was paid to her and

by her used for family expenses. The items "steer" and "sow" cover Lorin's share of profits on sales made a year before the injury. The item of \$150, for "Lorin's services at Butte Valley, furnishing milk and butter for the family" at the rate of \$1 per day, covers a period when he was employed by petitioner. It seems that while so employed Lorin milked the cows at home, mornings and evenings, putting in two hours a day. Sometimes the father did the milking. This work the Commission rated as being worth 50 cents per hour, and included \$150 as a contribution for the support of the family. It is at once apparent that none of the items of so-called contribution contained in Schedule B, other than the wages paid by this petitioner, have any relation to the rate of contribution at the time of the employee's death. Respondent cites no persuasive authority in support of its action in charging against this defendant a fixed amount for the services of the employee rendered in and around the home—petitioner calls it doing the chores—when not otherwise employed. The cases referred to by the Commission deal merely with the question whether or not rendition of household service and work about a farm may be considered in determining whether or not the other members of the family are dependent. *Fuller v. Inman*, supra; *Southern Surety Co. v. Hibbs* (Tex. Civ. App.) 221 S. W. 303. In no case that we can find has the value of these services been taken into consideration in fixing an "amount devoted to support." We are of opinion that it was never intended by the framers of the Workmen's Compensation Act that, in arriving at the amount an employee devoted to support of those partially dependent upon him, an arbitrary valuation should be placed upon those domestic services which any or every member of the family might be called upon to render as occasion arose. "Support" as used in the act means, we take it, "that which furnishes a livelihood to a person or family; a source or means of living; also subsistence, sustenance; living." *Standard Dictionary*. Milking the cows morning and evening, when no other member of the family did it, was not, in our opinion, devoting an amount, or any amount, to the "support" of the dependents as that term is intended to be construed by the provisions of the act.

Lorin went to work for the petitioner the 1st of May preceding his injury. From the pay roll in evidence it appears that his wages were \$126.99 for the month of May and \$459.41 for the period from July 1 to September 17, the date of the accident. For some time before his injury the rate of compensation for his services in the mill of petitioner was 74 cents per hour. All of his wages, other than a small deduction for supplies obtained from petitioner's commissary by the Savercool family, were paid by checks. These he usually gave to his mother for deposit in the joint

bank account of his father and himself. The whole amount, according to the evidence, was, in fact turned into the common family fund, which, as has been related, was used for the upkeep of the different ranches, for whatever business affairs the father and son engaged in, and for the support of the family. These facts afford a plain, simple, and, in the light of the Spreckels Case, the only logical and legal method of computing the annual amount devoted by the deceased to the support of the dependents. Mr. Justice Olney said in that case:

"It [the Workmen's Compensation Act] provides that not only shall the question of the condition of dependency as entire or partial be determined as of the date of injury to the employee, but also that the extent of dependency shall be determined as of that date. The provision of the statute that in cases of partial dependency the death benefit shall be proportioned to the amount of the annual contribution of the employee is but a provision that the death benefit shall be proportional to the extent of the dependency, so that the effect of the two provisions is that it is the annual contribution as of the time of injury that is to be taken. This can be only a rate of contribution, since it is a point and not a period of time by which the contribution is to be determined."

[10] It is the rule in this state, contrary to that which prevails in some other jurisdictions, that, in arriving at the annual amount devoted to the support of dependents, the sum of the general family expenses paid by the decedent must be diminished by deducting the fair proportion thereof that went to the support of the decedent, and of others, in the family who were not dependent upon him. Everything must be excluded therefrom except the amount of his contributions that was devoted to the support of the dependents. Federal Mutual Liab. Ins. Co. v. I. A. C., supra. The extent of dependency and the annual amount devoted to support are to be measured as of the date of the employee's injury. Spreckels v. I. A. C., supra. In this case the Commission found that one of the sisters of the decedent, Evelyn Savercool, was not dependent upon him. The testimony is that she had become self-supporting shortly prior to her brother's injury. No deduction was made because of that fact, the respondent explaining that, since the amount of Lorin's contribution remained the same, no part of his payments went to Evelyn's support at the time of the injury, and the Commission "disregarded this factor." The change in Evelyn's condition, it says, merely had the effect of increasing the rate of con-

tribution devoted to the support of the rest of the family at the time of the injury. Such contention does not meet the requirement of the case. Federal Mutual Liab. Ins. Co. v. I. A. C., supra.

[11] The Commission found that the deceased employee's "annual contribution" for the support of the dependents was \$1,366.66. There is no finding that any part or portion of this amount was actually devoted by the deceased to the support of the dependents, yet the statute in this state, differing in this respect from compensation acts in other jurisdictions, expressly provides that it is not the amount of contributions which shall be the basis of the computation, but it must be three times the annual amount devoted by the deceased to the support of the person or persons so partially dependent. It is the amount actually devoted by the employee to such support that fixes the compensation. The amount, it would seem, must not only be contributed for support, but it must be actually applied wholly to that purpose. It is very easy to conceive of a case, by way of illustration, in which only a small part or portion of what may be contributed will be devoted or applied to support, the rest being placed in bank or invested. The Compensation Act of Wisconsin uses the words "the amount devoted by the deceased" in declaring the measure of compensation in cases of partial dependency. In the dissenting opinion in Milwaukee Basket Co. v. Wiecki, 173 Wis. 391, 181 N. W. 308, this persuasive language is used:

"[We] cannot believe that it was the legislative intent that a father should be permitted to swell his investment account at the expense of an employer of his son, or at the public expense, if it instead of the employer ultimately bears the burden. Neither in popular nor in technical language does the word 'support' connote a meaning common to either 'investment' or 'savings,' and judicial construction should not change its meaning."

Such a situation is not presented here, but may occur in similar cases at any time. A finding in the language of the statute should be made.

The award is annulled, and the cause is remanded to the Industrial Accident Commission, for further proceedings in accordance with this opinion.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; MYERS, J.; SEAWELL, J.; RICHARDS, Justice pro tem.

192 Cal. 129

**KEISER, Real Estate Com'r, v. STATE
BOARD OF CONTROL et al.
(S. F. 10798.)**

(Supreme Court of California. Sept. 21, 1923.)

**States 127—Real estate commissioner's
fund held not abolished by Budget Amend-
ment.**

Real estate commissioner's fund created under Act May 27, 1919 (St. 1919, p. 1252), providing for the collection of fees by the real estate commissioner for a special fund for payment of the expenses of the commissioner, *held* not abolished by the Budget Amendment to Const. art. 4, § 34, in view of budget bill (St. 1923, c. 121) adopted pursuant to the amendment expressly providing that such act of 1919 shall remain in effect.

In Bank.

Application for writ of mandate by Edwin T. Keiser, Real Estate Commissioner of the State of California, against the State Board of Control of the State of California and members thereof. Writ granted.

Frank B. Austin, of San Francisco, and William F. McLaughlin, of Los Angeles, for petitioner.

Garret W. McEnerney and Andrew F. Burke, both of San Francisco, for respondents.

RICHARDS, Justice pro tem. The petitioner herein applies for a writ of mandate to compel the respondents herein, as members of and constituting the state board of control, to allow and approve a certain claim presented by him for the sum of \$287.35, the same being for the rental of certain premises in the city of Sacramento leased and maintained by said petitioner as real estate commissioner of the state of California. The basis of the petitioner's said claim is to be found in the act of the Legislature approved May 27, 1919, entitled "An act to define real estate brokers and salesmen; to provide for the regulation, supervision and licensing thereof; to create a state real estate department and the office of real estate commissioner," etc. St. 1919, p. 1252. Section 4 of said act provides that—

(4) "The real estate commissioner shall have his principal office in the city of Sacramento, and may establish branch offices in the city and county of San Francisco, and in the city of Los Angeles, and he shall from time to time obtain the necessary furniture, stationery, fuel, light and other proper conveniences for the transactions of business, the expenses of which shall be paid out of the state treasury on the certificate of the real estate commissioner and the warrant of the controller."

Section 5 of said act provides that—

"All fees charged and collected under this act shall be paid by the real estate commission-

er * * * into the treasury of the state to the credit of a fund to be known as the 'real estate commissioner's fund,' which fund is hereby created."

It further provides that—

"All moneys which shall be paid into the state treasury and credited to the 'real estate commissioner's fund' are hereby appropriated to be used by the commissioner in carrying out the provisions of this act, including the payment of the salaries of the commissioner and his deputies, clerks and assistants."

It further provides that—

"All of the expenditures of said commissioner including his salary shall be paid only from the real estate commissioner's fund."

The petitioner herein alleges that on or about the 17th day of July, 1923, he presented his claim in proper form to the board of control for said sum of \$287.35 for the rental of his said offices, with the request that the same be audited, allowed, and approved by the said board of control, but that the said board of control rejected and disallowed his claim for the reason, as stated by it in a letter to this petitioner, "that it is not drawn against any appropriation in accordance with section 34, Art. IV of the Constitution," wherefore he has applied for this writ requiring the respondents to audit, allow, and approve his said claim. The respondents herein have filed a general demurrer to said petition, and evidently intend thereby to rely upon the contention foreshadowed by their said letter to the petitioner herein that the amendment to section 34, art. IV, of the state Constitution, known as the "Budget Amendment," has worked a repeal of the statute of 1919, above referred to, in so far as the same relates to the creation of a special fund in the state treasury to be known as the "real estate commissioner's fund," from which the lawful expenditures of the real estate commissioner should be paid, and that the effect of said amendment to the Constitution has been the abolishment of said fund. That there is no merit in this contention may be seen by reference to the decision of this court in the matter of Railroad Commission v. Riley (Cal. Sup.) 218 Pac. 415, wherein it has been held that the constitutional amendment above referred to does not operate, either expressly or by necessary implication, to repeal previous statutes which provide for certain appropriations or collections for various public purposes and designating specific funds in the state treasury to which such appropriations or collections shall be assigned and out of which moneys should be drawn to meet and satisfy the purposes for which such appropriations or collections had been made as defined in the statutes creating the same. By reference to the budget bill approved May 7, 1923, adopted by the state

Legislature pursuant to the provisions of said budget amendment (Stats. 1923, c. 121), it will be seen that instead of repealing, or attempting to repeal, the provisions of the statute of 1919, above referred to, the said budget bill expressly provides that said statute shall remain in full force and effect by virtue of the item therein providing for salaries and support of the state real estate department reading as follows:

"For salaries and support of the state real estate department such sum or sums as are provided in chapter six hundred five statutes of nineteen nineteen and the amendments thereto, such amounts to be paid from the real estate commissioner's fund created thereby."

It follows necessarily from said decision and from the language of the statute of 1923, above quoted, that the petitioner herein is entitled to have the relief prayed for in his petition. Let the writ issue accordingly.

We concur: WILBUR, C. J.; LENNON, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.; LAWLOR, J.

26, 1915, because of escape therefrom, he was sentenced to a term of 4 years, the term to begin at the expiration of the term already serving; thus, without any credits, his term expires July 6, 1932. As a penalty for his escape in 1914, the prison directors forfeited all credits which he might earn under his 14-year sentence, amounting to 5 years and 2 months.

Partly because of this double penalty imposed for his escape, in the loss of credits amounting to 5 years and 2 months, and also the amount of sentence of 4 years imposed by the superior court of Marin county, and because of the record of petitioner in the United States army during the Spanish-American war and his good conduct subsequent to his escape, the Governor of the state, with the concurrence of the Justices of the Supreme Court, commuted the two sentences to a single term of 10 years. After reciting the fact hereinabove stated, the commutation of sentence issued by the Governor concludes as follows:

"Now, therefore, I, Wm. D. Stephens, Governor of California, do hereby commute the two sentences of the said John Bogden to a single term of 10 years, including time served."

This commutation occurred on the 20th of December, 1922. The petitioner contends that he is entitled to credits either on the first term of 14 years or upon the unexpired portion of that term plus credits for good conduct under the 4-year term, and claims that thereby his sentence has been so reduced that it has already expired.

The question depends upon the construction of the pardon issued by the Governor and its relation to the statute allowing credits for good conduct. At the time of the commutation of sentence the prisoner had served 8 years 5 months and 14 days. If the commutation is to be considered, without involving the question of credits for good conduct, it would follow that it should be interpreted as requiring the prisoner to serve the balance of the 10-year term, to wit, 1 year, 7 months and 16 days. This period would expire July 6, 1924. If we assume, without deciding, that the petitioner is entitled to the statutory credits for good conduct upon this term of 1 year 7 months and 16 days, his sentence has not yet expired. It is clear, we think, that the intent of the Governor was that the petitioner was to serve 1 year 7 months and 16 days, subject, of course, to the right of the board of prison directors to exercise their prerogative of parole during that period.

Petition denied.

All concur.

192 Cal. 163

Ex parte BOGDEN. (Cr. 2610.)

(Supreme Court of California. Sept. 28, 1923.)

Prisons — Term after commutation held not terminated by credits.

Where a prisoner, serving a 14-year term, was sentenced an additional 4 years for escape, and forfeited credits amounting to 5 years 2 months, which he might have earned on the 14-year term, after serving 8 years 5 months 14 days, had his sentence commuted by the Governor to a single term of 10 years, including the time already served, *held*, that, after such commutation, it was intended he should serve the remaining 1 year 7 months 16 days, subject to the prison directors' prerogative of parole, and that he was not entitled to a credit thereon of possible credits under the unserved 4-year term, or the unexpired portion of the 14-year term.

In Bank.

Application by John Bogden for writ of habeas corpus to be directed to the Board of State Prison Directors. Writ denied.

See, also, 216 Pac. 967.

John Bogden, in pro. per.

PER CURIAM. John Bogden applies for a writ of habeas corpus for release from imprisonment in the state penitentiary at Folsom. On July 6, 1914, he was sentenced to serve 14 years in that prison, and on May

192 Cal. 158
**BOARD OF OSTEOPATHIC EXAMINERS
 OF CALIFORNIA et al. v. RILEY, State
 Controller. (Sac. 3548.)**

(Supreme Court of California. Sept. 27, 1923.)

**1. Statutes $\S$ 35½ — Osteopathic Act held
 within proper sphere of initiative legislation.**

The Osteopathic Act of 1922, creating the board of osteopathic examiners, held within the proper sphere of initiative legislation, notwithstanding provision for collection of fees by the board and the deposit of the money in the state treasury in a special fund, to be drawn on for the salaries, costs, and expenses of the Board.

**2. Physicians and surgeons $\S$ 2—Osteopathic
 Act held not abrogated by adoption of budget
 amendment to Constitution.**

The Osteopathic Act of 1922, creating the board of osteopathic examiners, and providing for the collection of fees to be deposited in the state treasury in a special fund to be drawn upon for the salaries, costs, and expenses of the board, held not abrogated by adoption of the budget amendment to the Constitution, being consistent, and their having been adopted by the electors simultaneously showing intention that both should be given effect.

**3. States $\S$ 137—State controller required to
 issue warrant for expenses of osteopathic
 board on special fund created by Osteopathic
 Act.**

Under the Osteopathic Act of 1922, creating the board of osteopathic examiners, and providing for the collection of fees to be deposited in the state treasury in a special fund, to be drawn on for the salaries, costs, and expenses of the board, and Pol. Code, $\S$ 433, relating to the duties of the state controller, it was the duty of the controller to issue his warrant on the state treasurer for a sum drawn on such special fund for the salaries of the secretary and the stenographer of the board, though the board of control, in auditing the claim, had undertaken to change the source of payment from the special fund against which it had been drawn to the "salaries" fund provided for in budget bill, since such act was unauthorized, and could not affect the right to have the warrants drawn on the proper fund, nor the duty of the controller to draw the warrant on the proper fund.

In Bank.

Application for writ of mandate by the Board of Osteopathic Examiners of the State of California and others against Ray L. Riley, State Controller of the State of California. Writ granted.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, for petitioners.

H. C. Lucas, of San Francisco, James L. Atteridge, of Sacramento, and Dion R. Holm, of San Francisco, for respondent.

Garret W. McEnerney and Andrew F. Burke, both of San Francisco, for board of control.

RICHARDS, Justice pro tem. This is an application for a writ of mandate, directed to the respondent herein, as state controller, requiring him to do certain acts relating to the accounts and claims of the petitioners, acting as a board of osteopathic examiners under and by virtue of the provisions of the so-called "Osteopathic Act," an initiative measure adopted by the people at the general election held on November 7, 1922. The application herein is in two counts, in the first of which it is demanded that the respondent, as state controller, examine and settle the account of the said board of osteopathic examiners for fees collected, reported, and accounted for during the month of July, 1923, under the provisions of the said act creating said board, and which the state controller is required to examine, settle, and certify to the state treasurer under the provisions of section 433 of the Political Code. By the second count in said application it is demanded that the state controller be required to issue his warrant on the state treasurer for the sum of \$225 upon the claim of the petitioner for said sum for the salaries of secretary and stenographer of said board, approved by the board of control, and, which the petitioners demand shall be made payable out of the "board of osteopathic examiners contingent fund" in the state treasury.

The answer of the respondent herein, while admitting the averments of fact in both counts of said application contained, denies that he, as to the first count therein, is in duty bound to certify the accounts of the petitioners as set forth in said first count of their petition to the state treasurer to be credited to the "board of osteopathic examiners contingent fund," and as to the second count therein denies that he is in duty bound to issue his warrant on the state treasury, as demanded by the petitioners, payable out of said special fund in the state treasury. The respondent bases his refusal to do both or either of said acts upon his assertion that the effect of the adoption by the electors of California of the constitutional amendment known as the "Budget Amendment," and the effect of the submission by the Governor of California to the state Legislature of his "budget recommendations and estimated revenues," and the effect of the adoption by the Legislature of the budget bill of 1923 have been to repeal or modify any and all appropriations theretofore made by the Legislature or by the people of the state of California, in so far as there might have been created a special fund thereby for the payment of the petitioners' said claim.

[1] The respondent herein does not in his answer filed herein make any other specific assault upon the so-called "Osteopathic Initiative law" than that above referred to,

but it is contended in the briefs of his counsel filed herein that said law is invalid for the reason, as stated therein, that the making of appropriations is not legislative, but administrative, in character, and hence does not come within the constitutional provision providing for direct action of the people in the adoption of initiative laws. We discover no merit in this contention. The provision in the initiative law empowering the board of osteopathic examiners created thereby to collect fees in the exercise of the powers of said board and to deposit the moneys so collected in the state treasury in a special fund, which shall in turn be drawn upon for the cost of maintenance of said self-sustaining board, is merely an incidental provision to the main objects of its creation. The passage of laws providing for the organization and functioning of boards and commissions of this character performing subordinate administrative functions of the state government have from the earliest period of our state history down to its latest acts of legislation been always regarded as legislative in character, and have in certain instances been committed to the Legislature by the express terms of the Constitution, as, for example, the state board of health. The provision in many of these statutes by which boards and commissions of various kinds are required or permitted to collect fees and charges in the exercise of their functions, while incidental to the main purpose of their creation, are none the less in many instances essential to the proper exercise of their powers, particularly where these are regulatory in character. We entertain no doubt, therefore, that the initiative law of 1922, providing for the formation of the board of osteopathic examiners, and also providing the method for the function of said self-sustaining board through a system of fees and collections, and further providing that the moneys to be thus derived should be deposited in the state treasury in a special fund, which was in turn to be drawn upon for the salaries, costs and expenses of said board, was, as a whole, within the proper sphere of initiative legislation.

[2] As to the respondent's next contention, to the effect that said initiative law has been abrogated, either expressly or by necessary implication, by the adoption of the Budget Amendment to the Constitution on November 7, 1922, this contention has been sufficiently answered by the decision of this court in the recent case of *Railroad Commission v. Riley*, 218 Pac. 415, holding to the contrary as to ordinary legislation in the

form of special statutes previously enacted, creating and providing for the support of statutory boards and commissions. An even stronger reason exists why the initiative law here in question should not be held to have been abrogated by said constitutional amendment, since it is not only not inconsistent therewith, but was adopted by the direct action of the electors simultaneously with their adoption of said Budget Amendment, from which it must be implied that it was their intention that both should be given effect.

[3] As to the respondent's contention that the provision of said initiative law relating to the deposit of the fees and collections of said board of osteopathic examiners in a special fund in the state treasury and that the claims of said board for salaries and expenses should be drawn upon said fund and be payable out of the same, the decision in *Railroad Commission v. Riley*, supra, also applies, and it follows therefrom, and from the provisions of section 433 of the Political Code, that it was a duty specially enjoined by law upon the state controller to examine and settle the account of the petitioner herein and certify the same and the amount thereof to the state treasurer, to be by him credited to the special fund known as the "board of osteopathic examiners contingent fund," and it further follows from said decision that it was the duty of the respondent, upon the petitioners' demand therefor in due form, to draw his warrant upon the state treasurer upon said fund for the salaries of the secretary and stenographer of said board of osteopathic examiners as prayed for in the petition herein. The fact that the board of control, in auditing the last-named claim of the petitioners herein, had apparently undertaken to change the source of payment of the petitioners' said claim from the special fund against which the same had been drawn to the "salaries" fund provided for in said budget bill, being an act unauthorized by law, and hence not within the power of the said board of control, cannot be held to affect the right of the petitioners to have their warrants drawn upon the proper fund nor the duty of the state controller to draw his warrant upon such fund.

It is therefore ordered that a writ of mandate issue as prayed for in the petition herein.

We concur: WILBUR, C. J.; LAWLOR, J.; MYERS, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.

33 Cal. App. 487

SIMONE v. NATIONAL AUTOMOBILE INS. CO. (Civ. 4579.)

(District Court of Appeal, First District, Division 2, California. Aug. 20, 1923.)

Appeal and error $\hookrightarrow$ 1010(1) — **Findings of lower court will not be disturbed, if there is some evidence to sustain them.**

Findings of the lower court, having some evidence to support them, will not be disturbed on appeal, though there is sufficient evidence to have justified the trial court in finding in favor of appellant.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Mauro Simone against the National Automobile Insurance Company. From judgment for defendant, plaintiff appeals. Affirmed.

Thos. F. Lopez and C. M. Ozias, both of Fresno, for appellant.

Geo. G. Graham, of Fresno, for respondent.

NOURSE, J. Plaintiff sued to recover \$1,900 insurance upon an automobile completely destroyed by fire. On August 12, 1921, plaintiff contracted with the Bozzani Motor Car Company for the purchase of a new Fiat automobile for the sum of \$5,234.75, payable partly in cash, and the balance in monthly installments. On the same day the seller transferred the contract to the Finance Investment Corporation. On August 13, 1921, the defendant issued its policy of insurance covering the car in the sum of \$4,000. In this policy the assured were designated as follows: "Name of assured Mauro Simone and Finance Investment Corp. as their interests may appear." Plaintiff made the monthly payments until November, 12, 1921. On November 18th the investment corporation wrote him to the effect that, unless this payment was made within five days, it would exercise its option to repossess the car or to consider all deferred payments due. The car was destroyed by fire on November 22d, while being operated on a public highway. On December 22d following the investment corporation filed its proof of loss, in which it claimed to be the sole owner, and in which it stated the value of the car at time of loss to be \$2,100, the amount which was due it under its assignment of the contract. At the same time this company delivered to the defendant an assignment and subrogation receipt and an assignment of the original contract of sale to plaintiff. The defendant paid this claim in full. On January 17, 1922 (56 days after the fire), plaintiff filed its proof of loss.

The trial court found that the interest of plaintiff in the insured automobile was not canceled or annulled, and that the value

of the car at the time of the fire was \$4,000. It also found that one Nuss was not the agent of defendant, and that the latter was not bound by his representations. On these findings judgment was rendered in favor of the defendant.

The appellant's appeal is based on the ground that the evidence is insufficient to sustain the finding that Nuss was not respondent's agent, and upon the further ground that the conditions of the policy requiring proof of loss were substantially met, and that the trial court should have so found.

Both lines of attack upon the judgment are addressed to the consideration of the evidence heard by the trial court. In each case there is sufficient evidence to have justified the trial court in finding in favor of the appellant. But there is also some evidence supporting the findings which the trial court made, and it has been repeatedly held that, when such is the case, the findings cannot be disturbed on appeal.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

63 Cal. App. 513

PEOPLE v. DE VAUGHN. (Cr. 997.)

(District Court of Appeal, Second District Division 1, California. Aug. 25, 1923. Hearing Denied by Supreme Court Oct. 22, 1923.)

1. Larceny $\hookrightarrow$ 60—**To show taking of property from person of another, evidence must show property taken was in other's physical possession.**

In order that grand larceny may be committed in the taking of property from the person of another, there must be evidence to support the conclusion that at the time the property was taken it was actually on or attached to the person by his clothing or otherwise, or that it was in some manner in his actual physical possession.

2. Larceny $\hookrightarrow$ 55—**Evidence held to show accused committed grand larceny.**

Evidence held to show that, when prosecuting witness boarded a street car, his pocketbook was in his trousers pocket, and that accused feloniously abstracted it therefrom.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Herman De Vaughn was convicted of grand larceny, and appeals. Affirmed.

J. Morgan Marmaduke, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was found guilty on a charge of grand larceny in taking per-

sonal property from the person of one Lindbloom. He has appealed from the judgment, as well as from the order of the court denying his motion for a new trial.

The evidence shows that the prosecuting witness, Lindbloom, was employed as a car repairer in the yards of the Union Pacific Company in the City of Los Angeles; that on the 5th day of December, 1922, he finished his work at about 4 o'clock in the afternoon, when he started for a street car to take him to his home; that before he got on the car he took his pocketbook from his pocket, from which he removed his street car fare, and immediately replaced the pocketbook in his trousers pocket; that he did not thereafter see the pocketbook until after the defendant herein was arrested. When Lindbloom left his place of employment he boarded an East Fourth street car, paid his fare with the money which he had theretofore taken from his pocketbook, obtaining a transfer, got off the East Fourth street car at the corner of Third street and Main street, and transferred to a Brooklyn avenue street car; that, instead of giving the conductor of the latter car a cash fare, he gave him the transfer slip which he had obtained from the conductor of the car which he had first boarded. The evidence further shows that at the time Lindbloom boarded the Brooklyn avenue street car defendant was riding thereon as a passenger, and that defendant had neither come in contact with, nor had been in the presence of, Lindbloom until after Lindbloom transferred from the East Fourth street car to the Brooklyn avenue street car, and that thereafter defendant remained on the Brooklyn avenue street car only for a period of time covered by the street car in running between Third street and Second street—a distance of one block. Two Los Angeles city detectives had had defendant under close personal observation for a considerable space of time, including all the time that defendant was a passenger on the Brooklyn avenue street car, which was for a distance of about 20 blocks. From the testimony of the detectives it appears that defendant got on the rear of the street car and stood by the controller, where he remained at all times that he was on the street car, and at each point where the street car stopped to take on passengers, as the passengers would pass by defendant, he would crowd them—the manner of the crowding being illustrated to the court and jury by witness in conjunction with another person. Defendant wore a light overcoat, which had in it a slit about five inches long on the inside of the outside pocket, in which pocket defendant kept his hand. As Lindbloom entered the Brooklyn avenue street car and went past defendant, defendant crowded Lindbloom, as he had theretofore crowded other passengers, after which he immediately put his hand in his

small coat pocket and alighted from the street car at the next street corner. Just as defendant alighted from the street car he was arrested by the two detectives, one of whom immediately took from defendant's said outside coat pocket the pocketbook belonging to Lindbloom, and which Lindbloom had placed in his trousers pocket within a few minutes before boarding the East Fourth street car heretofore mentioned.

[1, 2] The only point upon which appellant relies is that he contends that the corpus delicti of the offense charged was not proven—in other words, that the evidence did not show that the loss by Lindbloom of his pocketbook and the possession thereof by defendant occurred through any criminal means. In order that grand larceny may be committed in the taking of property from the person of another, there must be evidence to support the conclusion that at the time the property was taken it was actually upon or attached to the person, by his clothing or otherwise, or that it was in some manner in his actual physical possession. *People v. McElroy*, 116 Cal. 586, 48 Pac. 718. Although Lindbloom did not know positively that his pocketbook was in his pocket at the time he came in contact with defendant, still there is no reason why that fact could not be established by circumstantial evidence, as well as by direct evidence. In view of the evidence, and especially that part thereof which shows that at the time in question defendant wore an overcoat with a slit in the outside pocket, conveniently arranged, so that, while apparently defendant had his hand in his own overcoat pocket, he could easily protrude it through the slit, and while his hand was covered by the outside of his own overcoat, and thus screened from the view of any person, nevertheless he could easily insert his hand in Lindbloom's trousers pocket; that the street car was full of passengers, and defendant was seen to crowd against Lindbloom, and immediately thereafter place his own hand in his own outside coat pocket, from which pocket the pocketbook belonging to Lindbloom was taken within a very short space of time—the inference is irresistible that the pocketbook was actually in Lindbloom's trousers pocket, and that defendant abstracted it therefrom. So far as this court can reason, no other rational deduction can be made from the evidence in the case. Lindbloom did not use, nor attempt to use, his pocketbook after the time he took therefrom the car fare which he gave to the conductor of the street car on the East Fourth street car line. It is not claimed or even intimated that Lindbloom may have lost his pocketbook; nor is any suggestion made that some one gave the pocketbook to defendant, or that some person unknown to defendant placed it in his pocket; in fact, it would be but a mere surmise—the wildest sort of spec-

ulation, resting upon no foundation whatsoever—to assume in the face of the evidence here even the possibility that anything of the kind happened.

Taking the facts of this case into consideration, it would be extremely difficult, if not wholly impossible, by anything like fair reasoning, to account for the pocketbook being in defendant's pocket within so short a time after the meeting of defendant with Lindbloom on any other assumption than that it was taken by defendant from Lindbloom's pocket and placed in defendant's pocket by defendant himself. In the case of *People v. Carroll*, 20 Cal. App. 41, 128 Pac. 4, where the evidence against the defendant was not nearly so strong as is the evidence here against this defendant, the court held that there was no rational probability or reasonable possibility that the defendant obtained the purse of the prosecuting witness in any other manner than by his abstracting it from the pocket of the prosecuting witness. If one were to place one's automobile in a garage at night, and the next morning were to discover that it was gone, in the absence of any other facts, it would be a fair inference that some one had entered the garage and taken it therefrom. So here, assuming that Lindbloom placed his pocketbook in his pocket, and within a short time thereafter discovered that it was gone and in the possession of defendant, taken in connection with the many suspicious circumstances connecting defendant with the disappearance of the pocketbook, leaves no escape from the conclusion that defendant, and no one else, took the pocketbook from Lindbloom's possession. While the evidence does not amount to a demonstration, the direct and circumstantial evidence against the defendant is so clear and convincing as to leave no reasonable doubt as to his guilt.

The judgment and the order denying the motion for new trial are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

63 Cal. App. 498

In re MILLINGTON'S ESTATE.

MILLINGTON v. HERBERT et al.

(Civ. 2647.)

(District Court of Appeal, Third District, California. Aug. 22, 1923.)

1. Exemptions ⚡4—**Liberal construction of statutes to carry out manifest purpose held proper.**

Laws exempting property from execution must be liberally construed to carry out their purpose of saving debtors and their families from want by reason of improvidence.

2. Statutes ⚡189—**Grammatical form must yield to intent.**

In the construction of statutes, mere grammatical form must yield to the evident intent of the Legislature.

3. Exemptions ⚡40—**Word "necessary" next to parenthetical phrase including words "wearing apparel," held to modify such words; "necessary * * * wearing apparel."**

In St. 1851, p. 85, exempting, from execution necessary household, table, and kitchen furniture, etc., including stove, stove furniture, and wearing apparel, beds, etc., the word "necessary" modifies "wearing apparel" as part of the parenthetical phrase following it, and limits the exemption to things usual and appropriate for the reasonable comfort of the debtor, though not indispensable to subsistence considering the debtor's previous financial condition and social station, etc.

[Ed. Note.—For other definitions, see Words and Phrases, Necessary wearing apparel.]

4. Exemptions ⚡40—**A gold watch held exempt as "necessary wearing apparel."**

Watches being so generally worn are exempt from execution within Code Civ. Proc. § 690, subd. 2, exempting "necessary wearing apparel."

5. Exemptions ⚡40—**Diamond rings and earrings held not exempt from execution as "necessary wearing apparel" under statute.**

An order setting aside to a surviving husband diamond rings, diamond earrings, and a gold watch and chain under Code Civ. Proc. § 1465, as exempt from execution, must be modified by striking out the earrings and diamond rings as not being within the meaning of "necessary wearing apparel" exempted by section 690, subd. 2.

Appeal from Superior Court, Colusa County; H. C. Bell, Judge.

In the matter of the estate of Cornelia C. Millington, deceased. From an order of the superior court setting aside certain articles as property of the estate exempt from execution, to the use of Seth Millington as surviving husband, Frances Dooling Herbert and another, legatees and devisees under the will, appeal. Affirmed as modified.

Alva A. King, of Colusa, and Ford & Johnson and M. M. Bourquin, both of San Francisco, for appellants.

Thomas Rutledge, of Colusa, for respondent.

FINCH, P. J. The trial court made an order setting apart to the surviving husband of decedent certain articles as property of the estate exempt from execution. From this order the other beneficiaries under the will have appealed. Appellants contend that the court was without authority so to set apart the following: Two diamond rings of the value of \$250; one set of diamond earrings, \$200; and one gold watch and chain, \$5. The

estate of decedent was appraised at \$25,513. She left no surviving children. By her will she gave her husband \$5,000 and appellants, who are a niece and the latter's son, all the remainder of the estate.

Section 1465 of the Code of Civil Procedure provides that—

"The court may on petition therefor, set apart for the use of the surviving husband or wife * * * all the property exempt from execution."

The provisions of this section have always been held to be mandatory. Subdivision 2 of section 690 exempts from execution or attachment—

"necessary household, table, and kitchen furniture belonging to the judgment debtor, including one sewing-machine, stove, stovepipes and furniture, wearing apparel, beds, bedding and bedsteads, hanging pictures, oil paintings and drawings drawn or painted by any member of the family, and family portraits and their necessary frames, provisions and fuel actually provided for individual or family use, sufficient for three months, and three cows and their suckling calves, four hogs and their suckling pigs, and food for such cows and hogs for one month; also one piano, one shotgun and one rifle."

[1] Respondent contends that the property in dispute is embraced within the term "wearing apparel." It is further argued that the word "necessary" does not limit any part of the articles enumerated in subdivision 2 except "household, table and kitchen furniture" and that since the Legislature has not limited the wearing apparel which may be claimed as exempt, either in quantity or value, the courts cannot do so. Appellants contend that the term "wearing apparel" is limited to clothing and cannot be extended to include ornaments of any kind which are not a constituent part of such clothing. In the latter view a wife's cheap wedding ring or a soldier's medal would not be exempt. In the former, jewelry worth a fortune, acquired by one in good faith, while in affluent circumstances, who subsequently suffered financial reverses, if a part of his wearing apparel, would be exempt from execution on a judgment for a family grocery bill. Both of these extremes should be avoided if reasonably possible. While exemption laws are to be liberally construed, the manifest purpose of their enactment must be kept in mind.

"Statutes exempting property from execution are enacted on the ground of public policy for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence." *Holmes v. Marshall*, 145 Cal. 777, 778, 79 Pac. 534, 535 (69 L. R. A. 67, 104 Am. St. Rep. 86, 2 Ann. Cas. 88).

The first statute on the subject enacted in this state exempted from execution—

"necessary household, table, and kitchen furniture, belonging to the judgment debtor, including stove, stove pipe, and stove furniture, wear-

ing apparel, beds, bedding and bedsteads, and provisions actually provided for individual or family use sufficient for one month." Stats. 1851, p. 85.

[2, 3] This language has been carried down, without substantial change, to the present time. The sentence has been extended to include other articles, but not in such manner as to change the relation of the word "necessary" to the term "wearing apparel." The words "including stove, stove pipe, and stove furniture" are clearly parenthetical. In the construction of statutes, mere grammatical form must yield to the evident intention of the Legislature. Treating the words under consideration as parenthetical, the word "necessary" clearly was intended to modify the term "wearing apparel." This conclusion is fortified by the other provisions of section 690. There appears therein a general purpose to limit the various articles exempted, either by number or value or by the word "necessary" or other equivalent expression. Of course, the word "necessary" does not limit wearing apparel to that which is indispensable, but it is sufficiently flexible to include things which are usual and appropriate for the reasonable comfort and convenience of a debtor, although they may not be absolutely necessary for mere subsistence. *Freeman on Executions* (3d Ed.) § 232; *Leavitt v. Metcalf*, 2 Vt. 342, 19 Am. Dec. 718; *Sellers v. Bell*, 94 Fed. 801, 36 C. C. A. 502.

The question is not whether the property in dispute would be embraced within the terms of a statute providing for the setting apart of necessary wearing apparel for the use of a surviving spouse. In such case the term would include all articles of wearing apparel—

"which are reasonable and proper for use in the home and in social intercourse, in view of the condition and value of the estate and the station and surroundings of the family." In *re Lux*, 100 Cal. 593, 605, 35 Pac. 341, 344.

The question here is whether such property would be exempt in the hands of an insolvent debtor. The statute expressly makes distinctions in the exemption of property from execution, based upon the occupation or calling of the debtor, but, beyond such express provisions, there can be no distinction, based upon the previous financial or social position of the insolvent debtor; otherwise the statute would operate unequally between the rich and the poor. In determining whether any article of apparel claimed as exempt by a debtor is necessary for his use, it would seem logical to inquire whether it is "reasonable and proper for use in the home and in social intercourse," in view of the debtor's insolvency. The previous financial condition and social station of the debtor may properly be considered in determining whether the article sought to be exempted was acquired in good faith, for the purpose for

which exemption is claimed, or for the purpose of defrauding creditors in contemplation of insolvency, but beyond this it is not perceived that they are material factors.

[4, 5] The decisions are conflicting as to whether watches and jewelry are embraced within the term "wearing apparel." The fourteenth section of the National Bankruptcy Act of 1867 (14 stat. 522) provided for the exemption of—

"the necessary household and kitchen furniture, and such other articles and necessities of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; also the wearing apparel of the bankrupt, and that of his wife and children."

In the case of *In re Thiell*, 23 Fed. Cas. 917, the court said:

"The phrase 'other articles' occurring in the fourteenth section of the act is a very indefinite expression. It might include family pictures, 'keepsakes,' a cheap watch or clock, and many other things of small value; but it certainly should not be construed as including things of considerable value, used only as things of ornament or pleasure, as gold watches, pianos, and the like."

In the case of *In re Steele*, 22 Fed. Cas. 1202, in construing the phrase "other articles and necessities," it is said:

"The assignee is to determine the question, not by mere arbitrary choice on his part, but by the exercise of a sound legal discretion."

It was held that a gold watch worth \$25 "certainly may be allowed as 'other necessities' under certain circumstances." The bankrupt did not claim any other property as exempt. In the course of the opinion the court said, although the decision was not based on this ground:

"It would not be doing any great violence to the meaning of the term 'wearing apparel,' as used in the Bankrupt Act, to include in it a gold watch of moderate value."

This dictum and the decision, as well as the *Thiell* Case, have been frequently cited as authority in the construction of statutes essentially different from that under consideration in those cases. It would unduly lengthen this opinion to analyze the conflicting decisions of other jurisdictions. Some of them are based on statutory provisions unlike those of section 690. Generally the statutes construed provided for the exemption of "wearing apparel" or "necessary wearing apparel." The cases examined and the conclusions therein reached are as follows: *Gooch v. Gooch*, 33 Me. 535 (watch not exempt); *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726 (breastpin not exempt); *Sawyer v. Sawyer*, 28 Vt. 249 (watch and ring not exempt); *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666 (rings and jewelry worth \$300 not

exempt); *Rothschild v. Boelter*, 18 Minn. 361 (watch worth \$40 to \$50 not exempt); *Stewart v. McClung*, 12 Or. 431, 8 Pac. 447, 53 Am. Rep. 374 (watch worth \$50 to \$70 exempt); *Brown v. Edmonds*, 8 S. D. 271, 66 N. W. 310, 59 Am. St. Rep. 762 (gold watch and chain exempt); *Phillips v. Phillips*, 151 Ala. 527, 44 South 391, 125 Am. St. Rep. 40, 15 Ann. Cas. 157 (watch worth \$35 and ring worth \$20 exempt); *Chamboredon v. Fayet*, 176 Ala. 211, 57 South. 845 (watch and chain exempt); *In re Holden*, 109 Misc. Rep. 207, 178 N. Y. S. 548 (bequest of "wearing apparel" includes watch but not jewelry); *Beckett v. Wishon*, 5 Ohio N. P. 155 (watch and chain exempt); *Coffinberry v. Madden*, 30 Ind. App. 360, 66 N. E. 64, 96 Am. St. Rep. 349 (watch, diamond shirt stud, and rings of decedent not "wearing apparel"); *First National Bank v. Robinson* (Tex. Civ. App.) 124 S. W. 177 (diamond ring exempt); *In re Caswell*, 6 Am. Bankr. Rep. 718 (watch and chain worth \$15 exempt); *In re Kasson*, 14 Fed. Cas. 138 (jewelry not exempt); *In re Ludlow*, 15 Fed. Cas. 1097 (watch and breastpin not exempt); *Sellers v. Bell*, 91 Fed. 801, 36 C. C. A. 502 (gold watch exempt); *In re Smith* (D. C.) 96 Fed. 832 (diamond shirt stud worth \$250, used to fasten shirt, exempt); *In re Jones* (D. C.) 97 Fed. 773 (gold watch and chain exempt); *In re Turnbull* (D. C.) 106 Fed. 667 (watch not exempt); *In re Everleth* (D. C.) 129 Fed. 620 (watch and chain not exempt); *In re Gemmell* (D. C.) 155 Fed. 551 (diamond ring worth \$400 to \$1,000 not exempt); *In re H. L. Evans & Co.* (D. C.) 158 Fed. 153 (watch, rings and other jewelry worth \$444.50 exempt); *In re Leech*, 171 Fed. 622, 96 C. C. A. 424 (two rings worth \$450 exempt); *Langever v. Stitt*, 237 Fed. 83, 150 C. C. A. 285 (diamond ring worth \$150 not exempt); *Rivas v. Noble*, 241 Fed. 673, 154 C. C. A. 431 (diamond ring worth \$650 not exempt).

While no general rule can be drawn from the foregoing conflicting decisions, it may be said that they generally recognize that wearing apparel may include something more than mere clothing. In many of them the value of the article claimed has been given weight, and logically so; because it is neither usual nor appropriate for one who is unable to pay his debts to wear expensive ornaments, and such ornaments therefore are not considered "necessaries" in the sense in which the word is used in exemption statutes. Watches are so generally worn and considered necessities by persons of every financial condition that, under a liberal construction of section 690, it is reasonable to presume that the Legislature intended to include them as necessary wearing apparel. The same may be said as to ornaments of a character and value generally worn by persons of small income or little property. It is not to be presumed, however, that the Legislature intended to exempt expensive diamonds worn

as mere ornaments. The purpose of exemption laws is to save debtors and their families from want, not to enable them to wear luxurious ornaments at the expense of their creditors. In this case the rights of creditors are not involved, but that fact is immaterial, because the court's authority to set the property apart for the use of the surviving husband is dependent upon whether the same would have been exempt in the hands of a debtor.

The order is modified by striking therefrom the words "two diamond rings, one set of diamond ear rings," and, as so modified, the order is affirmed.

We concur: HART, J.; JONES, Justice pro tem.

(63 Cal. App. 457)

McCARTHY v. STANDISH et al. (Civ. 4542.)

(District Court of Appeal, First District, Division 2, California. Aug. 16, 1923. Rehearing Denied Sept. 15, 1923. Hearing Denied by Supreme Court Oct. 15, 1923.)

1. Appeal and error ⇨223—Error of court in fixing size of drain held not to require reversal in absence of objection.

In an action involving the right to obstruct water courses, an error of the court in fixing the dimensions of a box to be placed on the boundary to limit the amount of water flowing from one tract of land to the other did not warrant a reversal, where neither the appellant nor his attorney made any objection thereto, and any inaccuracies as to the location and size of the box were very small.

2. Waters and water courses ⇨119(2)—Owner may protect land from flood water.

A landowner may erect dams to protect himself from flood water.

On Petition for Rehearing.

3. Appeal and error ⇨170(1)—Matter not ruled on not considered.

On appeal in action to enjoin obstruction of water courses, where artesian well water was not specifically designated in the pleadings or in the findings, and no ruling by the trial court was either asked for or made thereon, such matter is not involved and will not be considered, though there was some evidence of and concerning such water, the judgment appealed from and the pleadings relating to "rain and flood waters."

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Mary E. McCarthy against Miles Standish and another. Judgment for plaintiff, and defendants appeal. Reversed in part, and affirmed in part.

D. M. Burnett, of San Jose (Geo. W. Waldorf, of San Jose, of counsel), for appellants. S. G. Tompkins and J. P. Sex, both of San Jose, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to enjoin the defendants from obstructing certain alleged water courses. The defendants answered by denying many allegations, and at the same time filed a cross-complaint, asking that the plaintiff be enjoined from cutting and maintaining certain ditches, and discharging across the lands of the defendants excess waters. A trial was had before the trial court sitting without a jury. On certain issues the trial court found for the plaintiff, and on some issues it found for the defendants, but the defendants, being dissatisfied with the judgment, have appealed.

The plaintiff and defendants owned adjoining farms located northeast of San Jose. The plaintiff's farm is on the south side, and is the higher ground, and the farm of the defendants is on the north side, and is the lower ground. All of the lands are crossed by four water courses which parallel each other, and extend from the southeast to the northwest. The first one we shall call the slough A B, which runs under the bridge, which the engineer, Mr. Hermann, adopted as the bench for his survey; the second one we shall call C D, and is the water course which was by the parties on the trial spoken of as No. 1; the third one we shall call E F, and is the water course the parties spoke of on the trial as No. 2; and the fourth one was by the parties called and is generally known as Coyote river.

In pleading her case the plaintiff asserted her alleged wrongs in four counts. The first two counts were addressed to the water course C D, and the last two counts were addressed to the water course E F. In the first count she alleged that the water course C D was a natural depression which from time immemorial had drained the rain and flood waters from plaintiff's land. In the second count she alleged that the water course C D was an artificial ditch, which had drained said waters for 20 years last passed, and that her use had been peaceable, etc. Her allegations differed in the same respect regarding the water course E F. After denying many of plaintiff's material allegations, the defendants pleaded affirmative allegations in their answer, and repeated in a cross-complaint as follows:

"That in the year 1918, without the consent of defendants or either of them, the plaintiff constructed a large ditch of a depth of over 4½ feet, and of a width in the bottom of over 2 feet, and with gradually sloping sides to the top of said ditch, so that the same is over 7 feet wide at the top thereof. That said ditch

so constructed runs generally from defendants' southerly line in the southeasterly direction over plaintiff's lands for a distance of 1,000 feet, and then turns in an easterly direction on plaintiff's lands a distance of over 1,200 feet. That plaintiff constructed on the westerly side of the portion of said ditch running northerly and southerly an embankment of earth of over 3 feet in height, and on the northerly side of the portion of said ditch running easterly, an embankment of earth of over 3 feet in height. That without the consent of defendant or either of them the said plaintiff at the time she constructed said ditch, wrongfully, and without right, continued said ditch in the northerly direction over the land of defendants for a distance of over 300 feet."

The findings made by the trial court were to the general effect that the water course C D was an artificial ditch as claimed by the plaintiff; that as the same stood at the day and date somewhat less than five years before the commencement of the action it had a capacity equal to a ditch 3 feet wide on top, 1½ feet wide at the bottom, and 2 feet deep, and thereupon the trial court ordered a box, wooden or concrete, having said dimensions, inserted by the plaintiff on the boundary line in said water course. As to the water course E F, the trial court found that a natural depression existed at said place, and that the water-carrying capacity of said depression was equal to a ditch of the same dimensions, and ordered a box of said dimensions inserted at said point. The court also by its findings limited the plaintiff from discharging waters in excess of the carrying capacity of said two boxes across the lands of the defendants, and the court enjoined the defendants from obstructing such waters as might flow through the two boxes mentioned.

On this appeal the appellants make four points, which they state as follows: (1) The evidence does not sustain the finding that rain waters are carried from the lands of plaintiff to the lands of defendants; (2) the trial court erred in directing the installation of the box of the dimensions stated; (3) the court failed to find on certain allegations contained in the answer of the appellants; and (4) appellants are not obligated to take flood water from plaintiff's land.

1. The contention that the evidence does not show that rain waters are carried across the lands of plaintiff onto the lands of defendants cannot be sustained. There is an abundance of evidence in the record that the zone in question has two slopes; it slopes from the Coyote river to the west, and it slopes from the south to the north, and there is an abundance of evidence in the record that at times waters flow from the southerly side of the plaintiff's land across her land, and thence in a northerly direction across the lands of appellants.

[1] 2. The second point made by the appellants is likewise without merit. Except

as noted below, the trial court did not, in ordering the installation and maintenance of the box outlets, require the plaintiff to take flood waters. Neither was the location of the box at No. 1 uncertain. It was to be located at a stake shown on Defendants' Exhibit No. 2, and which stake is located almost immediately adjacent to the bench hereinabove referred to, and the top of which stake the engineer testified was 99.16. In this behalf we note that the appellants contend that the bottom of the box will be .33 of a foot lower than the bottom of the present ditch. If appellants had any objection to that slight discrepancy they should have called the attention of the trial court to the matter. However, as we understand the record, the location and dimensions of the box at No. 1 was, in legal effect, assented to in open court by the appellants in propria persona. The objection to the location and size of the box at No. 2 is equally without merit. As we have stated above, the court found that at the point known as No. 2 there was a natural swale. One witness testified that from one side of the swale to the other side it was approximately 40 feet. The swale had uniform sloping banks. One witness testified that the lowest point was probably about 1 foot deep. In the presence of counsel the trial court stated that he was "about to fix the dimensions of that box the same as the other box." Neither of the appellants nor their attorney made any objection thereto. If the trial court made any error regarding the size or location of the boxes we think that the error was not such as would warrant a reversal.

3. Before the commencement of the action the plaintiff had deepened the water course known as C D, and at a point approximately in the middle of her farm she had made a right angle turn, and had lengthened and deepened that ditch. This fact was pleaded by the defendants in their answer and in their cross-complaint. The trial court did not find on those allegations in the identical words of the pleadings of the defendants. However, the trial court did, in its own method, find on, and fully deal with, the subject-matter of the allegations just mentioned. In finding No. XII the trial court found that the plaintiff, within the last two years, had—

"enlarged the artificial ditch mentioned in paragraph 4 of these findings, by deepening the same to a depth of 3½ feet, and widening the same to a width of approximately 2 feet at the bottom and 5 feet at the top."

It further found that the plaintiff—

"be required to reduce the size of the ditch on her lands as mentioned in paragraph 4 of these findings, so that the same will not exceed a depth of 2 feet below the natural surface and slope of plaintiff's land, nor be of a greater width than 3 feet at the top, or of 1½ feet at

the bottom, which said ditch is to be so filled in to such capacity aforesaid from said box southerly to or near the westerly end of a transverse ditch now existing about midway of said ditch mentioned in said paragraph 4, and from such midway point southerly said ditch shall be maintained as now existing gradually becoming shallower from said point to the southerly end thereof."

[2] 4. Counsel for the appellants contend that, although the appellants had no right to obstruct the flow of surface waters without first providing ditches, canals, and outlets of sufficient capacity to carry such surface waters as the said waterway was accustomed to carry, nevertheless the appellants had the right to protect their land from flood waters. This contention is sound. In her brief the respondent does not contest the point, but treats the matter as though the point was not involved. We have read the entire bill of exceptions, and the point was not involved, so far as the introduction of evidence was concerned, in the trial court; neither did that court make any ruling to the contrary. On the other hand, having heard the evidence and indicated to counsel the issues on which the trial court was minded to decide in favor of the plaintiff, and on which it was minded to decide in favor of the defendants, thereupon the trial court directed the attorney for the plaintiff to prepare the findings. Thereafter findings and judgment were prepared, signed, and filed. In each count of her complaint, in describing the waters which the defendants were obstructing, the plaintiff used the expression "rain and flood waters." In preparing the findings and judgment the same words were used in describing the waters. As stated above, the appellants were under no obligation to receive over their lands and care for flood waters. *McDaniel v. Cummings*, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575. It was error, therefore, to enjoin the appellants from erecting dams to protect themselves against flood waters. The record shows affirmatively that in comparatively recent years Coyote river has overflowed its banks, flowing out over the lands of the plaintiff and thence over the lands of appellants. It may do so again. In the event that it does do so the appellants should not be confronted with a judgment which enjoins them from protecting themselves against such flood waters.

As to the issue of and concerning flood waters, as that expression was used in plaintiff's complaint, and carried into the findings and into the judgment, the judgment is reversed; as to all other matters the judgment is affirmed. And it is further ordered that appellants do have and recover their costs on appeal.

On Rehearing.

PER CURIAM. [3] The petition for a rehearing is denied. The appellants assume that the court overlooked the evidence of and concerning surplus artesian well water. That water was not specifically designated in the pleadings or in the findings. True, it was referred to by some of the witnesses, but no ruling by the trial court was either asked for or made thereon. We therefore did not think this matter involved upon the appeal presented to us.

63 Cal. App. 463

JACKINS v. BACON et al. (Civ. 4485.)

(District Court of Appeal, First District, Division 1, California. Aug. 17, 1923. Hearing Denied by Supreme Court Oct. 15, 1923.)

1. Trover and conversion §34(2)—Date of conversion immaterial if within period of limitations.

In an action for conversion of corporate stock, the actual date of the conversion, or the actual date on which defendant's conversion was made manifest, immaterial, if within the period of limitations.

2. Trover and conversion §4—Conversion of stock took place when person other than owner wrongfully exercised acts of dominion.

The conversion of corporate stock was consummated when person other than owner exercised acts of dominion over it in defiance of the owner's superior right thereto, and in interference with her lawful right and effort to obtain control.

3. Trover and conversion §7—Pledgee of stock certificates could recover for conversion against one obtaining issuance of new certificates.

Where pledged stock was sold under execution against pledgor, and the corporation on purchaser's demand canceled the original certificates, and issued new certificates to the purchaser, who refused to retransfer the stock to pledgee, after pledgee had recovered judgment that she was the owner, the purchaser was liable for conversion, though the pledgee had at all times been in possession of the original certificates.

4. Judgment §590(4)—Judgment in action to establish ownership of stock held not to preclude subsequent action for conversion.

Where the plaintiff in an action to establish her ownership of stock did not ask for alternative judgment for the value thereof, the judgment adjudging ownership in plaintiff and canceling outstanding certificates did not preclude plaintiff from bringing a subsequent action for conversion on defendant's refusal to deliver up the certificates because he had transferred them.

We concur: LANGDON, P. J.; NOURSE, J.

5. Trover and conversion — 2—Stockholder could recover for conversion of stock, though corporation after conversion had suffered forfeiture of charter.

A stockholder could bring action for conversion of stock and recover the value thereof at the time of conversion, where the corporation was then a going concern, though prior to the commencement of the action the corporation had suffered a forfeiture of its charter through its failure to pay its state license.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Minnie Hance Jackins against Frank P. Bacon and others. Judgment for plaintiff, and named defendant appeals. Affirmed.

RICHARDS, Justice pro tem., not participating.

Lucius K. Chase, of Los Angeles, for appellant.

Joe Crail and Julius V. Patrosso, both of Los Angeles, for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the plaintiff and against the defendants herein in an action for conversion by said defendant Bacon of certain stock of the Queen Oil Company, a corporation, of which the plaintiff alleged herself to have been the owner at the time of such conversion. The undisputed evidence in the case showed that on and prior to August 31, 1918, one Harry Jackins, the husband of the plaintiff and respondent herein, appeared on the books of the Queen Oil Company as being the owner of 40,000 shares of the capital stock of said corporation, as evidenced by certificates Nos. 46 and 47. On said August 31, 1918, the sheriff of Los Angeles county, acting under and by virtue of an execution, issued in a certain action against said Harry Jackins and others, sold said 40,000 shares of the capital stock of said corporation to Frank P. Bacon, the defendant and appellant herein, and on September 4, 1918, pursuant to said sale, issued to said Bacon a certificate of sale of said stock. Thereupon, and upon said last-named date, said Bacon presented to the Queen Oil Company said certificate of sale, demanding that there be issued to him by virtue thereof new certificates representing said shares of stock. The Queen Oil Company complied with this demand. The record further shows that on March 26, 1918, and while said Harry Jackins was the owner of the aforesaid stock, he assigned and transferred the same to the plaintiff and respondent herein as collateral security for the payment of his promissory note to her in the principal sum of \$3,500, and that thereafter, and on the 24th day of February, 1919, having made default in the payment of said note, the respondent herein caused the said

stock to be sold, as provided by law, for the sale of pledged property, and became the purchaser thereof at said sale; that thereafter, and on the 22d day of April, 1919, the respondent presented said original certificates of stock, Nos. 46 and 47, to the Queen Oil Company, and demanded that the transfer of said stock to her be entered upon the books of the corporation, and that new certificates of stock therefor be issued to her. This demand was refused by the corporation for the assigned reason that said stock had theretofore been sold by the sheriff of Los Angeles county under a writ of execution to Frank B. Bacon, and that new certificates of stock had been issued to him pursuant to said sale. Thereupon, and on April 24, 1919, the plaintiff commenced an action wherein the Queen Oil Company, Harry Jackins and the appellant herein, Frank P. Bacon, were made defendants, for the purpose of establishing her title to the stock in question. Thereafter, and after due proceedings had therein, judgment was entered in said action, wherein it was adjudged and decreed that the plaintiff therein was the owner of the stock in question, and it was ordered that the defendants therein cancel all certificates evidencing the ownership of said 40,000 shares of said stock of the Queen Oil Company in any person or persons other than the plaintiff, and that the defendant Frank P. Bacon surrender to the Queen Oil Company for cancellation the certificates for said stock which had theretofore been issued to him. An appeal from said judgment was taken by said Bacon to the Supreme Court, where, after due hearing, said judgment was affirmed in a decision of said court entitled *Jackins v. Queen Oil Co.*, 184 Cal. 645, 195 Pac. 51. The remittitur in said case was filed with the clerk of the superior court of Los Angeles county on the 14th day of February, 1921, and thereafter, and on said February 14, 1921, in accordance with said judgment as thus affirmed, the plaintiff herein demanded of said Frank P. Bacon that he comply with the judgment in said action by surrendering for cancellation the certificates representing said shares of stock which had theretofore been issued to him. The said Bacon refused to comply with said demand, placing his refusal upon the ground that he had theretofore and prior to the institution of said action sold said stock, and had never since been the owner thereof. Thereupon the plaintiff commenced the present action for the conversion of said stock against Frank P. Bacon and the Queen Oil Company, a corporation, alleging as the date of such conversion the 4th day of December, 1918, which was the date upon which the defendant Bacon received the certificate from the sheriff upon the aforesaid execution sale. Upon the trial of the cause the court found for the

plaintiff and against the defendant Frank P. Bacon, fixing the date of said conversion as of the 22d day of April, 1919, the date when plaintiff had made her demand upon the defendants for the retransfer and cancellation of said stock, and assessing the plaintiff's damages by reason of said conversion at the sum of \$8,000. The defendant Bacon has appealed from said judgment.

[1, 2] The first contention which the said appellant makes upon this appeal is that there is no evidence sufficient to sustain the finding of the trial court to the effect that there was a conversion of said stock by said Bacon on the 22d day of April, 1919, or at any other time prior to the institution of the present action. We discover no merit in this contention. The actual date of the defendant Bacon's conversion of said stock or the actual act by which his conversion thereof was made manifest is not material, so long as the date thereof was within the statutory period required for the commencement of the present action. The defendant Bacon's conversion of the stock in question was consummated according to the authorities when he wrongfully exercised acts of dominion over said stock in defiance of the plaintiff's superior right thereto and in interference with her lawful right and effort to obtain control over said property. *Fletcher, Cyclopedia Corporations*, vol. 5, § 3446. It has been held that the attachment or sale under execution of personal property not owned by the person against whom the process runs will be sufficient to constitute a conversion thereof. *Davidson v. Oberthier*, 42 Tex. Civ. App. 337, 93 S. W. 478; *Westheimer v. State Loan Co.*, 195 Mass. 510, 81 N. E. 289; *Tipton v. Burton*, 58 Mo. 435; *Rogers v. Weir*, 34 N. Y. 463; *Feury v. McCormick*, 6 S. D. 396, 61 N. W. 162; *Seivert v. Galvin*, 133 Wis. 391, 113 N. W. 680; 38 Cyc. p. 2020, § 8; 26 R. C. L. p. 1120, § 31.

[3] It is, however, contended by the appellant herein that there could be no conversion of said stock by either of said defendants, for the reason that the said plaintiff had at all times been in possession of the original certificates of said stock by virtue of the pledge thereof by Harry Jackins to her prior to the attempted sale of the interest of said Harry Jackins therein under execution. It has been held, however, by the Supreme Court of this state that the unexplained refusal of the corporation issuing such stock to transfer the same upon its books and to issue new shares therefor to the assignee thereof will be held to amount to a conversion of said stock. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476; *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80; *People v. Williams*, 60 Cal. 1. This being so, it must be held by analogy that the purchase by the defendant Bacon of said stock and of the alleged, though then nonexistent, interest of Harry

Jackins therein at execution sale, followed by his own successful demand upon the corporation that it effect a cancellation of the original shares of said stock upon its books and that it issue to him new shares in lieu thereof, taken together with his subsequent refusal, after the final judgment in plaintiff's favor in the former case to retransfer to plaintiff said stock, amounted to such an interference with her rights in and control over the same as established by said former judgment as to amount to a conversion of the same.

[4] The appellant's next contention is that, assuming that a conversion of said stock occurred, as the court found, on April 22, 1919, the plaintiff then had her election either to commence an action in damages for the conversion of said stock or to commence an action in equity to establish her ownership of the same, and that, having elected to commence said former action to have her ownership in said stock established, and having obtained judgment therein establishing her ownership in said stock and canceling any outstanding certificates thereto, she is estopped by said action and by the judgment obtained therein from maintaining the present action for the conversion of said stock. This contention is also without merit. It is true that the plaintiff in said former action might have prayed for and recovered a judgment, not only for the recovery of said stock from the defendant Bacon, but also for an alternative judgment for the value thereof in case of the failure or refusal of the said defendant to deliver up said property to her. The plaintiff, however, did not include in her said former action either averments or a prayer for such alternative relief, and did not obtain therein a judgment for the same. The judgment in said former action only went so far as to provide for her recovery of the specific property sued for, and this being so, when it appeared that upon the entry of such judgment the defendant refused to comply with the terms thereof by delivering up said property, and when he based his refusal upon the ground that prior to the entry of such judgment he had disposed of the same, the plaintiff was entitled to fall back upon her action for conversion in order to obtain that relief which had been rendered impossible by the defendant's refusal to comply with said former judgment and by his prior transfer of said property which rendered compliance therewith impossible. In the early case of *Nickerson v. California Stage Co.*, 10 Cal. 520, the Supreme Court held that a judgment in replevin constituted no bar to a subsequent action for conversion, unless it appeared that the judgment in such prior action had been satisfied. In the recent case of *Carvell v. Weaver*, 54 Cal. App. 734, 202 Pac. 897, this court approved the rule laid down in said early case, holding that a judg-

ment, obtained in an action for the return of specific personal property, which failed to include an alternative judgment for the value thereof, in case a return could not be had did not constitute a bar to a subsequent action for conversion, wherein it was made to appear that the defendant was unable to make a return of the property in question in conformity with the prior judgment. There is nothing to be found in the case of *Erving v. Goodman, etc.*, Bank, 171 Cal. 559, 153 Pac. 945, since in that case the plaintiff in the former action brought suit for the possession of personal property and damages for its detention, and recovered a judgment therein for such damages. Such judgment was properly held to be a bar to the maintenance of the later suit for damages and to a recovery therein. In the instant case it appears that the respondent secured nothing by her former judgment. She was not, therefore, estopped to seek a further remedy in the form of the present action.

[5] The appellant's next contention is that the plaintiff was not entitled to maintain the present action or to recover damages therein for the reason that prior to the commencement of such action the Queen Oil Company had suffered a forfeiture of its charter through its failure to pay its state license tax and that thereby the plaintiff had become the owner of a beneficial interest in its corporate assets, and hence would not be entitled to recover damages for the conversion of the stock of said corporation, the conversion of which the plaintiff in this action complained occurred prior to the time of the forfeiture by said corporation of its corporate charter and while said corporation was a going concern. The trial court found that at the date of said conversion the 40,000 shares of the capital stock thus converted were of the value of \$8,000. The evidence in the case sufficiently sustains this finding, and the judgment in the plaintiff's favor is based upon it. The plaintiff, therefore, at the time she commenced this action had a vested right to recover from the defendants the amount of damages which she was thus found to have suffered from the conversion of her said property by them. Nothing that the defendant corporation could do in the way of failing to pay its corporate license tax or of suffering a forfeiture of its charter for such failure can be held to have affected the plaintiff's vested chose in action at the time the present suit was begun.

As to the appellant's final contention, that the damages awarded to the plaintiff herein were excessive, this point is already covered by what has heretofore been said in this opinion and must, therefore, be held to be without merit.

The judgment is affirmed.

We concur: TYLER, P. J.; ST. SURE, J.

(63 Cal. App. 397)

JONES et al. v. PECK et al. (Civ. 4196.)

(District Court of Appeal, Second District, Division 2, California. Aug. 4, 1923. Hearing Denied by Supreme Court Oct. 2, 1923.)

1. Mines and minerals ⚡50—Complaint alleging ownership in action for possession of mining properties need not allege right of possession.

In an action to recover the possession of mining properties complaint alleging ownership in plaintiffs held sufficient without allegation as to right of possession, since the right of possession accompanies ownership as a matter of law.

2. Corporations ⚡617(2)—Ownership of property of defunct corporation is in stockholders, but right of possession is in directors.

The property of a defunct corporation belongs to the persons who were stockholders at the time it ceased to be a corporation, but the right of possession passes to the directors in office under a statute making them trustees to settle the corporate affairs.

3. Mines and minerals ⚡48—Mining claim is "real estate."

A mining claim is real estate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Estate.]

4. Appeal and error ⚡1036(2)—Overruling of demurrer on ground that plaintiffs to whom no relief was awarded were improperly joined held harmless on appeal by defendants.

The fact that plaintiffs to whom no relief was awarded were improperly joined with plaintiffs for whom the judgment was rendered does not make overruling of demurrer to complaint reversible error on appeal by defendants, since defendants were not prejudiced thereby.

5. Appeal and error ⚡1026—Errors not affecting substantial rights not ground for reversal.

A judgment should not be reversed for errors that do not affect the substantial rights of the parties.

6. Appeal and error ⚡1040(10)—Overruling of demurrer on ground of uncertainty which did not mislead not ground for reversal.

Overruling of demurrer to complaint on the ground that the complaint was uncertain in certain particulars held not ground for reversal, where it was apparent from the record that the alleged uncertainties did not mislead or embarrass defendants in making their defense.

7. Appeal and error ⚡1050(1)—Evidence as to fact not in dispute held harmless.

In an action by trustees of a defunct corporation to recover possession of mining properties in which the complaint alleged and the answers failed to deny that the corporation owned certain locations prior to a certain date and that the plaintiffs were in possession prior to other date, the admission in evidence of a deed to the corporation prior to such dates, if error, was harmless.

8. Mines and minerals ⚡50—Defendants being sued for possession of mining properties having admitted plaintiffs' ownership and possession prior to certain dates had burden of showing forfeiture of locations.

In action by trustees of a defunct corporation to recover possession of mining properties in which the answers admitted that at some time prior to a certain date the corporation owned certain mining locations and had possession prior to other date, defendants had the burden of showing that the locations were not forfeited by the corporation or by its stockholders after it became defunct.

9. Property ⚡9—Ownership and possession of land presumed to continue until contrary is shown.

Ownership and possession of land are conditions which are presumed to continue until the contrary is shown.

10. Mines and minerals ⚡23(4)—Affidavit as to work performed on mining location within year may be filed within 30 days after expiration of year.

Under St. 1891, p. 219, giving occupant of mining claim 30 days after the time within which the labor is to be performed within which to file the affidavit showing that the requisite amount of work has been done for the year, an occupant has 30 days after the expiration of the year within which the work is to be done in which to file the affidavit, since the work may be done at any time during the year.

11. Limitation of actions ⚡201—Finding that defendant was barred by limitations from asserting right to enter on mining land and remove equipment held supported by pleadings.

In action to recover possession of mining properties in which defendant alleged that he had acquired by purchase the right to enter upon the premises and remove equipment, the pleadings held sufficient to support a finding that a defendant's right to enter upon the premises and remove equipment was barred by the statute of limitations under Code Civ. Proc. § 343, and section 338, subd. 3.

12. Mines and minerals ⚡50—Prescriptive right to mining property can be proved under general allegation of ownership.

A prescriptive right to mining property can be proved under the general allegation of ownership.

13. Adverse possession ⚡110(1)—Statute of limitations barring right to enter upon land and remove equipment held available under pleadings.

In an action to recover possession of mining properties in which the defendant claimed to have acquired the right by purchase to enter upon the premises and remove certain equipment therefrom, the plaintiffs could invoke the statute of limitations without formally pleading it, since, if defendant's allegation was in effect a denial of ownership in the plaintiffs, the plaintiffs in support of allegations of ownership could prove that any right on the part of defendant to enter and remove equipment was barred by limitation, or, if defendant's allegation was in the nature of an affirmative defense

of new matter, such defense must be deemed controverted under Code Civ. Proc. § 462.

14. Corporations ⚡283(3)—In action by former directors of defunct corporation as trustees a plaintiff's title to office of director was not open to collateral attack.

In an action by the former directors of a defunct corporation as trustees to recover possession of property that had belonged to the corporation, the title of one of the plaintiffs to the office of director was not open to collateral attack on the ground that he had not owned stock, and therefore was not qualified to be a director.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by E. N. Jones and others, as trustees of the Bagdad Mining & Milling Company, a defunct corporation, and others, against I. M. Peck, C. B. Conlin, E. C. Eddie, and others. Judgment for the plaintiffs constituting the trustees of the Bagdad Mining & Milling Company, and the last two named defendants appeal. Affirmed.

J. W. Hocker and Z. B. Stuart, both of Los Angeles, for appellants.

Kaye & Slemmon, of Bakersfield, for respondents.

FINLAYSON, P. J. This is an action to recover the possession of mining properties, and to enjoin the defendants from removing certain improvements, fixtures, and machinery. Judgment passed for the plaintiffs other than Berry and Rives. The appeal is by the defendants, C. B. Conlin and E. C. Eddie.

The complaint alleges the following facts: On March 4, 1916, the Bagdad Mining & Milling Company, a California corporation (hereafter for brevity referred to as the Bagdad Company), was the owner of the Bagdad mine in San Bernardino county, consisting of a contiguous group of 10 mining locations situated about seven miles northeasterly from the Bagdad station of the Santa Fé railroad, together with a mill site known as the John Denair mill site. On that date the corporation forfeited its charter for nonpayment of its license tax. The plaintiffs, Jones, Morgan, Chester, and Gill, and the defendant Standley were the directors in office at the time of the forfeiture of the corporation's charter. Ever since that date the persons who were the then stockholders of the Bagdad Company have been and are now the owners of the 10 mining locations and of the mill site. Upon the premises are certain permanent improvements which, it is alleged, the defendants threaten to, and, unless restrained, will remove. On April 18, 1921, while plaintiffs were in possession, the defendants, with force and violence, entered upon the prem-

ises, and began to dismantle and remove the fixtures. The plaintiffs, Berry and Rives, are the owners of certain of the fixtures and improvements, namely, the mill building, stamp mill, crusher, elevator, automatic feeder, concentrators and scales. Wherefore, plaintiffs pray that they be adjudged to be the owners of the Bagdad mine and of the mill site and of the fixtures and machinery, and that defendants be enjoined from further acts of demolition and trespass.

The defendants, Conlin, Standley, and McKelvey, demurred to the complaint upon general and special grounds of demurrer. The demurrer was overruled, and an answer was filed by each of the appellants—the defendants Conlin and Eddie. Conlin, in his answer, denied that the Bagdad Company forfeited its charter, and also denied that on April 18, 1921, or at any time subsequent to December 29, 1920, that corporation or plaintiffs owned or possessed any part of the property described in the complaint. For a separate defense Conlin alleged that on December 29, 1920, all of the mining property described in the complaint was open, unoccupied mineral ground of the United States; that on that date one I. M. Peck (a woman) made a lode location on the premises, designating it as the "Ophir"; that her location embraces all the property and improvements described in the complaint, and that after she had located the Ophir mine she conveyed it to him. The defendant Eddie, in his answer, denied that plaintiffs were in possession on April 18, 1921, or that on that date he entered the premises without right, and began dismantling or removing the fixtures. He also denied that the plaintiffs, Berry and Rives, own any of the improvements. For a further defense Eddie alleged that through one C. C. Calkins he purchased certain of the equipment on the premises from the Bagdad Company, that he was given permission to remove the same, and that, pursuant to such permission, he removed a part thereof before the commencement of the action.

The court found the facts substantially as alleged in the complaint, except that it found that the plaintiffs Rives and Berry do not own any of the property. It also found that it is not true that on December 29, 1920, any part of the premises was open or unoccupied ground or subject to location. As to the claim of the defendant Eddie, it was found that on August 24, 1914, he purchased from Calkins certain of the mining equipment; that subsequent to his removal of a portion thereof controversies arose between him and the Bagdad Company respecting his right to remove any of it, and that his claim to enter the premises and make further removal of equipment is barred by subdivision 3 of section 338 and by section 343 of the Code of Civil Procedure.

[1-3] We shall consider first the demurrer to the complaint. To state a cause of action the allegations of the complaint were sufficient without an averment that plaintiffs are "entitled to possession." Their right to possession followed from the facts alleged by them. This is a possessory action (*Haggin v. Kelly*, 136 Cal. 481, 483, 69 Pac. 140); and if, as the complaint alleges, the Bagdad mine and the John Denair mill site were owned by the stockholders of the defunct corporation at the time of the commencement of the action, then the directors in office at the date of the forfeiture of the corporate charter, on March 4, 1916, i. e., the defendant Standley and all or the plaintiffs other than Berry and Rives, are entitled to the possession of the properties as a matter of law. All of the property of a defunct corporation belongs to the persons who were its stockholders at the time it ceased to be a corporation, but the right of possession passes to the directors in office by force of the statutory provision which makes them trustees to settle the corporate affairs. *Rossi v. Caire*, 174 Cal. 81, 161 Pac. 1161. A mining claim is real estate, and the rules of pleading relative to real estate are applicable to it. *Harris v. Kellogg*, 117 Cal. 488, 49 Pac. 708. In a possessory action it is sufficient for the plaintiff to allege that he is the owner of the land in question. The right of possession accompanies the ownership; and from the allegation of the fact of ownership—which is the allegation of seisin in ordinary language—the right of present possession is presumed as a matter of law. *Payne v. Treadwell*, 16 Cal. 220, 244; *Garwood v. Hastings*, 38 Cal. 218; *Heeser v. Miller*, 77 Cal. 192; *Harris v. Kellogg*, supra; *Haggin v. Kelly*, supra; *Davis v. Crump*, 162 Cal. 516, 123 Pac. 294. It follows, therefore, that the averment that the defunct corporation owned the mining claims at the date of its demise and that they are now owned by the persons who were its stockholders when it forfeited its charter is a sufficient statement of the right of the plaintiffs, other than Berry and Rives, to maintain the action.

[4, 5] It may be conceded that Berry and Rives were improperly joined as parties plaintiff, and that their cause of action to recover possession of certain of the fixtures and improvements was improperly united with the cause of action alleged on behalf of the other plaintiffs. It may also be conceded that because of such defects in the complaint the demurrer thereto should have been sustained. But as no relief was awarded to either Berry or Rives, and as the judgment was apparently not affected by their joinder as parties plaintiff or by the improper uniting of their alleged cause of action with that which was alleged by the other plaintiffs, we cannot say that appellants

have suffered any injury by the ruling upon the demurrer, even if that ruling was erroneous. A judgment should not be reversed for errors that do not affect the substantial rights of the parties. *Conaway v. Toogood*, 172 Cal. 706, 713, 158 Pac. 200; *Grossetti v. Sweasey*, 176 Cal. 793, 169 Pac. 687. As was said in the *Grossetti Case*:

"The matter of pleading becomes unimportant when a case is fairly tried, as this one apparently was, upon the merits and under circumstances which indicate that nothing in the pleadings misled appellant to its injury."

[6] One of the grounds of demurrer was that the complaint is uncertain in certain particulars. If it should be conceded that this ground of demurrer was well taken, nevertheless it is apparent from the record that the alleged uncertainties did not mislead or embarrass appellants in making their defense. The overruling of the demurrer is therefore not a ground for reversal. *Bank v. Fulgham*, 151 Cal. 237, 90 Pac. 936.

As a part of their case in chief plaintiffs, over defendants' objection, were permitted to introduce a deed from one John Denair, as grantor, to the Bagdad Company, as grantee. The deed was executed July 31, 1911, and purports to convey to the grantee the 10 contiguous mining locations which constitute the Bagdad mine—the mine which the complaint alleges was owned by the Bagdad Company at the date of its demise, March 4, 1916. The deed recites the date of the location of each of the 10 claims, and gives the book and page wherein each location is recorded. It would seem that at the date of the deed the 10 locations, as a group, were known as the "Orange Blossom" mine. The deed states that the locations are consolidated and worked as one mine known as the "Orange Blossom Mine." No attempt was made by plaintiffs to connect Denair with title to any of the 10 locations. It is for this reason that defendants objected to the introduction of the instrument. Though there was no direct evidence that any of the 10 mining locations described in Denair's deed to the Bagdad Company was a valid location, appellants concede that at one time the 10 claims were located by certain parties. They commence their opening brief as follows:

"During the year 1906 some parties located what was known as the Orange Blossom group of mining claims situate in the Hikorum mining district, San Bernardino county, Cal., about 9 miles, in a northerly direction, from Bagdad Station, on the Santa Fé Railroad."

Not only do appellants assign as error the admission in evidence of the deed without connecting the grantor with title to the locations described therein, but for the same reason they claim that the evidence is insufficient to support the finding that these locations were owned by the Bagdad Com-

pany on March 4, 1916, and that since then they have been owned by its stockholders. For the reasons about to be stated we think that appellants were not injured by the admission of the deed in evidence, and that the finding is supported by the evidence if the ground was not open to relocation on December 29, 1920.

Appellants' answers seem to have been framed upon the theory that this mining ground was open to relocation on December 29, 1920, and that by reason of a location made on that date by I. M. Peck, under whom the defendant Conlin claims title, judgment should be given for them against plaintiffs. In harmony with this evident theory of the answering defendants, the denials in the answers are pregnant with the admission that prior to December 29, 1920, these mining properties were owned by the Bagdad Company. As we have stated, the complaint alleges the dissolution of the latter company on March 4, 1916, and avers that on that date the corporation owned, and since then the stockholders have owned, the 10 mining locations, which, as a group, constitute what is known as the "Bagdad Mine." The complaint also alleges that on April 18, 1921, the date of the alleged ouster, plaintiffs were in possession of all of the 10 locations. After denying, on information and belief, that the corporation forfeited its charter, the answer of appellant Conlin denies plaintiffs' allegations of ownership as follows:

"Denies that on the 18th day of April, 1921, or at any other time or at all since the 29th day of December, 1920, the said corporation has been the owner or possessed of any of the mining property or the improvements thereon as described in the complaint."

This denial is pregnant with the admission that prior to December 29, 1920, the Bagdad Company, whose dissolution the defendant denied, was the owner of these mining locations. The action having been commenced on April 27, 1921, the allegation in the complaint that the stockholders of the Bagdad Company have owned these claims at all times since March 4, 1916, includes, as a necessary implication, the averment that the stockholders were such owners between March 4, 1916, and December 29, 1920. The answer makes no attempt to deny this implication, save that in the denial to which we shall next call attention, the denial of plaintiffs' allegation of possession, it is denied that plaintiffs were "seized" of the property at any time subsequent to July 1, 1918. This denial is as follows:

"Defendant denies that on the 18th day of April, 1921, or at any time subsequent to July 1st, 1918, the said plaintiffs or any or either of them were seized or possessed of the property described in the complaint herein or of any part or parcel thereof."

This denial is pregnant with the admission that prior to July 1, 1918, plaintiffs were in possession of these properties. The denials in the answers of the other defendants are pregnant with similar admissions.

[7-9] Since the complaint alleges and the answers fail to deny that the corporation owned these several mining locations prior to December 29, 1920, and that plaintiffs were in possession prior to July 1, 1918, no injury could have been done appellants by the admission in evidence of the deed from Denair to the Bagdad Company. Ownership by that corporation prior to its demise and by its stockholders thereafter and possession by plaintiffs up to July 1, 1918—facts admitted by the answers—are conditions which may be presumed to continue until the contrary is shown. The admission in the answers that, at some time prior to December 29, 1920, the Bagdad Company owned the mining locations imports as a necessary implication that they were valid locations, made as required by the United States mining laws. The burden, therefore, was upon defendants to show that the locations were not forfeited by the corporation, or by its stockholders, subsequent to its demise.

"After a valid location has been made the locator need not keep an actual possession of the claim. His right of possession will continue until he has in fact abandoned it, or has forfeited it by failure to do the requisite amount of work within the prescribed time (*Belk v. Meagher*, 104 U. S. 279), and the burden of proving such forfeiture or abandonment is on him who would attack this right." *Harris v. Kellogg*, supra, 117 Cal. 488, 489, 49 Pac. 709—citing *Hammer v. Garfield Mining, etc., Co.*, 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964, and *Quigley v. Gillett*, 101 Cal. 462, 35 Pac. 1040.

From the foregoing it follows that those plaintiffs for whom judgment was given—those who were the directors in office at the date of the forfeiture of the Bagdad Company's charter—were entitled to judgment unless, as appellants claim, the ground was open to relocation by Mrs. Peck on December 29, 1920. That is, the judgment is correct unless the evidence shows that the corporation or its stockholders had forfeited their right to the mining locations by failing to do the requisite amount of work thereon within the prescribed time.

Affidavits were filed with the county recorder showing that the requisite amount of work had been done on each of these mining locations for each of the years 1914, 1915, 1916, 1917, 1918, and 1919 by the Bagdad Company. These affidavits were introduced in evidence by plaintiffs as part of their case. Appellants make certain technical objections to them, but we think the objections are hypercritical, and that the affidavits are in substantial conformity with the require-

ments of the Act of March 31, 1891. Stats. 1891, p. 219. By the express provisions of that act the affidavits are prima facie evidence of the facts stated therein. In addition to these affidavits, plaintiffs put witnesses on the stand, who testified to the performance of work for each of the years 1914 to 1919, inclusive. True, there was a sharp conflict between the testimony of the witnesses for the respective parties upon the question as to whether the requisite amount of work had been done during these years, but we think the evidence was sufficient to justify the finding that for each of the years 1914 to 1919, inclusive, the necessary amount of work was done on these claims for or on behalf of the Bagdad Company and those who have been trustees for its stockholders from the date of its dissolution.

[10] The necessary amount of work having been done for the years 1914 to 1919, inclusive, the claims were not subject to relocation until 30 days after the expiration of the year 1920. The trustees for the stockholders of the Bagdad Company had all of the year 1920 within which to do the work for that year.

"The law fixes no time within a year when the work must be done. Consequently, if done at any time during the year, it is enough, and there can be no forfeiture until the entire year has gone by." *Belk v. Meagher*, 104 U. S. 283, 26 L. Ed. 735.

"The statute [the state statute of March 31, 1891] gives to the occupant thirty days after the time within which the labor is to be performed within which to file the affidavit, and the mine is not open to relocation until after the expiration of said thirty days." *Harris v. Kellogg*, supra, 117 Cal. 490, 49 Pac. 709.

For these reasons we conclude that this mining property was not open to relocation on December 29, 1920, when Mrs. Peck attempted to make her location.

[11-13] There is no merit in the point that the pleadings afford no basis for the finding that the claim of the appellant Eddie to enter upon the premises and remove equipment is barred by the statute of limitations. Eddie's answer not only denies the averments of the complaint that the stockholders of the defunct corporation are the owners of the property, that plaintiffs are in possession, and that defendants wrongfully entered and by force and violence began the work of dismantling and removing the fixtures, but, by what his answer denominates a further defense, he alleges that by purchase of said equipment from the Bagdad Company, through one Calkins, he acquired the right to enter the premises and remove the equipment. This averment of a right to enter the premises is wholly inconsistent with plaintiffs' allegation that on April 18, 1921, the defendants, Eddie included, entered the premises without right.

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It also is wholly inconsistent with plaintiffs' allegations of ownership by the stockholders for whom they are the statutory trustees. It is probable, therefore, that Eddie's averment of a right to enter the premises adds nothing whatever to his denial of plaintiffs' allegation that he entered without right. Such right of entry, if ever acquired by him, was a limitation upon the right of ownership which plaintiffs allege is possessed by the stockholders for whom they are trustees. If Eddie ever had such right of entry, and if he subsequently lost it by reason of the statute of limitations, then it was reacquired by the Bagdad Company or by its stockholders. In that case it was acquired in a manner analogous to that whereby a right of prescription is acquired. A prescriptive right can be proved under the general allegation of ownership. *Gillespie v. Jones*, 47 Cal. 259; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 594, 77 Pac. 1113. Under the view that Eddie's allegation of a right to enter the premises amounts, in effect, to no more than a denial of absolute ownership in the stockholders of the defunct Bagdad Company, plaintiffs, in support of their allegations of ownership and that Eddie's entry of April 18, 1921, was without right, were entitled to show, if they could, and the court was justified in finding, if the evidence warranted it, that any right to enter the premises which Eddie may have possessed prior to April 18, 1921, was on that date barred by the statute of limitations. If, on the other hand, Eddie's defense that he had acquired by purchase from the Bagdad Company the right to enter the premises and to remove equipment should be regarded as an affirmative defense of new matter, then under section 462 of the Code of Civil Procedure such defense must be deemed controverted, and plaintiffs were entitled to invoke the statute of limitations without formally pleading it. *Pacific Improvement Co. v. Maxwell*, 26 Cal. App. 268, 269, 146 Pac. 900. It follows that under any view of the pleadings it was proper for the plaintiffs to show and for the court to find that Eddie's alleged right to enter the premises and to remove the fixtures was barred by the statute.

[14] At the trial defendants attempted to show that John W. Chester, who is one of the plaintiffs, and who had acted as one of the directors of the defunct corporation prior to its demise, did not actually own stock in the company, and therefore was not qualified to be a director. The court excluded such evidence upon the ground that it was immaterial. If Chester was not a director de jure he was a director de facto, and his title to the office is not open to collateral attack in this action. *Hygienic Health Food Co. v. Grant*, 187 Cal. 431, 435, 202 Pac. 653; *Thompson on Corporations*, vol. 2, § 1122.

There are no other points which merit special discussion.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

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KERRIGAN, J. This action was commenced by Daniel A. McColgan against the defendant, Joseph Sockolov, to recover a judgment for moneys expended for the defendant, and also for moneys loaned to him as represented by certain promissory notes. Pending the litigation Daniel A. McColgan, hereinafter called the decedent, died, and the plaintiff, as administratrix, was substituted. Judgment was rendered in favor of the plaintiff, but, being dissatisfied with the amount, she brings this appeal.

In his complaint plaintiff set out seven causes of action. The first cause of action was to recover from the defendant the sum of \$2,550 paid by the plaintiff to a surety company in pursuance of an indemnity agreement. Plaintiff recovered in full on this cause, so it is not questioned on this appeal. The second, third, fourth, fifth, sixth and seventh causes of action were on promissory notes executed by defendant to Daniel A. McColgan. The trial court found that the notes set out in the second and third causes of action, and part of the note set out in the fourth cause, were paid; that the balance of the note described in the fourth cause of action, and the note set out in the fifth cause of action, and part of the note described in the sixth cause of action were paid by defendant by work and labor furnished to plaintiff at his request; that the balance of the note set out in the sixth cause and the note described in the seventh cause had not been paid.

The most important point in this case is the question of the application of certain payments made on the above-mentioned promissory notes. It appears from the record that the original plaintiff, Daniel A. McColgan, and Reginald McColgan, his brother, were partners, and were engaged in loaning their own moneys and negotiating loans for other persons. The defendant was a carpenter, making repairs on small jobs, taking contracts and building houses for others, and, to some extent building houses on his own account for sale. While so engaged he borrowed sums of money from the McColgans, borrowed sums of money from others through negotiations conducted by the McColgans, and at different times made repairs on different buildings for the account of the McColgans. This business association extended over a period of at least six years, and the notes here sued on represent some of the amounts which defendant borrowed from the McColgans.

At the time of the commencement of the action the decedent held the defendant's one-day promissory notes of the same general form as follows: (1) \$500, June 19, 1914; (2) \$311.10, June 22, 1914; (3) \$500, January 8, 1916; (4) 700, January 15, 1916; (5) \$500, January 22, 1916; (6) \$500, January 29, 1916; (7) \$1,000, February 2, 1916; (8) \$500, February

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McCOLGAN v. SOCKOLOV. (S. F. 10471.)

(Supreme Court of California. Oct. 4, 1923.)

Payment — Credit should be applied on notes due at time credit accrues.

Where the maker of several notes of different dates was entitled to credits for payments and for work done, the credits should be applied on those notes which were due at the dates that the credits respectively accrued, in view of Civ. Code, § 1479.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Daniel A. McColgan, revived in the name of Adelaide McColgan, as administratrix, against Joseph Sockolov. From a judgment for plaintiff for partial relief only, she appeals. Reversed.

Alfred J. Harwood, of San Francisco, for appellant.

W. J. Tuska, of San Francisco, for respondent.

5, 1916; (9) \$500, February 10, 1916. The first three notes above listed were not sued upon, it being the theory of the plaintiff that the \$2,000 payment, hereinafter referred to, was applied by him to pay the first, second, third, and part of the fourth notes, and that he was suing for the balance of the note last mentioned, and for the principal and interest due on each of the later notes. The defendant's case was based on the theory that all the notes were paid. As already indicated, the trial court found that this \$2,000, as well as certain credits for work and labor, were applied on the notes in suit, the court not taking into account the three earlier notes not sued upon.

There is sufficient evidence in the record to sustain the findings of the court relative to the credits for the work and labor performed, but we believe that the court erred in the application which it made of these credits. The work performed consisted in defendant superintending certain repair work on various properties either owned or controlled by the McColgans. Although defendant claims to have done many such jobs, there are at least five jobs sufficiently identified to be credited. These five different jobs were dated, respectively, January, 1915, \$75; June, 1915, \$171; June, 1915, \$500; August, 1915, \$200; and October, 1916, \$400. As each service for superintendence was performed the defendant testified that he gave to Daniel A. McColgan a bill showing the charge for superintendence, and the cost of the job, and asked to be given credit for the amount of the superintendence on his notes, and that McColgan promised to give it. We are convinced that this was the agreement under which the decedent and the defendant transacted their business, but it is practically impossible to ascertain the state of their accounts at any specific time. The defendant kept no books of account, and was only able to produce at the trial a memorandum on which he had entered the cost of the various jobs. The plaintiff kept a set of books, but they are not very enlightening.

As already noted, the trial court found that some of the notes in suit had been paid for by work and labor, but the only evidence in the record of work performed were those jobs which we have just referred to, and all of these, with the exception of the last, were done prior to the making of the promissory notes to which the court applied them as credits. We believe that the court erred in so applying these credits. The credits for work done in 1915 should have been applied

against the three earlier notes not in suit, in accordance with the method outlined in section 1479 of the Civil Code. The only way in which they could have been applied against the notes in suit would be on the theory that they remained stated job accounts, and as such were the proper subject-matter of set-off or counterclaim. The defendant filed a supplemental answer, counterclaim, and cross-complaint, in which he set up that plaintiff was indebted to him for \$1,500, being the alleged value of the services rendered, but the court found against him on his counterclaim and cross-complaint, and, further, such claim would have been barred by the statute of limitations.

Applying these credits for work and labor in the manner which we have suggested, no difficulty is presented in the proper application of the payment of \$2,000. On February 17, 1916, the defendant delivered to Daniel A. McColgan a check for \$2,000. That fact is not disputed in the record. The decedent had on one page of his ledger the notes in the above list, 3 to 9, inclusive, total, \$4,200. Immediately below he wrote: "Joseph Sockolov—paid on account, February 17, 1916—\$2,000." That entry was never exhibited to the defendant until the trial. As we have already seen, it was the theory of the plaintiff that this \$2,000 was applied on the earlier notes not in suit, and he contended that the mere entry in his ledger was not conclusive as to how the payment had been applied. But under the view which we take of this case it is not necessary to decide this point, for it is conceded that the \$2,000 should have been applied somewhere on "defendant's account." At this time when defendant made the \$2,000 payment there remained unpaid part of note 3 in the above list, and all of the notes here sued on. Therefore plaintiff should have applied, in payment of these outstanding notes, first, the \$2,000 payment, and then the credit of \$400 for work and labor done in October, 1916.

In giving his data regarding these various credits for superintendence defendant included a charge of \$154 for compensation insurance, which the trial court erroneously allowed, giving credit for \$1,500, whereas, it should have given credit for only \$1,346.

For the reasons above set forth, the judgment is reversed.

We concur: WILBUR, C. J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.; MYERS, J.; LENNON, J.

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CITY OF VALLEJO v. SCALLY.
(Sac. 3387.)

(Supreme Court of California. Oct. 4, 1923.)

1. Easements ⚡30(2)—**By grant may not be lost by nonuser.**

Under Civ. Code, § 806, and section 811, subd. 4, mere nonuser will not destroy an easement created by a deed of grant.

2. Abandonment ⚡4—**Waters and water courses** ⚡191—**City held not to have lost, by abandonment, title to pipe line or right of way therefor.**

A city, which had acquired an easement in a right of way for a pipe line, did not lose by a nonuser of the line and abandonment of part of it, and the establishment of another line, which rendered subsequent use of the old line unlikely, either its title in the easement of right of way or the pipe line, so as to prevent its removal even after the period of limitation for the recovery of personalty in the possession of another.

3. Appeal and error ⚡1170(1)—**Judgment granting proper relief not reversible for errors in procedure.**

Under Const. art. 6, § 4½, a judgment doing substantial justice will not be reversed for procedural errors.

In Bank.

Appeal from Superior Court Napa County; H. C. Gesford, Judge.

Action by the City of Vallejo against M. Scally. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank L. Coombs and Nathan F. Coombs, both of Napa, for appellant.

John T. York, of Napa, and L. G. Harrier, of Oakland, for respondent.

WILBUR, C. J. On July 11, 1893, the defendant and his wife deeded to the plaintiff, the city of Vallejo, a right of way over certain real property "for any water pipes or mains which may be laid by the city of Vallejo, the party of the second part, and the right to maintain such water pipes, provided that all water pipes and mains shall be laid so that not less than 1½ feet of ground shall cover such water pipes or mains, and that in no case shall the said water pipes interfere with the proper cultivation of the land of the party of the first part, and also the use of so much land as is necessary in the laying down and maintaining of said pipes, and also the right to enter into and upon said lands for the purpose of laying and maintaining said pipes or mains, and also at all times in the future for the purpose of repairing and inspecting and maintaining said pipes or mains, and causing no more damage in entry or entries than cannot be avoided. * * * These pipes were laid, and thereafter, in 1902, the city of Vallejo constructed a new pipe line, which ren-

dered unnecessary the continued use of the pipe line in the said right of way across the defendant's land. From that time forward the pipe line laid along the right of way in question was not used by the plaintiff for the conduct of water. In 1918 the city of Vallejo desired to remove the pipe line laid in the right of way on defendant's property, and, upon finding that the defendant opposed the removal of such pipe line, brought this action in claim and delivery, and under the writ issued herein removed the property and sold it. The defendant claims the property as personal property, and appeals from the judgment of the superior court in favor of the plaintiff.

[1] The trial court found as a fact that the plaintiff had abandoned the right of way in question, but had not abandoned the pipe line, and that the plaintiff still owned the pipe line. The finding that the plaintiff had abandoned the right of way was erroneous. It was shown without controversy that the plaintiff had ceased to use the right of way, but mere nonuser does not destroy an easement created by a deed of grant. Civ. Code, § 806, and section 811, subd. 4; *Gardner v. San Gabriel Valley Bank*, 7 Cal. App. 106, 111, 93 Pac. 900; *Smith v. Worn*, 93 Cal. 206, 212, 28 Pac. 944; *Storow v. Green*, 39 Cal. App. 123, 178 Pac. 339; *Parker v. Swett*, 40 Cal. App. 68, 180 Pac. 351). In *Parker v. Swett*, supra, it was said:

"It is true that the plaintiff and his predecessors have neglected for 25 years to exercise their right to lay a pipe line, but an easement founded upon a grant cannot be lost by mere nonuser, no matter how long that nonuser may continue"—citing *Currier v. Howes*, 103 Cal. 437, 37 Pac. 521; *Walker v. Lillingston*, 137 Cal. 401, 70 Pac. 282.

A petition for rehearing in this case was denied by the Supreme Court.

[2] The case of *Home R. E. Co. v. Los Angeles Pac. Co.*, 163 Cal. 710, 126 Pac. 972, is cited as sustaining the conclusion that there is sufficient evidence in this case, in addition to the mere nonuser, to support the finding of abandonment. In that case, however, the court was dealing with an agreement to convey an easement based in part the benefit to be derived by the grantor by the operation of the railway. The railroad was constructed under the agreement without any conveyance of the easement, and the defendant thereby acquired a license only "for the purpose of carrying passengers over said road and across said 30-foot strip to and from the city of Los Angeles, and otherwise to do a general railroad business over the same." The railroad company had constructed a parallel road to Los Angeles and had ceased to use said right of way for the purposes for which it had been conveyed. In the case at bar the easement was granted to lay and maintain water pipes. Nothing is said about the use of the pipes,

and, of course, the grantor of the easement was not interested in that matter, so long as his use of the land for agricultural purposes was not interfered with. The situation here presented is entirely different from that considered in *Home R. E. Co. v. Los Angeles Pac. Co.*, supra.

It is difficult to see how there could be either an abandonment or a nonuser of the easement so long as it was actually occupied by water pipes owned by the plaintiff, which it is found by the court the plaintiff had no intention of abandoning. If the plaintiff intended that its water mains should remain in a right of way granted to it by deed for the purpose of laying such pipes or mains, it is difficult to see how the city could be said to have abandoned the easement, without some formal declaration to that effect based upon a consideration or a deed, grant, or quitclaim. The only evidence of abandonment pointed out is the nonuser of the pipe line for the flow of water, the establishment of a new pipe line for the flow of such water, and the abandonment of certain portions of the old line, rendering it unlikely that such old line will ever be re-established as a conduit for water. This evidence is insufficient to establish an abandonment of the easement, particularly where the court found affirmatively that there was no intention to abandon the pipe line. The findings in that regard are as follows:

"That no acts indicating an intention to abandon the pipe laid down and constructed under the terms of the said deed aforesaid were ever done or performed by the plaintiff, and that it was not the intention of the plaintiff to desert or abandon said pipe, or the materials of which it consisted, notwithstanding the apparent intent on the part of the city of Vallejo not to again use said pipe, or materials, laid down and constructed across the land of the defendant for the purpose of carrying water. * * * That the plaintiff, by reason of the nonuse of the easement granted by said deed aforesaid, and the original pipe line over in and upon the land of the defendant, and other acts shown by the evidence in the case ever since the year 1907, in carrying of water from Creston to Fleming Hill reservoir, through the pipe line laid in and along said right of way, has shown its intention to abandon and has abandoned its easement and the right of way conveyed by said deed aforesaid."

The defendant's claim is, in substance, that the plaintiff abandoned the easement, and thus restored the ownership and possession thereof to the defendant as owner of the fee;

that plaintiff retained the right to remove the pipe only for the period of the statute of limitation for the recovery of personal property in the possession of another, plus a reasonable period for a demand and refusal of such possession. But, as we have said, the finding that the easement was abandoned was erroneous and inconsistent with the findings above quoted concerning the pipe line. The findings, taken together, amount to a finding that the plaintiff intended to use the right of way for the pipe line until it decided to remove the same.

It was originally conceded by the respondent that, inasmuch as it did not appeal from the judgment in its favor, it was bound by the finding of abandonment, and that we must decide the case upon the assumption that the finding of abandonment is conclusive upon the respondent. Upon this assumption the parties in their briefs discussed their rights in and to the pipe line upon the theory that the fee of the land and the easement for a right of way thereover are both vested in the defendant. Upon this basis the question of who was in possession of the pipe line, and whether or not the statute of limitations had run in favor of the defendant because of his possession of the pipe line, and whether or not sufficient demand was made by the plaintiff for the pipe in the land before the bringing of the suit are discussed and presented for our review. Upon argument of the cause and in briefs subsequently filed the respondent has insisted that the finding as to the abandonment of the easement was unsupported by the evidence, and in this view we concur. The trial court arrived at a correct conclusion, namely, that the pipe in the land belonged to the city of Vallejo. In doing so, however, it entered an erroneous finding of fact against the city to the effect that the right of way had been abandoned. The city not only owned the pipe line but also the right of way and had the right to remove the former. It has removed the pipe under the writ of replevin in this case. Whether or not this form of action was an appropriate one is a matter which does not now concern us.

[3] The defendant has failed to establish that there has been any miscarriage of justice by reason of the judgment of the trial court, and we cannot reverse it for mere errors of procedure. Const. art. 6 § 4½.

Judgment affirmed.

We concur: WASTE, J.; SEAWELL, J.; LENNON, J.; LAWLOR, J.

192 Cal. 132

**LIVE OAK WATER USERS' ASS'N et al. v.
RAILROAD COMMISSION OF STATE
OF CALIFORNIA et al.
(S. F. 10299.)**

(Supreme Court of California. Sept. 21, 1923.
As Modified Oct. 4, 1923. Rehearing
Denied Oct. 18, 1923.)

1. Waters and water courses ⇨257(1)—Classification of contract and noncontract consumers held proper.

The Railroad Commission properly and reasonably divided ordinary consumers of water from canal company and contract consumers into two classes, and required contract consumers to pay rates for all acreage covered by their contracts, as provided thereby, though the ordinary consumers were not so required to pay, a lower rate per acre being fixed for contract consumers.

2. Public service commissions ⇨35—Decisions of Railroad Commission conclusive on Supreme Court.

Decision and order of Railroad Commission on the question of discrimination and classification is not subject to annulment by the Supreme Court, in view of Const. art. 12, § 23, and Public Utilities Act, §§ 17(b), 67, especially where there was logical ground for the classification.

3. Waters and water courses ⇨257(1)—Discrimination based upon reason proper.

A discrimination in fixing rates for water for irrigation based upon reason and justice can properly exist.

In Bank.

Application for certiorari by Live Oak Water Users' Association and others to review an order of the Railroad Commission of the State of California regulating water rates of the Sutter-Butte Canal Company. Order affirmed.

F. S. Brittain and T. C. Nelson, both of San Francisco, for petitioners.

Hugh Gordon, of San Francisco, and William W. Clary, of Los Angeles, for respondent Railroad Commission.

Devlin & Brookman, of San Francisco, and Henry Ingram, of Gridley, for respondent Sutter-Butte Canal Co.

SEAWELL, J. This court had occasion once before to outline the facts of the instant case, and for the purposes of the present consideration it adopts its former statement of facts with some modifications.

By this proceeding petitioners seek to have reviewed and annulled a certain order and decision of the Railroad Commission, given and made on April 26, 1922, with relation to the water rates of the Sutter-Butte Canal Company, in so far as the said order and decision of the Commission affects and undertakes to regulate certain water rates payable by petitioners as customers of the Canal Com-

pany in alleged violation of law. The individual petitioners herein, and also those persons who constitute the membership of the several associations who are named as petitioners herein and for whom merely an oral appearance was entered and who introduced no evidence before the Commission, with the exception of two, are landowners in the region supplied with water for irrigation purposes by the Canal Company, and as such landowners are either directly, or through their predecessors in interest, the holders of contracts with such Canal Company, or its predecessors, for the furnishing of water upon their respective parcels of land. No complaint is made as to the rates fixed by the order, nor is the necessity of an increase in rates questioned. The sole question is whether or not these rates should be applied to the full acreage covered by the contracts or only to the acreage actually irrigated, assuming the contract holder does not desire to irrigate all the land covered by his contract. These contracts in at least six different forms were entered into at various times by the parties thereto prior to the year 1913. They differ somewhat as to the charge per acre for water and also in some instances as to the amount of the initial charge required by the water company at the time of making said contracts; but in other respects they are substantially the same, and constitute a burden or servitude upon the waters of the Canal Company. *Southern Pacific Co. v. Spring Valley Water Co.*, 173 Cal. 291, 296, 159 Pac. 865, L. R. A. 1917E, 680; *Palermo L. & W. Co. v. Railroad Commission*, 173 Cal. 380, 385, 160 Pac. 228; *Allen v. Railroad Commission*, 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249. The water rights contracted for were to be appurtenant to each parcel of land and might not be sold except with the land. Said contracts provided further that all the covenants and conditions therein contained should run with the land. The contractual rate per acre was to be computed upon the entire acreage of the individual tract to which the water right was made appurtenant, whether or not the land was all irrigated or susceptible of irrigation. The consumer was to construct lateral ditches for delivery and the water company was given rights of way over the consumer's land, and was also given a lien upon the consumer's entire tract of land for defaulted payments for water. The contract parties operated under these contracts without disagreement for several years, during which period the water company largely extended its irrigation system so as to include among its consumers many persons who were not contract holders, but were merely consumers of water furnished by the water company in its capacity as a public utility. That the Sutter-Butte Canal Company was from its inception a public

utility, supplying water for irrigation uses, must be and is conceded by the petitioners (*Butte County Water Users' Ass'n v. Railroad Commission*, 185 Cal. 218, 196 Pac. 265. *King et al. v. Railroad Commission* [Cal. Sup.] 212 Pac. 200). This much may be regarded as an established fact and condition so far as the instant proceeding is concerned. In the year 1917 the Railroad Commission, upon application of the Canal Company, undertook to investigate, establish, and fix general water rates for said Canal Company affecting all of the consumers of its water for irrigation, whether contract or noncontract users of said water. All of the parties hereto were parties to that proceeding. The Commission, by its order therein, made on the 25th day of March, 1918, fixed rates per acre for water affecting all such consumers, and, in its decision so doing, provided that the water served thereunder might be charged for at the acreage rate or might be measured by meter and charged for that way. With that portion of the order which deals with meterage rates we are not concerned, but with that portion of the order which dealt with acreage rates by which the Commission divided the consumers of the Canal Company into two classes, those who held contracts and those who did not. The annual rate for contract holders was made somewhat lower than that for noncontract holders. The reason for this differentiation was explained by the Commission in its order as being that, since a large portion of the contract holders had paid initial charges in varying amounts per acre, it would seem unfair that new consumers who had not made a similar advance should receive service at the same cost as those who had made such payment. With respect to the provision in the contracts that the holders thereof should pay water rates according to the acreage of each individual tract, whether the same was irrigated or not, the Commission made no order or ruling which would have the effect of superseding or abrogating said contracts in that respect. The effect of the order of the Railroad Commission was that the increased rate established by it was as to contract holders less per acre than the rate fixed for noncontract customers. The contract holders were required, however, to pay such lower rate upon the basis of the entire acreage of their respective holdings while the noncontract customers were to pay the higher rate upon the total acreage designated in the application of the consumer. The foregoing order of the Commission went into effect shortly after the date of its entry, and its rates were thereafter charged and collected by the water company as to all of its customers during the succeeding three years or over, and to the time when the subsequent order of the Commission, now under review, was made and put into effect. None of the contract water users

of the Canal Company during that period took any proceedings looking to a review or annulment of said order, or otherwise attempted in any form to assert that any rights under the provisions of their contracts had been invaded by the Commission in making said order, with the exception that certain of these contract customers, upon the putting into effect of said order, protested against the Canal Company's interpretation of the same and offered to pay the company at the rate set forth in its said order as affecting them, for each year, according to the number of acres upon which each of said contract customers desired to use water for irrigation during that year, but the company at all times refused to accept said offer and demanded and received payment of the rates so established upon the entire acreage of each of said contract holders, who thereupon submitted to and paid said water rates according to the acreage of their respective tracts of land as provided in their said contract without further objection. On November 5, 1921, the Sutter-Butte Canal Company filed another application with the Railroad Commission asking for a general increase in its water rates. The Commission on April 26, 1922, after an exhaustive hearing and investigation, gave its decision and entered its order authorizing a further increase in rates for water service by said Canal Company which affected all its consumers. In its consideration the Commission took express cognizance of the contention of these contract water users that its previous order, as interpreted by the Canal Company, did, and that its present order would, operate to work a discrimination between contract and noncontract users by compelling the former to pay an increased acreage rate on the entire acreage of their respective tracts of lands covered by said contracts, whether the whole or any portion thereof was irrigated or not. In dealing with said contention the Railroad Commission expressly held that the interpretation placed by the Canal Company upon its said former order was correct and in substance held that with the exception of its admitted power over the regulation of the water rates of said public utility, it had no power to abrogate or interfere with the obligations of said contracts. It accordingly, by its decision and order, made a general increase in the water rates of the Canal Company, substantially in the form of its previous order, but with the express ruling that as to the acreage of contract holders to be affected by such increase the provisions of their contracts should remain in full force and effect. The petitioners herein filed an application for rehearing before the Commission, which was denied, whereupon they instituted the present proceeding to annul said last-named order in the respect above indicated. The reply which the respondents

made to petitioners' application brings before us the proceedings had before the Commission upon both hearings, as well as the record in the proceeding which resulted in making the order of April 26, 1918.

The petitioners do not contend that the Sutter-Butte Canal Company and its predecessors, through whom they claim to have received their water right contracts, had not taken on the character of a public utility from a period antedating their said contracts, nor do they deny that their contract rights thereunder were not at all times subject to control and regulation as to rates by the state under article 1, § 16, of the state Constitution.

[1] The Railroad Commission did not attempt to change, limit, modify, or abrogate any of the provisions of said contracts. A decision on the question of liens, as other questions of a purely legal character, was reserved by the Railroad Commission for adjudication by the courts. *Law v. R. R. Comm.*, 184 Cal. 737, 195 Pac. 423, 14 A. L. R. 249. Acting within its unquestionable jurisdiction it did increase the water charges by the adoption of a uniform rate scale which was made applicable to each and every acre owned by the contract holders. Its action in this particular was in strict accord with the system which was agreed upon by the petitioners. The Railroad Commission could not have acted in any other way and kept within its jurisdiction. By what authority it could have done differently than it did, so far as total acreage of each individual contract holder was concerned, has not been, and cannot, we think, be shown. Petitioners impliedly, if not expressly, admit that if the contract holders had exercised their full rights, and irrigated each acre of their lands without exception, the objection based on unlawful discrimination would be removed. If, indeed, the number of acres which a consumer should choose to irrigate rather than the number upon which he contracted to pay a water rate is the criterion by which unlawful discrimination is to be determined, then the failure or refusal of a noncontract holder to irrigate in any one year a single acre included in the total acreage designated in his annual application would bring about the very result petitioners complain of. By such a rule one would be excused from performing what he agrees to do and may do that which it pleases him to do, a basis too shifting to predicate unlawful discrimination upon.

The power of this court to review the orders and decisions of the Railroad Commission are expressly limited by constitutional provision. Section 23 of article 12 of the Constitution provides:

"Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any

* * * canal, pipe line, plant, or equipment, or any part of such * * * canal, pipe line, plant, or equipment within this state, * * * for the production, generation, transmission, delivery or furnishing of heat, light, water or power * * * either directly or indirectly, to or for the public * * * is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. * * *" (Italics ours.)

Deriving its authority from the above constitutional source, the Legislature has provided, by section 67 of the Public Utilities Act (St. 1911 [Extra Sess.] p. 18), the limit of this court's jurisdiction and power as a reviewing body by the following provision:

"* * * The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of California. *The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review*; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on *reasonableness and discrimination*. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the commission. * * *" (Italics ours.)

By section 17(b) of said act it is again provided:

"Except as in this section otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product or commodity furnished * * * or for any service rendered * * * than the rates, tolls, rentals and charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time * * * nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals and charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons; provided, that the commission may by

rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

[2] The above-cited article of the Constitution and sections of the Public Utilities Act are conclusive upon the question that the Railroad Commission's decision and order in the instant case on the question of discrimination and classification is not subject to annulment by this court. But if we were vested with jurisdiction to correct or annul the decision it is by no means certain that we would do so upon the record presented and the showing made. That there is a logical and natural ground for the classification made by the Railroad Commission seems convincing. A great many of the contract consumers had, in various ways from the beginning of the utility's existence, aided financially and otherwise in the construction and maintenance of the irrigation system by liberal loans of money, advancements, donations of rights of way, and by making initial payments aggregating large amounts for water rights as shown by the record in the instant case, as well as in former and other proceedings had before this court in which the affairs of this identical Canal Company were involved. It is true that any sums which became due for water service became a lien upon the lands and might be foreclosed as such, but this provision was a part of a contract freely entered into. In addition to the advantages here pointed out the contract holder's right to water was appurtenant to and ran with the land and continued as long as the corporate existence of the Canal Company lasted.

It is the claim of petitioners that under certain decisions of this court, notably *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82, 106 Pac. 404, 29 L. R. A. (N. S.) 213, *Limoneira v. Railroad Commission*, 174 Cal. 232, 162 Pac. 1033, and *Butte County Water Users' Ass'n v. Railroad Commission*, 185 Cal. 218, 196 Pac. 265, contracts such as the one under consideration (and in the latter case the identical contracts) give neither party any right which is not subject to the power of the state, as the latter has unquestionable power to regulate and control public uses irrespective of the contractual relations of private parties. This knowledge was imputable to petitioners before they entered into their contracts. But whatever may be said for or against the contention that the contracts impressed upon the waters of the Canal Company were but mere naked easements which are noneffective and could offer no resistance to the state's right to control and prorate said waters under the rule declared in *Butte County Water Users' Ass'n v. Railroad Commission*, supra, the answer is that the owners of said easements enjoyed the right to be supplied with one cubic foot per second of

water for each 160 acres of land, unless by reason of a capacity of the water supply, as pointed out in the last-cited case, new consumers would suffer material loss if denied the privilege of sharing with the old consumers in an equal distribution of the entire water supply. The point we seek to make is that said water contracts are a thing of value and were of sufficient importance to receive the attention and consideration of the Commission in making the classification which it did make even though said contracts must yield to the exigencies of great public necessity, as was fully considered in the last-cited case. It was there said:

"A water company supplying water for irrigation has not the power to take on new consumers without limit. Its power to supply water is, of course, limited by the amount of its supply, and when the demands of its consumers upon it have reached this limit, it has no right to take on new consumers to the necessary injury of those it has."

The value to the contractor of the right to have water appurtenant to his land is discussed by the decision in *Palermo L. & W. Co. v. Railroad Commission*, supra, and in other cases cited.

The Commission further found from the record before it that a compliance with petitioners' request to relieve a large acreage from water-rate payments contrary to their agreements would have reduced the revenues of the Canal Company to a dangerous, if not ruinous, point, and probably would have seriously crippled, if not defeated, plans for present and future developments that were essential to the welfare of all concerned. Whether or not petitioners used upon their lands the full amount of water which they bound themselves to pay for, it was the duty of the Canal Company, nevertheless, to hold itself in readiness to supply the water when required. Without discussing the legal effect of these two last propositions they were entitled to receive and did receive consideration by the Commission in balancing the equities of the parties to this proceeding. The duty of the Canal Company to furnish the water which it agreed to furnish by its contract remains a continuing and enforceable obligation excusable only upon the happening of some such contingency as was pointed out in *Butte County Water Users' Ass'n v. Railroad Commission*, supra.

That the rights conferred upon petitioners by said contracts are regarded by them as being of value is well shown by their unwillingness to concede that said contracts were anyway annulled or abrogated by the Commission's action.

In making the classification for the purpose of rate fixing, the Commission gave consideration to a number of important factors or elements which distinguished one class from the other. The contract holders paid

an initial charge which the year-to-year customers were not required to pay, and it was the judgment of the Commission that it was unfair that the new customers should receive service at the same cost as those who had made advance payments and were permanent consumers. A vast majority of the new consumers were growers of rice, an industry which had suddenly developed into favor and prominence, but which was in a speculative stage. Rice growing required in some respects a different kind of service than was required for the production of other crops. They were classed as short term consumers, but, like all of their class, were permitted to enter the class of the contract holders by paying said initial or advance payments. It is clear that the purpose of classification was in the interest of equaling, as far as the situation would permit, the cost of carrying water upon the lands of all of the Canal Company's consumers. Petitioners have shown no violation of the provisions of section 19 of the Public Utilities Act, which provides that no public utility shall make or grant any preference or advantage to any corporation or person, or subject any person or corporation to any prejudice or disadvantage, or establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect as between classes of service. It will be noted that this section provides that the Commission shall have the power to determine any question of fact arising under said section.

We find nothing in the record by way of evidence which shows or tends to show that the classification made by the Commission in dealing with a complex situation was either unfair or unreasonable as to the members of either class of consumers. On the contrary, there is much to show that the entire effort of the Commission was to compose and equalize an inharmonious situation brought about by various causes.

[3] There is no claim made that the rates established by the Railroad Commission were confiscatory or oppressive. No design has been shown on the part of any one to give any person an unlawful preference or unfair advantage over another or to indulge in an unlawful discrimination in any manner whatsoever. Not every discrimination or recognition of a ground of difference may be classified as unlawful. A discrimination based upon reason and justice can properly exist. The true principle which governs the instant case is correctly stated in *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315. In dealing with the reasonableness of rates and permissible discrimination based upon differences of conditions, it is there said:

"Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates and the permissible discrimination based upon a difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."

The Railroad Commission undoubtedly had jurisdiction to make the order under review. Its classification for the purpose of rate fixing was a legitimate exercise of its power. As a matter of law, it cannot be said that it was arbitrary or unreasonable. But, however this may be, its findings and conclusions on questions of "reasonableness and discrimination" are not subject to review by this court.

The order is affirmed.

We concur: WILBUR, C. J.; LENNON, J.; WASTE, J.; KERRIGAN, J.; LAW-LOR, J.

192 Cal. 167

BIGLIONE v. BRONGE. (S. F. 10691.)

(Supreme Court of California. Oct. 2, 1923.)

1. Sales $\S$ 261(4)—"Estimated" amount of grapes sold not a warranty.

Where one sold his entire crop of grapes on a ranch, "the crop estimated as 130 tons," the naming of the quantity was not a warranty, for, generally, the word "estimated," following a description of the subject of the contract, indicates that a statement of quantity is a matter of description, and not of the essence of the contract, and the buyer takes the risk of the quantity, if there is no fraud.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estimate.]

2. Sales $\S$ 71(3)—Sale of grape crop estimated at 130 tons for fixed price held in bulk for gross price.

A sale of the grape crop on seller's ranch, "estimated at 130 tons," for \$6,200, held a sale in bulk for a gross price, so that shortage in the crop was no defense against payment of the entire purchase price, in the absence of fraud or misrepresentation.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by C. Biglione against A. Bronge. From a judgment for plaintiff, defendant appeals. Affirmed.

James Gallagher, of Fresno, for appellant.
C. K. Bonestell, of San Francisco, and Kitt Gould, of Clovis, for respondent.

SEAWELL, J. This appeal is taken from the judgment roll alone. The action is based upon the refusal of appellant to make the third and final payment on the purchase price of a crop of grapes, as provided by the terms of the following contract entered into between the appellant and respondent:

"Fresno, Cal., July 23, 1921.

"For and in consideration of the sum of one dollar (\$1.00) each to the other paid, receipt of which is hereby acknowledged, C. Biglione has this day sold, and A. Bronge has this day bought, the entire crop of Malagas, Muscats, and black grapes, same to be clean, free of mildew and fungi diseases, now growing on the ranch of C. Biglione, situated Scandinavian Col., Fresno Co., consisting of 55 acres, more or less, the crop estimated as 130 tons. Above grapes to be picked and delivered to buyer's packing house at Bronge Spur, by buyer at such time as may be desired by the buyer. Terms cash, payable, July 23, 1921, \$1,500.00; Sept. 5, 1921, \$3,000.00; Sept. 18, 1921, \$1,700.00. Seller to furnish team and truck free.

"[Signed] Seller, C. Biglione.

"[Signed] Buyer, A. Bronge."

The first and second cash payments were made as in the contract provided. Appellant refused to make the third or final payment, amounting to \$1,700; hence the action.

The allegations of the complaint as to appellant's liability to make said payment as provided in said contract is sufficient. This allegation is followed by general allegations, authorized by the provisions of section 457 of the Code of Civil Procedure, which are to the effect that respondent complied with all the terms and conditions of said contract (the contract being made an exhibit) to be performed by him. Appellant, in answering the complaint, admitted the execution of the contract, but denied that according to the terms of said contract, as mentioned in paragraph II of said complaint, or at all, defendant became indebted to the plaintiff in the sum of \$6,200, the contract price of the whole grape crop, or in any sum other than \$2,312.55, which amount defendant has paid to plaintiff. He then proceeded to make denial:

"That there were 130 tons of grapes grown and delivered on or from the ranch, mentioned in said contract as sold by plaintiff and bought by defendant, or any tonnage or weight of such grapes other than 133,614 pounds."

Appellant admits that:

"He paid plaintiff, as alleged in said complaint, the sum of \$4,500 in accordance with the terms of said contract for said grapes, and before the delivery thereof, but denies that the tonnage or weight of said grapes, and the whole

thereof, when delivered, was 130 tons, or any tonnage or weight other than 133,614 pounds, the price of which was said \$2,312.55 so paid by defendant to plaintiff, and in this connection defendant alleges that, on plaintiff's representation that there was, as in said contract specified 130 tons of said grapes, he (defendant), relying on and believing such representation, overpaid plaintiff in the sum of \$2,187.45 on the 5th day of September, 1921, and such overpayment or any part thereof has not been paid by plaintiff to defendant; but the whole thereof, with interest thereon at the rate of 7 per cent. per annum from September 5, 1921, remains due, owing, and unpaid."

All the matters contained within quotation marks and which make specific reference to tonnage and overpayment were on motion of respondent stricken out, upon the ground that said matters were irrelevant, and did not constitute either denials of the allegations of the complaint, or new matter properly set up as affirmative defenses. Other denials as to the quantity of the crop not exceeding 133,614 pounds, or about 66 tons, were stricken from the pleadings; but, as the matter already presented is typical of that omitted, it would add nothing to the strength of appellant's contention to repeat them.

The same matter contained in the answer is repeated in the cross-complaint, omitting therefrom the alleged misrepresentation that the quantity of grapes was 130 tons. No allegation of fraud, misrepresentation, mistake, or surprise is pleaded or attempted to be pleaded in the cross-complaint. The answer in this respect contains only what is shown by the portions contained within quotation marks. The cross-complaint prayed for judgment for the sum of \$2,187.45, with interest, this amount being the difference between the sum appellant paid, to wit, \$4,500, and the amount, to wit, \$2,312.55, which appellant claims respondent was entitled to receive, under the terms of said contract.

By what method of computation or under what theory of the case the last stated amount has been brought into the transaction has not been made clear to us. The contract provided for the sale of the entire crop of three varieties of grapes grown on certain described premises, and is silent as to the sale by the ton or by the pound. A demurrer was sustained to the cross-complaint on general grounds. Appellant did not amend either his answer or cross-complaint, or ask leave to do so.

[1, 2] The general rule is that the word "estimated," following a description of the subject of the contract, indicates that a statement of quantity is a matter of description, and not of the essence of the contract, and the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case. This is equally true, where both parties have equal means of knowledge as to

quantity. The naming of the quantity is not under such circumstances, regarded in the nature of a warranty, but only as an estimate or opinion of the probable amount in reference to which good faith is all that is required of the party making it. There is nothing in the contract before us or the record in the case which would justify us in assuming that both parties did not have an equal means of knowledge as to quantity. Nor is there anything before us to justify the assumption that the estimated tonnage of grapes was not upon the vines at the time the estimate was made. By the contract it would appear that the 130 tons was the estimated tonnage of both parties to the contract, and not the estimate of but one of said parties. In a case in principle identical with the one before us this court recently said:

"In every such case the contract is held to be only for the sale of the specific article or articles in bulk for a gross price, and the fact that upon delivery the thing sold proves less in number or weight or measurement than was the estimate of the parties at the time of the purchase furnishes no defense against the payment of the entire purchase price, in the absence of fraud or misrepresentation upon the part of the seller." *Farrell v. Parkford*, 208 Pac. 276.

This disposes of the only question presented by the appeal.

The judgment is affirmed.

We concur: WILBUR, C. J.; RICHARDS, Justice pro tem.; WASTE, J.; KERRIGAN, J.; MYERS, J.; LAWLOR, J.

(192 Cal. 165)

Ex parte MANN. (Cr. 2611.)

(Supreme Court of California. Oct. 1, 1923.)

1. Prisons ☞9—Jurisdiction of state board of prison directors as to length of sentence held exceeded.

Where a prisoner was sentenced for burglary in the second degree and for receiving stolen property for the maximum term fixed by law for each offense, which under Pen. Code, §§ 461, 496, was 5 years each, with the provision that the sentences should run concurrently, the state board of prison directors, by determining that the sentences should run consecutively, exceeded its jurisdiction.

2. Prisons ☞15—Statutory credits against term of imprisonment not matter of right.

Statutory credits fixed by Pen. Code, § 1588, to which prisoners may become entitled, are not matters of right.

In Bank.

Petition by Frank Mann for writ of habeas corpus to be directed to the State Board of Prison Directors. Writ denied.

F. F. Mann, in pro. per.

WILBUR, C. J. The petitioner was sentenced for the crime of burglary in the second degree and for receiving stolen property of the value of over \$7,000. Sentence was imposed June 3, 1920, to the effect that the petitioner be imprisoned for the term provided by law for each offense, the sentences to run concurrently. He alleges that the state board of prison directors fixed the term of his imprisonment at 5 years for each offense, the sentences to run consecutively. He claims that the state board had no jurisdiction to make the sentences run "consecutively," and that therefore the entire term of his imprisonment should be 5 years, and that the term of 5 years has been reduced by credits allowed by law as "regular good conduct prison credits" of 1 year 5 months, and a further credit of 147 days for work done by him on the highways of the state.

[1] The effect of the judgment by the court was that the petitioner was sentenced for the maximum term fixed by law for each offense—that is to say, for 5 years for each offense (Pen. Code, §§ 496, 461)—and as the sentences were to run concurrently, by the judgment of the trial court, the maximum term of imprisonment was 5 years. This maximum term fixes the limit of the jurisdiction of the state board, and it could not be increased by them beyond this term of 5 years. Let it be noted that we are not dealing with a case where the maximum term for either offense exceeds the term fixed by the state board, for the effect of the decision of the state board, as alleged by the petitioner, is that he is to be imprisoned a maximum of 10 years. The use of the term "consecutively" in fixing the two terms merely means that the total term is 10 years, and if the maximum for either offense exceeded 10 years the board would be acting within its jurisdiction in fixing the term at 10 years.

[2] The petitioner, however, is not entitled as of right to the statutory credits fixed by section 1588 of the Penal Code, whatever may be the practice of the state board of prison directors in allowing such credits. It was for this reason that we held section 1168, Penal Code, as adopted in 1917, an *ex post facto* law, as to offenses committed before that date, in *In re Lee*, 177 Cal. 690, 695, 171 Pac. 958; that is to say, because it substituted the discretion of the state board of prison directors for an absolute statutory right, thus making what had been before a right now a matter of grace.

Inasmuch as the petitioner is not entitled, as of right, to the credit of 1 year and 5 months claimed by him, his petition must be denied.

Writ denied.

We concur: RICHARDS, Justice pro tem.; WASTE, J.; MYERS, J.; KERRIGAN, J.; LAWLOR, J.; SEAWELL, J.

63 Cal. App. 598

PEOPLE v. CLAIBORNE. (Cr. 1119.)

(District Court of Appeal, First District, Division 2, California. Sept. 1, 1923.)

Criminal law ⇨ 1156(2)—Discretion of the trial court in granting a new trial on the grounds of the sufficiency of the evidence will not be disturbed.

Where the evidence for defendant was not inherently improbable, the appellate court will not substitute its discretion for that of the trial court in granting a motion for new trial, on the grounds of the sufficiency of the evidence to sustain the verdict.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

William L. Claiborne was convicted of the crime of grand larceny. From an order granting a new trial, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

Henry Skinner and Monroe M. Friedman, both of Oakland, for respondent.

NOURSE, J. This is an appeal by the state from the order of the trial court granting defendant's motion for a new trial after a verdict of guilty. The defendant was tried upon an information charging him with the crime of grand larceny, consisting in the taking of an automobile of the value of \$1,500. At the close of the evidence offered by the prosecution the defendant moved for an advised verdict, which motion was denied. Thereafter the defendant offered evidence consisting of his own testimony and that of other witnesses, and the jury found him guilty. On his motion for a new trial the defendant relied upon his attack upon the sufficiency of the evidence to warrant the verdict of guilty. The parties to this appeal concede that the trial court granted the new trial upon that ground, and that the question involved in this appeal is whether in doing so he abused the discretion which the law vested in him in such proceedings.

The evidence on the part of the prosecution is concededly merely circumstantial, and consists of the testimony of witnesses showing that some time after the automobile had been stolen by parties unknown, while left by its owner upon a public street in the city of Oakland, the respondent sent one O'Neil to Carson City, Nev., with instructions to procure three Nevada licenses for three automobiles and to procure said licenses in the names of persons in Reno, Nev., giving three names therefor which, it is now assumed, were purely fictitious. The licenses so secured were delivered to the respondent by O'Neil, and a few days thereafter the car which is the subject of the larceny in this case was registered with the motor vehicle

department of this state at Sacramento upon an application for registration which showed that it had been sold by one Billington to one Ellis, residing at Nilson, Alameda county, Cal., a fictitious place. Ellis was not accounted for, and it was assumed that that name was also fictitious. About the same time respondent in this case personally left the automobile at a garage for repairs and paid the cost thereof. Thereafter the car was returned to respondent's place of business and later sold to one Stroll, under a bill of sale by which the respondent represented himself to be the owner. Stroll subsequently sold the automobile to one Hilton, in whose possession it was identified by the true owner.

Respondent took the stand in his own behalf, and testified that the sending of O'Neil to Nevada and the procuring of the Nevada licenses was done at the behest of one Shouse, now deceased, but with whom the respondent was then associated in business. He also attempted to show that at the time the car was said to have been stolen he and Shouse were hunting with a party consisting of the sheriff of Colusa county and others at some place in Colusa county and that he was not, therefore, at the place where the crime was alleged to have been committed. All the evidence offered by the respondent tended to show his innocence of the crime charged and to prove an alibi. It was sufficient, if believed by the jury, to warrant a verdict of not guilty. On the other hand, the evidence offered by the prosecution was sufficient, if believed, to warrant a verdict of guilty.

It is upon the theory that the testimony offered by the respondent was so inherently improbable that it cannot be given any weight that the appellant now asks this court to set aside the action of the trial court. We are not, however, able to say that this testimony is inherently improbable. The credibility of the witnesses was, of course, a matter for the jury to determine in the first instance. But the sufficiency of the evidence to sustain the verdict was the precise question which was addressed to the trial court upon respondent's motion for a new trial. As was said in *People v. Canfield*, 173 Cal. 309, 311, 159 Pac. 1046, 1047:

"It was for the judge of the trial court to say what had been the effect of the evidence upon the jury, and whether or not the defendant in view of all of the facts had been given a fair trial. * * * The judge who presided at the trial of the cause, who heard the testimony, who observed the jurors and had an opportunity also of testing the truth of the defendant's statements by noticing his demeanor, was in a peculiarly favorable position for determining justly the question whether or not the defendant had been accorded a fair trial. * * * We can hardly manufacture in fancy a hypothetical situation in which a reviewing court

would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge."

Whatever may be our view of the sufficiency of the evidence constituting respondent's defense to the charge, it is not the function of this court to substitute its discretion for that which is vested in the trial court.

The order granting a new trial is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

63 Cal. App. 510

PEOPLE v. RAMIREZ. (Cr. 1027.)

(District Court of Appeal, Second District, Division 1, California. Aug. 25, 1923.)

Criminal law ⚡1073—Certificate of probable cause must issue unless appeal clearly frivolous.

Where there was at least one debatable question affecting the conviction of defendant, a certificate of probable cause under Penal Code, § 1243, staying execution of the judgment, should issue, the only ground for refusal being, not whether the ruling ought to be affirmed in the Supreme Court, but whether the case is so clear that no judge could fail on a mere inspection of the record to pronounce the appeal frivolous.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Guadalupe Ramirez was convicted of assault with intent to commit murder, and he appeals and applies for a certificate of probable cause after denial thereof by the trial judge. Application granted.

W. W. Judd, of Los Angeles, for appellant.
U. S. Webb, Atty. Gen., for the People.

HOUSER, J. In this matter defendant has applied to this court for a certificate of probable cause. It appears that defendant was convicted of "assault with intent to commit murder," and that he forthwith gave notice of appeal, together with the grounds thereof; whereupon the court made its order for the transcription of the reporter's phonographic notes taken at the trial of the cause. Thereupon, according to the statement made to this court by the attorney representing defendant, a request for a certificate of probable cause was peremptorily denied by the judge of the trial court.

Although the language of the statute (section 1243, Pen. Code) in terms confers the power to issue a certificate of probable cause upon only the judge of the trial court, or upon a justice of the Supreme Court, it has been held that jurisdiction to issue such certificate also lies in a justice of the District Court of Appeal. In re Mayen, 49 Cal. App.

531, 193 Pac. 813. The duty of the trial judge to issue a certificate of probable cause is extensively discussed by Chief Justice Beatty in the Matter of Adams, 81 Cal. 163, 22 Pac. 547. Such a certificate in no way conflicts with an order denying a motion for a new trial. In effect it is merely an expression of opinion by the trial judge that debatable questions are or may be raised on the appeal; that the case presented is not altogether frivolous or trifling and vexatious, but that there is room for an honest difference of opinion as to the existence of prejudicial error in some part of the proceedings leading to the conviction of the defendant. In such circumstances the certificate of probable cause is not merely a privilege which may be either graciously extended to the defendant or withheld from him by the trial judge, as either his pleasure or his whim may suggest, but it is a positive legal right possessed by the defendant. In several California cases the attention of the judges of the superior court is particularly directed to their bounden duty in this regard. In re Adams, 81 Cal. 167, 22 Pac. 547; People v. Gallanar, 144 Cal. 657, 79 Pac. 378; People v. Valencia, 45 Cal. 305; Ex parte Hoge, 48 Cal. 6. As is stated in the Adams Case, supra:

"It matters not that the judge before whom the prisoner has been tried may be satisfied that his conviction is in every respect regular and valid (which, indeed, must always be the case before there can arise any necessity for an appeal); he is, nevertheless, bound to grant a certificate of probable cause, and stay the execution pending the appeal, unless the case is so clear as to admit of no rational doubt or serious discussion."

And again, in the Gallanar Case, supra:

"In all such cases it is the duty of the trial judge to grant the certificate, notwithstanding his own opinion that the record is free from error."

The trial judge having heard the evidence in the case, and perhaps having weighed the reasons advanced by counsel why a new trial should be granted, primarily occupies a superior position to that of a justice of the District Court of Appeals or that of a justice of the Supreme Court in the matter of knowledge both as to the facts of the case and to the law applicable to any legal points which may be raised on appeal. Before a justice of either of the latter courts may fairly pass upon the propriety of issuing a certificate of probable cause, it ordinarily becomes necessary that he not only acquaint himself with the entire transcript of the testimony taken on the trial, but with the clerk's transcript as well, and thereafter bring to bear thereon his general knowledge of the law having to do with any possible point of attack, not to which his attention has been directed by zealous counsel for defendant, but which in

all probability the justice may have discovered through his own initiative and industry. While this court neither wishes to nor will shirk any of its duties or responsibilities, yet, considering that, with the proper legal principles in mind by the judge of the trial court, together with a fair sense of his judicial duty, the arbitrary denial of counsel's request for a certificate of probable cause and the resultant imposition upon a justice of the District Court of Appeal or a justice of the Supreme Court of the burden necessary to a proper determination of the questioned right of the defendant to a certificate of probable cause is not entirely consonant with a due sense of proportion. As was said by Chief Justice Beatty in the Adams Case, supra:

"For all these reasons we hope that hereafter the superior judges to whom these applications are made will, before denying them, seriously consider, not merely the question whether upon mature consideration and after argument on the part of the people all their rulings ought to be affirmed in the Supreme Court, but whether the case is so clear that no judge could fail, on a mere inspection of the record, and without argument, to pronounce the appeal frivolous."

After an examination of the entire record herein, it affirmatively appears that there is at least one debatable question affecting the conviction of the defendant. It is neither necessary nor appropriate that at this time any discussion should be had of such question, much less its ultimate determination by this court. Suffice it to say that it exists, and upon its submission to either division of this court it will necessarily call for most serious and careful consideration. It follows that the certificate of probable cause should issue. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

63 Cal. App. 545

ELDER v. ROSE et al. (Civ. 2633.)

(District Court of Appeal, Third District, California. Aug. 27, 1923. Hearing Denied by Supreme Court Oct. 25, 1923.)

1. Trial §165—Motion of nonsuit presupposes truth of evidence and inferences.

The motion for nonsuit presupposes the truth of the evidence produced, and concedes every inference of fact legitimately deducible therefrom.

2. Trial §165—Court cannot go beyond limits of motion in rendering decision on motion for nonsuit.

A court cannot go beyond the limits of the motion for nonsuit in rendering its decision, and it is its duty, if doubt exists, to let the case go to the jury, and the evidence should be most strongly interpreted against defendant.

3. Master and servant §286(2)—Negligence of ranch owner as to minor employee injured by defective tractor held for jury.

Whether defendants, ranch owners, were guilty of negligence in permitting a tractor to be out of repair, so as to require the placing by hand of dirt on the rollers of the caterpillar revolving track, and whether they were guilty of a breach of duty to plaintiff, a minor employee, in directing him to place dirt on the rollers while the tractor was in operation, without providing him with a proper tool, by reason of which his arm was crushed in the machine, held, on the evidence, a question for the jury.

4. Master and servant §218(6)—Minor employee held entitled to rely upon assurance of employer and not to have assumed risk.

Where plaintiff employee, a minor, was not warned of the danger of placing dirt with his hands on the rollers of the revolving track on a caterpillar tractor, he was justified in relying upon the implied assurance contained in the specific direction of his employer to place such dirt on the rollers by inserting his arm through an opening in the machine while it was moving over rough ground; and hence plaintiff could not be held to have assumed the risk.

5. Master and servant §285(6)—Whether employer's negligence was proximate cause of injury to employee held for jury.

Evidence held to raise a question for the jury as to whether failure of defendant employer to keep a plow tractor in repair and to furnish a suitable contrivance for placing of dirt in its rollers to prevent slipping of its revolving track was the proximate cause of the injury to plaintiff employee's arm when, in obedience to instructions from the employer, he used his hands in throwing dirt in the roller while it was in operation, though there was evidence that plaintiff stumbled on the uneven ground and that his sleeve caught in the mechanism.

6. Master and servant §129(2)—Employer held under duty to anticipate slip or stumbling by employee in following tractor.

Where plaintiff, as defendant's employee, was required to watch the operation of a defective tractor used in plowing, the employer was bound to anticipate and guard against a probability of plaintiff's slipping or stumbling while following the machine and in throwing dirt into the rollers.

7. Appeal and error §996—Evidence furnishing rational inference is sufficient in appellate court.

It is sufficient for an appellate court to find in the evidence a foundation for a rational inference that an injury was due to the negligence of defendant, though there might be also ground for the opinion that it may have been produced in some other manner.

Appeal from Superior Court, Glenn County; H. C. Bell, Judge.

Action by Jesse P. Elder, a minor, against Joe D. Rose and another. From a judgment of nonsuit, plaintiff appeals. Reversed.

Ware & Ware, of Chico, for appellant.

R. M. Rankin, of Willows, and Preston & Duncan, of San Francisco, for respondents.

PER CURIAM. The following opinion, prepared by the late Justice BURNETT a few days before his death, is adopted as the opinion of the court.

"The action was for damages for the loss of an arm, alleged to have been caused by the negligence of defendants. The appeal is from a judgment of nonsuit granted at the close of plaintiff's case. Plaintiff, a minor of the age of nearly 18 years, went to work as tractor engine swamper and plow tender for defendant on November 5, 1920. The tractor engine was a 75 horse power Best caterpillar, track-laying type, and the plow it drew was a gangplow. At the time of the injury the engine was operated by William E. Rose, one of the defendants, in plowing a grain ranch belonging to both defendants. The duties of the plaintiff related, not only to the care and operation of the plows, but he was required to oil the tractor and the tracks, which are the caterpillar linked belts or endless chains which carry the tractor and convert its power into traction upon the ground. His further duty was to watch the track rollers, which are spoollike wheels, which bear down upon and under which the ground side of the moving track operates, and he was to keep them rolling by putting, when necessary, oil and dirt upon the tracks in a manner directed by his employers. At the time of the injury, the tractor was not in good running order by reason of the failure of the oiling system to work smoothly and efficiently, and from the fact that the rollers upon which the track ran would often stick and refuse to revolve. For the first trouble the plaintiff was personally instructed by William E. Rose to take a quart measure can, and, having taken the oil from a five-gallon can on the tractor, with it to oil the rails of the track on both sides of the machine whenever they needed it. These rails were about three inches apart in the middle of the tracks, which were about twenty-four inches wide. The oil had to be dropped on the rails while the tractor was being operated, and plaintiff was instructed by said William E. Rose to pour the oil just in front of the first rollers and to be sure to pour it on the rails. This he did at various times to the knowledge of his employer. As to the rollers, at times they did not revolve because some of them were old and worn and because they would become clogged with dirt and oil.

"About a week after Elder went to work on the plow, said defendant, who was driving the tractor, turned around and signaled to the former to come up to the engine. When he did so, Rose told him to stay on the engine and steer while he got down and fixed the rollers. Rose then got down, picked up dirt and with his hand put it in an opening and dropped the dirt on the tracks, and the tracks carried it under the rollers, and the friction caused the rollers to start turning. He did this by dropping the dirt through the same openings on both sides used by the plaintiff in pouring oil upon the rails. After this demonstration, Rose told plaintiff to watch the rollers, and if they stuck to remedy it by dropping dirt the same way through

the openings. The track of the machine ran around what were called drive sprockets at the rear end and a smooth wheel, called an idler, about three feet in diameter on the front end. The openings referred to were just behind the idler on each side and just in front of the track frame. Two of their sides consisted of moving parts, the track above and the large idler wheel over which the track passed in front. The one on the right was about 14 inches wide, and the one on the left, where the injury was received, was only about 8 inches in width on account of a certain boxing taking up a part of the space. The plaintiff was directed by William E. Rose to apply dirt when needed by reaching in these openings with his hand and arm while the machine was in motion and while he was walking on the ground along its side. According to the evidence this was the only practicable way for doing this work, and it was done in that manner frequently several times a day by plaintiff in his employer's presence, and on some occasions Mr. Rose would see the rollers sticking and would signal to plaintiff to get off the plows and walk forward and apply dirt to the moving rails. To drop the dirt directly over the inner rails it was necessary to thrust the hand and arm into the opening a distance of approximately fifteen inches.

"As to how the accident occurred, the plaintiff testified: 'I saw the two back rollers were sliding, and I walked ahead and picked up the dirt and reached through the opening with my hand in ahead of this boxing in on the track, and that goes back to the track and in front of these two back rollers that was sliding here. * * * I was walking at the side of the tractor and had my right arm in the opening in front of this box dropping dirt on the rails down in here (showing on the diagram), and I don't know whether I stumbled or caught my sleeve or how, but my arm fetched up on this roller between the idler and the track and rolled around this idler to the bottom of the track here.' (Showing on the diagram.)

"It further appears from his testimony that the machine was running under load at the time, vibrating and lunging, and plaintiff was walking over the uneven ground of a grain field; that he was never warned of the danger of the task, and was never given any instructions or tools by which it could be performed more safely. When asked if he realized that he was apt to get hurt he replied: 'I didn't realize that I would. They told me to do it, and I was trying to please them, and I knew if I didn't I would lose my job, and, of course, I supposed it was a general thing, and that everybody did it that way—swamping that way.'

"No device was furnished the plaintiff by the use of which in safety he could have applied the oil or dropped the dirt on the tracks. It is a fair inference from his testimony that if he had been furnished for that purpose with a common ash shovel used for stoves the peril could have been minimized or obviated, and the spade or shovel on the machine was too large to be available. As to that we quote his testimony as follows: 'Q. State whether or not you could have used the spade on the left side in dropping the dirt? A. I don't think that spade could be used on the left side. Q. Why?

A. It was too large. It was one of those spade handled spades and too large; but if it had been a small ash shovel or something like that, that could have been put in the opening, it could have been used. Q. State whether or not, being provided with an ordinary ash shovel such as is being used for stoves, you could have got that to operate and dropped the dirt on the track with it? A. I think it could have been used; yes, sir.'

"Respondents seem to believe that the witness was not sufficiently positive and emphatic in his affirmation to make his testimony of adequate probative force, but in this they are mistaken. Necessarily, the matter involved a question partaking somewhat of the nature of an opinion, and the witness so expressed it. It does not appear that he had ever actually used a shovel for such purpose, but from his knowledge of the mechanism and his experience in dropping the dirt he was abundantly qualified to exercise a sound judgment on the subject. Besides, as suggested by appellant, 'the parts of the tractor, the nature of the opening, and the purpose and nature of the operation of dropping dirt having been fully described to the jury, in the total absence of any testimony on the subject of the use of a shovel to drop dirt, the jury was perfectly competent to draw its own conclusions that dirt could have been dropped on the lower track by means of some such simple mechanical device.'

"The foregoing is deemed a sufficient recital of the facts for the application of the familiar legal principles that are involved.

[1, 2] "As to the rule applicable in cases of nonsuit, there can be and is, of course, no controversy. The motion presupposes the truth of the evidence produced, and concedes every inference of fact that may be drawn legitimately from such evidence; the court cannot go beyond the limits of the motion in rendering its decision; it is the duty of the court, if there be any doubt, to let the case go to the jury, and the evidence should be most strongly interpreted against the defendant. *Bush v. Weed Lumber Co.*, 55 Cal. App. 588, 204 Pac. 24, and cases therein cited.

"As to the duty of the employer to his employee, it is equally well settled—and, indeed, it is not disputed herein—that he is required to exercise ordinary and reasonable care to provide safe tools, machinery, and appliances. The dictates of humanity as well as the mandate of the law exact every reasonable and practicable precaution to reduce the danger of a hazardous occupation. The authorities upon the subject are multitudinous and the doctrine is quite familiar. The following quotations may be taken to illustrate the general expression of the rule. In 18 R. C. L. 587 et seq. it is said:

"The employer's obligation of care extends as a general rule to all tools, machinery, and appliances that may be furnished for the use of the employee in the discharge of his duties; and for any neglect of this duty the employee may hold the employer liable in damages. The employee has a right to rely upon the performance of this duty by the employer, and to govern his actions accordingly. * * * The measure of the employer's duty is the exercise of ordinary or reasonable care to provide safe tools, machinery, and appliances. * * *

Although the doctrine has met with some opposition, the courts have generally held that an employer owes to his employees a duty to make safe the place where they are required to perform their services, failing in which he renders himself liable to an employee who may sustain injuries as the proximate result of his neglect.'

"In *Brown v. Sharp-Hauser Contracting Co.*, 159 Cal. 89, 112 Pac. 874, the rule is thus stated: 'It is the duty of an employer to furnish a reasonably safe place in which the employee may perform the work in which he is engaged, and to use ordinary care to keep the place reasonably safe so that the employee may not be exposed to danger. He is not an insurer of the safety of the employee; the measure of his obligation being to use ordinary care in seeing that the place of work is safe in the first instance, and to employ the same degree of care to keep it such.'

"And in *Duffy v. Hobbs, Wall & Co.*, 166 Cal. 210, 135 Pac. 1093, L. R. A. 1916F, 806, it is said: 'An employer is bound to use ordinary care to see that his employees have a safe place in which to work, and that the tools and appliances which they are to work with are in good condition and reasonably safe for the purposes intended. He is also bound to use ordinary care to maintain them in this condition.'

[3] "We think a rational—if, indeed, not the only—inference to be drawn from the evidence is that defendants violated this plain duty imposed by the law. The first omission was in permitting the machine to get out of order so that the rollers would not revolve. It is a fair deduction that, if they had properly attended to that matter, there would have been no necessity for throwing dirt upon the rollers, and hence the accident would not have occurred. But beyond that, and possibly more inexcusable, was their failure to furnish some simple mechanical device for precipitating the dirt upon the rollers and their direction for the plaintiff to do the work as already stated.

"Appellant presents a vivid picture of the situation as follows: 'The two lower back rollers of the left side track were sliding. The boy walked up along the side of the moving tractor. He stooped down while walking and with his right hand picked up a handful of loose dirt, reached in an eight-inch opening between the tractor frame and pulley boxing on the one side and the moving track and idler wheel on the other. The tractor was vibrating and lunging under power and load, the ground was an uneven grain field, and the boy's eyes must have been on his hand and work and not his footsteps. His gauntlet glove and loose jumper sleeve were in an eight-inch hole, at one side of which, and certainly not more than three or four inches from his sleeve, the three-foot idler wheel rolled under the enormous power of the tractor. On the second handful his arm was caught.'

[4] "We think there can be no doubt that, upon the showing made, the question of defendants' negligence should have been submitted to the jury. The only uncertainty that could arise from the foregoing, as we view it, is as to whether the danger was not so obvious and imminent that the plaintiff should have declined to perform the work in such manner. As to this, however, it is conceded that the doctrine

of 'assumed risk' does not apply in this state to cases involving injuries in agricultural employment. *Hackelberry v. Sherlock Land, etc., Co.*, 39 Cal. App. 764, 180 Pac. 37. Besides, the plaintiff was a minor and was therefore not held to the same strict rule of accountability as an adult. Moreover, the jury had a right to consider his explanation as refuting any imputation of reckless indifference to his own safety, and, not having been warned of the danger, he was justified in relying upon the implied assurance contained in the specific direction of his employer to pursue the suggested method. We may add that, having specifically directed plaintiff how to do the work and having illustrated the manner in which it should be done, respondents should not be heard to say that plaintiff should have disobeyed the order because it involved manifest and serious peril.

[5] "But the trial court's order was based principally upon the theory that there was no evidence to show that the negligence of defendants, if any, was the proximate cause of the injury. This is disclosed by the following quotation from the written opinion of the judge: 'But assuming, for the purpose of considering this motion for a nonsuit, that there was negligence on the part of the defendants in permitting the track to be oiled in the manner described, can it be held, as a matter of law, that said negligence was the proximate cause of the injury to plaintiff. To do so the testimony of the plaintiff must show it to be so, for there is no other proof of any kind in the case. He testified that he was picking up dirt and dropping it on the track, and, when asked how his arm was caught in the idler, he says, "I don't know. I either stumbled, or the idler caught my sleeve." This is the only testimony as to what caused the injury.'

"And the court concluded that it was insufficient. We think the trial judge was mistaken in this view of the case. In the first place, it entirely ignores the circumstantial evidence which was persuasive enough to justify the conclusion that the negligence of defendants 'proximately' caused the injury. We have detailed the various facts surrounding the occurrence, and we may emphasize the single circumstance that the main feature of the negligence of defendants consisted in their failure to keep the machine in repair and especially to furnish a suitable contrivance for the distribution of the dirt. If they had performed their duty in that respect the accident in all probability would not have occurred. From the various facts disclosed by the evidence it was competent for the jury to find that the accident was directly due to this dereliction on the part of defendants; in other words, that it was the proximate cause of the injury. We attach no particular importance to the fact that plaintiff was uncertain as to whether he stumbled or his sleeve got caught. It is not strange that he could not be positive as to this mere incident, since his concentrated and undivided attention must be directed to the work in hand. Whether he stumbled or not, the outstanding fact remains that it could be justly inferred by the jury that, if the defendants had performed their duty, the sleeve would not have come into contact with the idler, and, if plaintiff had stumbled, it would not have resulted in injury.

[6] "In this connection the claim is made that, 'if the plaintiff stumbled, it was certainly due entirely to his own fault. No claim is made by appellant and none could be made that respondents are in any wise responsible for his stumbling.' But this is one of the very things that defendants were bound to anticipate and guard against on account of the probability that it would happen. This is in accordance with a well-settled rule of law that requires precaution and provision to avoid the hurtful consequence of what may reasonably be anticipated. Indeed, there are numerous authorities going to this very point. It is sufficient to refer to the note and cases cited on page 4766, vol. 4, *Labatt's Master and Servant* (2d Ed.) wherein it is stated: 'The fact that the immediate cause of the servant's being injured by coming in contact with machinery which should have been guarded, or of his being injured in some other way, was a slip or stumble, will not, according to the greater weight of authority, prevent the master's negligence from being considered the proximate cause of the injury.'

"In fact, if either of these circumstances, the probable stumbling or the contact of the sleeve with the wheel, might be regarded as affecting the liability of the defendants, it would be only as a debatable question of contributory negligence, to be submitted to the jury under proper instructions. Assuredly, upon a motion for nonsuit, made solely upon the ground that there was 'no proof of any negligence on the part of the defendants in this action,' neither of said circumstances could be considered as having any bearing upon the primary responsibility of defendants.

"The three cases cited by the trial judge in support of his ruling are, in our opinion, distinguishable from the one before us. In *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457, the plaintiff was injured in a sawmill while operating a saw used for sawing the bands with which bundles of shingles were bound. There was no evidence that the defendants therein failed to furnish any safety device that might reduce the danger of the use of the saw. In fact, the court said: 'The machine itself was standard, and the kind in use in nearly all shingle mills. The device called the "carriage," however, seems not to be in common use, if it was not altogether new to this machine. But it was not testified by any one that it increased the dangers of operating the saw, and it was in evidence that it greatly lessened them.'

"The boy, while on the witness stand, did not attempt to give an explanation of the accident, and the court states that nowhere in the record was there anything to show what caused it. Under such circumstances it was held that the evidence was insufficient to show that the injury was caused by the negligence of the defendant. It is true the court states that there were hidden and latent dangers connected with the operation of the saw, and it was the duty of the defendant to inform the plaintiff concerning them; 'and, had it been shown by evidence, either direct or circumstantial, that the injury was caused by some one or more of the hidden or latent dangers which the respondent had not been warned against the appellant would be liable in damages for his injuries.' It was declared, however, that there was no such evi-

dence. Therein the work was being done in the customary way, without any more than the ordinary danger incident to such occupation, and without failure on the part of the defendant to supply any reasonable safety device, and evidence was lacking of any causal connection between the supposed negligence of the defendant and the injury suffered by the plaintiff. Herein there is ground for a reasonable inference that plaintiff was required to perform an unusually hazardous task made necessary by the negligence of defendants in permitting the machine to get out of repair; that he was not supplied with a suitable contrivance with which to do the work, and that, owing to this omission, he suffered the injury.

"We may add that some qualification is needed for the following statement in the Hansen Case: 'And it is not proving his case by circumstantial evidence for the respondent to show that there were causes, for which the appellant would be liable, which could have produced the injury, without showing that it could not have been produced in any other manner, or in a manner for which the appellant would not be liable.'

[7] "Such consideration might be addressed properly as an argument to the jury or trial judge, but it is sufficient for an appellate court to find in the evidence a foundation for a rational inference that the injury was due to the negligence of the defendant, although there might be also ground for the opinion that it may have been produced in some other manner.

"In *Cole v. German Savings & Loan Soc.*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416, the injury was due to the act of a third party in pushing open the sliding door of the well of an elevator, whereby the plaintiff stepped in and fell to the bottom of the well. The elevator was at an upper floor in charge of the regular operator, and the court properly held that the defendant could not be expected to foresee or reasonably anticipate the said act of the third party, and that the accident was due to an independent intervening cause, although the defendant was negligent in permitting the hall to be dark, in allowing boys to ride upon the elevator and sometimes to operate it, in neglecting to provide a lock for the door, and in permitting the door to stand open from one to ten inches.

"In *Buckley v. Gutta Percha & Rubber Co.*, 113 N. Y. 540, 21 N. E. 717, the plaintiff was operating a machine having cogs and wheels, and the injury happened because he slipped and fell and instinctively threw out his hand to recover himself. The court declared that the machine was not imminently dangerous, that the hands of the plaintiff, in anything which he had to do or was doing about the machine, would not come within nine inches of the cogs where he was injured, and that the falling was a mere accident from which and the accompanying injury no caution or instruction from the agents of the defendant would have saved him. The machine was also stationary in the factory and, of course, under the circumstances, the defendant could not be expected to anticipate that the plaintiff would fall and throw out his hand so as to come into contact with the cogs."

The judgment is reversed.

63 Cal. App. 533

BROWN v. COBB et al. (Civ. 4476.)

(District Court of Appeal, Second District, Division 1, California. Aug. 25, 1923.)

Appeal and error $\hookrightarrow$ 937(2)—**Presumption of no negligence in failing to file transcript, where proceedings to settle bill of exceptions still pending.**

On motion to dismiss an appeal for failure to file a transcript in the appellate court, where no motion has been made to dismiss the proceedings for settlement of bill of exceptions, which are still held under submission by the trial court, the presumption is that appellant has not been guilty of negligence in failing to file a transcript within the prescribed time, in view of Supreme Court rules II and VI.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Carol D. Brown against Silas Cobb and another. From a judgment for plaintiff, defendants appeal. On motion to dismiss appeal. Denied.

R. W. Richardson, of Los Angeles, for appellants.

Douglas L. Edmonds, of Los Angeles, for respondent.

HOUSER, J. From the affidavit presented by respondent, it appears that, after a motion for new trial had been denied by the court, and on January 23, 1922, appellants gave notice that on January 24th a bill of exceptions would be presented to the court for settlement. On April 8th a nunc pro tunc minute order shows that the matter of settlement of such bill of exceptions was ordered submitted to the court as of date January 24, 1922. Between the said date of submission and April 18, 1922, various other notices in the cause were filed, including notice of appeal, notice to clerk to prepare transcript, notice of the court's denial of the motion for a new trial, and two notices that on two several dates, respectively, defendants would move the court for a settlement of the bill of exceptions, at each of which times the court already had the matter under submission.

The motion to dismiss the appeal is based upon the ground that no transcript has been filed in the District Court of Appeal and that there has been a lack of prosecution of the appeal.

By rule II of the Supreme Court rules (176 Pac. vii) it is provided that the transcript must be served and filed within 40 days after the appeal is perfected, provided that—

"If a proceeding for the settlement of a bill of exceptions which may be used in support of such appeal is pending * * * the time aforesaid shall not begin to run until the settled and authenticated bill of exceptions has been filed.
* * *

Rule VI (176 Pac. ix) provides, among other things, that—

"It shall be incumbent on the party moving to dismiss to show * * * that no proceeding for a bill of exceptions is pending in the trial court."

Certain authorities submitted by respondent (Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112; Estate of Johnston, 14 Cal. App. 376, 112 Pac. 191; Harbaugh v. Lassen Irr. Co., 24 Cal. App. 773, 142 Pac. 847; Warren v. McGowan, 7 Cal. Unrep. 190, 77 Pac. 909) tend to establish his right to a dismissal; but they are all cases in which there was an apparent abandonment of the appeal, and in none of which was there a submission of a bill of exceptions to the trial judge for settlement.

A case which in principle more nearly than any case cited by respondent applies to the facts in the instant case is that of Depeaux v. Peck, 118 Cal. 522, 50 Pac. 682, where it is held that it is the duty of the party seeking to avail himself of a bill of exceptions to take whatever steps may be necessary to provide for its settlement, including, in case of refusal by the trial judge to settle same, an application to the Supreme Court for an order that the bill of exceptions may be settled "in such manner as the Supreme Court may by its order or rules direct." That case, however, differs from the instant case in that in the Depeaux Case the judge before whom the case was tried was no longer in office, and his successor refused to settle a bill of exceptions; while here the judge before whom the case was tried has the matter still under submission and does not refuse to settle the bill of exceptions.

In the case entitled Dernham v. Bagley, 151 Cal. 216, 90 Pac. 543, it is held that the 40 days' time within which the transcript may be served and filed does not commence to run until the settled bill of exceptions has been filed and that that portion of the rule to the effect that "if a proceeding for the settlement of a bill of exceptions which may be used in support of such appeal is pending," includes "any proceeding looking to the settlement of such a bill actually inaugurated by a party * * * undisposed of and not abandoned, regardless of all questions as to whether the proceeding can ultimately avail and the bill be legally settled." It is further held that those questions are primarily for the trial court to determine, subject to review by the appellate court. The court said:

"It is well settled that the adverse party desiring to avail himself of such an objection must interpose it in the trial court, or before the judge settling the bill, and that if no objection

is there made the bill may be settled, and thereafter used on the appeal [citing cases]."

In the case of Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1112, it was said that the Supreme Court—

"would not undertake to determine, on a motion to dismiss an appeal, whether or not a party had so failed to comply with the requirements of the law in regard to the settlement of a bill of exceptions, that his pending proceeding for such settlement must ultimately fail, but would leave that question to be determined by the trial judge, subject to review on appeal."

In the case of Curtin v. Ingle, 155 Cal. 53, 99 Pac. 480, it is said that whether a party has been guilty of laches in the matter of the settlement of a statement on appeal—

"is primarily a matter for the trial court before whom the proceedings for the settlement of the statement on appeal is pending, and this court should not be called upon originally to determine, on a motion to dismiss an appeal, whether an appellant has been derelict in securing with due expedition such settlement. * * * When the settlement of the statement comes up for hearing there [in the lower court], the respondent may move the court to dismiss the proceedings for a settlement on account of the failure of appellant to proceed with reasonable diligence in procuring a settlement, or may object to the settlement on account of his failure to have done so. If his motion is denied, or his objections are overruled, he can have them incorporated into the record on appeal and have the action of the court reviewed here. [Citing cases.] And we think this is the course that should be pursued."

To the same effect see the following cases: Curtin v. Ingle, 9 Cal. App. 241, 98 Pac. 868; Union Collection Co. v. Oliver, 23 Cal. App. 318, 137 Pac. 1082; Baker v. Eilers Music Co., 24 Cal. App. 348, 141 Pac. 395; Jansson v. National Steamship Co. (Cal. Sup.) 208 Pac. 90.

Relying upon the foregoing authorities, it follows that in the circumstances here present, where the question of the settlement of the bill of exceptions is held under submission by the trial court, without any refusal by the judge thereof to settle the bill, and no motion having been made by respondent to dismiss the proceedings for the settlement of the bill—the presumption that appellant has been guilty of no inexcusable neglect in the matter must apply (Curtin v. Ingle, 9 Cal. App. 244, 98 Pac. 868) and the appellant cannot be in default with reference to filing his transcript on appeal.

The motion to dismiss is denied.

We concur: CONREY, P. J.; CURTIS, J.

63 Cal. App. 557

PEOPLE v. FELLOWS. (Cr. 1003.)

(District Court of Appeal, Second District, Division 1, California. Aug. 27, 1923.)

1. Indictment and information ☞86(6)—Information sufficient under the statute.

An information under Pen. Code, § 288a, charging that the crime was committed within the county is sufficient, though the crime was committed on train passing through said county, and the venue under section 783 might have been laid in any county through which the train passed.

2. Criminal law ☞564(1)—Evidence sufficient to give jurisdiction of offense committed on train passing through county.

Evidence that an offense committed on a train began at a point in the county where venue was laid, and continued while train was passing through the county, was sufficient to show that it was committed within the jurisdiction of the court.

3. Criminal law ☞763, 764(8)—Instruction held not open to objections as telling jury act was committed within county.

An instruction to find the defendant guilty if they found that any of the alleged act took place in the county, though some part took place in another county, was not open to an objection that it instructed the jury that the act was committed in the county and that they should so find.

4. Criminal law ☞772(4)—Unnecessary for the court to define boundaries of county where offense took place on train.

On trial for offense committed on a train passing through the county, it was unnecessary for the court to define the boundaries of the county, as the only point necessary for the jury to consider was whether the train on which the offense was committed had arrived within the county.

5. Criminal law ☞814(10)—Where evidence disproved intoxication and showed guilt, it was not injurious to refuse to charge that intoxication would constitute a defense.

Where the evidence showed that defendant, though he had been drinking, was sober when the offense was committed, and clearly showed guilt, the refusal to charge, as provided in Pen. Code, § 22, that if defendant was so intoxicated that he could not form a felonious intent he should be found not guilty, did not injure defendant.

6. Criminal law ☞1023(12)—Appeal will not lie from order denying motion in arrest of judgment.

No appeal lies from an order denying a motion in an arrest of judgment.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

George W. Fellows was convicted of sex perversion, and he appeals. Affirmed.

Roland Thompson, of Santa Ana, and Albert Pearce, of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. By an information filed by the district attorney of Orange county defendant was charged with having committed the crime of sex perversion, as denounced by section 288a of the Penal Code, in "that the said George W. Fellows, on or about the 22d day of December, 1922, at and in the county of Orange, state of California, * * * did willfully, unlawfully and feloniously participate" in the act of which complaint is made.

The evidence showed that the crime was committed on board a passenger car of a railroad train which was traveling between the city of Los Angeles and the city of San Diego. Defendant was convicted, and he appeals to this court from the judgment, as well as from the order denying his motion for a new trial; he also appeals from the order by the court denying his motion in arrest of judgment.

[1] Section 783 of the Penal Code provides, in part, that "when the offense is committed in this state, * * * on a railroad train or car prosecuting its trip, the jurisdiction is in any county through which the train or car passes in the course of her trip, or in the county where the trip terminates"; and in that connection it is contended that the information is faulty in its failure to contain appropriate allegations showing the extra-territorial jurisdiction of the superior court of Orange county. Defendant also contends that under the provisions of section 777 of the Penal Code (except as otherwise in the Penal Code provided) every public offense is punishable in the county wherein it is committed. In view of the fact that the information directly charges the commission of the offense in Orange county, it becomes immaterial that the venue might also have been laid in any other county through which the train passed. *People v. Moore*, 103 Cal. 508, 37 Pac. 510.

[2] It is further objected that the evidence does not show that the offense was committed in Orange county. An eyewitness to the act of which complaint is made testified:

"Q. And what did you see? A. That man (defendant) was going on his knees. Q. And where was your train at that time, if you know about where it was? A. We was at Northrup; right at Northrup. Q. Northam? A. Yes, Northam."

After relating details unnecessary to be here considered, the testimony of the witness continued:

"Q. Then what did he do? A. Kept at it until I come up and pushed him on the arm. Q. How long was he at it, would you say? A. Five minutes."

On cross-examination the witness testified as follows:

"Q. Where does Northam come in? A. Well, it is between Santa Fé Springs and Fullerton. Q. And when did you notice you were at Northam, if you did notice that? A. I never noticed any certain time we was at Northam. Q. You never noticed Northam at all, did you. A. No, sir."

It is shown by other evidence that Northam is in Orange county and that the train was running at the rate of about 40 miles per hour. Assuming that defendant started to commit the offense at or near Northam (although the witness who testified to having seen the act committed did not notice the time), that defendant was five minutes engaged in its commission before being disturbed therein by the witness whose testimony has been quoted, and that the train was proceeding toward the interior of Orange county at a rate of 40 miles per hour, there can be no question but that the venue of the offense was properly laid in the information and no error was committed by the court in either refusing to strike out all evidence relating to the commission of the offense or in denying defendant's motion that the action be dismissed for want of jurisdiction of the court to try the cause.

[3] Among others, the court gave an instruction as follows:

"You are instructed that although you may find and believe from the evidence that some part of the act alleged in the information took place in Los Angeles county (if you find any act as alleged did take place), yet if you further find beyond a reasonable doubt that at the time and place alleged in the information any of the act of copulation as alleged in the information took place in Orange county, Cal., you should find the defendant guilty as charged."

The objection to the instruction, that in effect it instructed the jury that the act was committed in Orange county and that the jury should so find, is not well taken. The instruction is well guarded in the very respects to which objection is made and the jury could not have been misled or improperly influenced thereby.

[4] Appellant also specifies error by the court in refusing to give to the jury an instruction defining by metes and bounds the boundary lines of Orange county. Such a description was not at all necessary. The only point to be considered by the jury in connection with the boundary lines of Orange county was whether or not the railroad train on which defendant was riding at the time of the commission of the offense had arrived within that county. There was sufficient evidence from which the jury could well determine the question, and other instructions of the court fully and fairly covered the situation.

[5] Error is also predicated upon the re-

fusal by the court to give to the jury the following instruction requested by defendant:

"The jury is instructed that if you do find beyond a reasonable doubt that the defendant committed the identical offense charged in the information, but that at the time said offense was committed, if the same was committed by the defendant, that he was so under the influence of intoxicating liquors that a felonious intent could not be formed in his mind, then you are instructed to bring in a verdict of not guilty."

Section 22 of the Penal Code provides:

"No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any * * * purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

The evidence produced on the trial showed that, while previous to the time when the offense was committed defendant had been drinking intoxicating liquor, he was perfectly sober at the time of its commission. The offense was committed at about 2 o'clock a. m. Defendant testified in substance that while he, his woman companion, and another man had consumed two pints of intoxicating liquor from about 8 or 9 o'clock in the evening until 12 or 12:30 o'clock of the same evening, nevertheless he remembered distinctly all that took place on the occasion referred to, and one of the witnesses testified that at that time defendant was "just as sober as I am." The entire testimony of the defendant was based upon such a condition of mind. He related in full detail what his general conduct and actions were, together with what was said and done on the part of the brakeman and the conductor of the train on which defendant and his companion were traveling. There was nothing of any importance developed by the evidence which would indicate other than that defendant was in complete possession of his mental faculties and thoroughly understood everything that was taking place at all times in question. While in the circumstances the giving of the requested instruction would not have been entirely improper, the failure to give it certainly worked no injury to defendant. An examination of the entire cause, including the evidence, clearly, if not conclusively, establishes defendant's guilt, and if there was any error by the court in refusing the instruction such error did not result in a miscarriage of justice.

[6] Although there is an appeal from the order denying the motion in arrest of judgment, neither argument nor authority is presented in support of such appeal other than

such as has already received the attention of the court in connection with other points herein discussed. The law does not provide for an appeal from such an order.

No error appearing, the judgment, as well as the orders from which an appeal is taken, are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

(63 Cal. App. 492)

SODERBERG v. SODERBERG. (Civ. 4534.)

(District Court of Appeal, First District, Division 1, California. Aug. 21, 1923. Hearing Denied by Supreme Court Oct. 18, 1923.)

Contempt $\S$ 80 — Modification of decree denied on court's motion where party seeking it is in contempt.

Where one seeking the modification of a divorce decree as relates to the custody of a minor child is in contempt for failure to comply with a requirement to make payment for the child's support, he is not entitled to such relief, and the court on its own motion may deny it.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action for divorce by Eda M. Soderberg against Walter H. Soderberg. From an order denying a motion to vacate and set aside the final decree, defendant appeals. Affirmed.

James E. Fenton, of Los Angeles, for appellant.

C. A. S. Frost, of San Francisco, for respondent.

TYLER, P. J. Appeal from an order denying a motion to vacate and set aside a final decree of divorce upon the ground that it changed or modified the terms of the interlocutory decree referring to the custody of a minor child, the issue of the marriage, it being claimed that such change was made without authority.

It appears from the record that the parties hereto were formerly husband and wife. Plaintiff brought an action against defendant for divorce on the ground of extreme cruelty. Her charges were of a serious nature. Judgment went in her favor. Findings were waived, but the decree recited that the allegations of plaintiff were sustained by the evidence, and that they were true. An interlocutory decree was thereupon entered on June 11, 1913, against Walter H. Soderberg and in favor of the plaintiff on the ground of cruelty. In and by the terms of this decree plaintiff and defendant were awarded the joint custody of their minor child, some six years of age, the defendant to pay to the

plaintiff the sum of \$25 a month for its support and maintenance.

On June 19, 1914, a final decree was entered dissolving the bonds of matrimony existing between the parties. This decree ordered that the care, custody, and control of the minor child be given to the plaintiff, and that the defendant be permitted to visit it at all reasonable hours. It also provided, in conformity with the interlocutory decree, that the defendant pay \$25 per month for the child's support and maintenance.

Some two years thereafter plaintiff (who in the meantime had again married) removed with her husband to the state of Arizona, where she and the minor child still reside. Before removing from this jurisdiction, however, plaintiff asked for and received permission from the trial court to take the child with her. Some eight years after the entry of the final decree and in the month of January, 1922, defendant filed this petition and motion to vacate and set aside the final decree of divorce, and to enter in lieu thereof a final decree awarding to him and his former wife the joint custody of the child in accordance with the terms and provisions of the interlocutory decree. The trial court denied the motion and dismissed the petition. This is an appeal from the order.

In support of the appeal it is claimed that when a valid interlocutory decree of divorce has been regularly made and entered the court has no jurisdiction to vacate, change, or modify it at the request of the party in whose favor the decree was given, without notice to the adverse party; and that no notice having been given the court had no jurisdiction to make the change in question.

It was and is the claim of the plaintiff that under section 138 of the Civil Code the court, in an action for divorce, either during its pendency or at the final hearing, may make such order for the care, custody, and control of minor children as may seem necessary or proper, and it may at any time modify or vacate the decree with respect thereto. In this connection it is claimed that there is nothing in the record to show affirmatively that the defendant did not have the necessary notice, but that, on the contrary, the final judgment imports that he did, as it recites that the motion of the plaintiff "came on regularly for hearing," and as the jurisdictional facts fully appear therefrom it is argued that the judgment is regular on its face.

We do not think we are called upon to discuss or decide any of the questions here presented by the defendant. From his own showing it affirmatively appears that he has never complied with the judgment he seeks to have re-established. By his petition he agrees to do so in the event that the plaintiff returns to the jurisdiction and brings the

child with her. Defendant is in no position to stipulate with the court under what terms and conditions he will comply with the judgment. That judgment directed that he pay the sum mentioned for the support of his offspring, but, with the exception of a single payment of \$25, he has never complied with the order either during the period when his former wife resided in the jurisdiction, or at any time thereafter, but on the contrary he has during this long period of time left to the mother the entire burden of providing and caring for their child. Aside from the positive legal duty imposed upon the defendant, he has wholly failed to show any natural interest in his child, and has entirely neglected the moral duty that he owes to his offspring irrespective of any dissensions which may have arisen between him and his wife, and which can give rise to no scruples which would justify such indifference and neglect on the part of a parent. No party to an action can with right or reason ask the aid or assistance of a court by modifying in his favor its legal orders while he stands in an attitude of contempt with regard thereto (Weeks v. Superior Court, 187 Cal. 620, 203 Pac. 93), and it matters not that no objection is made by either party. The court of its own motion may refuse aid under such circumstances. *Domenigoni v. Imperial Livestock, etc., Co.* (Cal.) 209 Pac. 36.

The order denying the motion to modify the decree and the order granting the motion to dismiss are affirmed.

We concur: RICHARDS, J.; ST. SURE, J.

63 Cal. App. 505

BATES et al. v. BERRY et al. (Civ. 4396.)

(District Court of Appeal, First District, Division 1, California. Aug. 23, 1923.) Rehearing Denied Sept. 21, 1923. Hearing Denied by Supreme Court Oct. 22, 1923.)

Judgment ⚡683—Assignee with notice of pending litigation against assignor and participating therein bound by judgment.

Under Code Civ. Proc. § 1908, an assignee with notice of pending litigation against assignor, and participating therein by advancing money for its conduct is bound by a judgment against assignor, for whom he could have been substituted as defendant under section 385.

Appeal from Superior Court, Santa Clara County; W. A. Beasley, Judge.

Action by C. A. Bates and others against W. R. Berry and others. Judgment for plaintiffs, and defendant Berry appeals. Affirmed.

R. M. F. Soto, of San Francisco, for appellant.

Ralph C. McComish, of San Jose, for respondents.

TYLER, P. J. Action to quiet title to nine separate parcels of land owned by the various plaintiffs herein.

The complaint is in the ordinary form. Defendants by their answer admit that defendant Berry claims to have a lien in and upon each of the several parcels of real property described in the complaint, and by way of cross-complaint and for the purpose of obtaining affirmative relief they allege that certain proceedings were had under the Street Bond Act of 1893 (St. 1893, p. 33) for street work done under the Vrooman Act (St. 1885, p. 147, as amended), by which certain bonds were issued against the several parcels of land in question. From the record it appears that certain proceedings leading up to the issuance of the bonds were inaugurated in June, 1912, when the city council of San Jose passed its resolution of intention for the improvement of Alum Rock avenue, providing for a concrete base, asphalt covering, concrete gutters and corrugated iron culverts. The work was done under the Vrooman Act, the cost to be collected under the Bond Act of 1893. Ransome-Crummey Company, a corporation, was the successful bidder. A notice of the award was posted January 31, 1913, and published February 3, 1913. The right of the owners to perform the contract expired February 13, 1913. The contract with the Ransome-Crummey Company was thereafter executed February 13, 1913.

With reference to the corrugated iron culverts which formed part of the work to be performed the resolution provided:

"That there be constructed thereon eleven corrugated iron part circle pipe culverts, each having a twelve-inch radius, a height of six and one-half inches at the center, and a concrete base four inches thick."

The value of this portion of the work amounted to several hundred dollars. On March 10, 1913, the mayor and members of the common council met informally with a representative of the Ransome-Crummey Company, discussed the matter of making certain changes or alterations in the work which was then being constructed, and they finally agreed that there should be omitted therefrom the 11 corrugated iron part circle pipe culverts, and that in lieu thereof open concrete drains should be substituted. Thereafter a resolution was adopted to this effect. The time to protest under section 5½ of the Vrooman Act, as added by St. 1909, p. 31, had expired on February 13, some 25 days before the above action was taken. In the performance of the work the culverts provided for under the original resolution of

intention were omitted therefrom. On April 28, 1913, the assessment and warrant were recorded. Certain property owners filed an appeal under section 11 of the Vrooman Act. On the same day the contractor also took an appeal under the same section. The appeal of the contractor was sustained, and a new assessment was issued on July 2, 1913. The bonds here involved were previously issued on June 16 by the city treasurer to the contracting company.

In his answer to the supplemental complaint filed herein defendant Berry claimed to have acquired these bonds as trustee for the Standard Portland Cement Corporation, to which company they had been assigned by the Ransome-Crummey Company.

On July 24, 1913, an action was commenced in the superior court of Santa Clara county in which the plaintiffs were substantially the same as the plaintiffs in this action, and Ransome-Crummey Company and the treasurer of San Jose were defendants. That action was also one to quiet title to the same land involved in this action. The record also shows that the Standard Portland Cement Corporation and W. R. Berry had definite notice and knowledge as early as January, 1914, of the pendency of this action. Berry also had notice at this time that the interest coupons on the bonds were not paid on January 2, 1914. Counsel for appellant herein verified an answer and cross-complaint in the *Bates v. Ransome-Crummey* Case, 42 Cal. App. 699, 184 Pac. 39, in which that company claimed to be the absolute owner of the bonds. This was almost a year after their pretended sale to Berry. Judgment was entered in that action on November 24, 1915, quieting the title of plaintiff against Ransome-Crummey Company and the city treasurer. An appeal was taken and it was dismissed October 14, 1919. The present action was commenced February, 1915.

Upon the trial thereof it was claimed that the bonds were prematurely issued, and that the contract was changed after it was executed by the omission of the iron culverts, for which reason it was asserted that no recovery could be had thereon. It was also contended below, and is here, that defendants are estopped by the former judgment above referred to, which is pleaded in the supplemental complaint as being *res judicata*.

The trial court found, in substance, that neither nor any of the defendants had any right, title, interest, or estate in the parcels of land in question. It further found that in doing the work provided for in the resolution of intention Ransome-Crummey Company wholly failed and omitted to install the iron culverts, and had not therefore substantially performed its contract; that the owners had appealed from the assessment and that their appeal had been denied. It was further

found that on July 24, 1913, an action was commenced in the superior court of Santa Clara county in which the plaintiffs in this action were plaintiffs, and Ransome-Crummey Company and the city treasurer of San Jose were defendants; that this action was one to quiet title to the same property described in the action against Ransome-Crummey Company and the city treasurer, and that it arose out of the same improvement of the same street; that on August 2, 1913, said company indorsed and delivered to the defendant herein the bonds referred to in the cross-complaint; that in the month of January, 1914, defendant received notice and knowledge of the pendency of said action, and that plaintiffs herein were contesting the validity of the bonds; that in the month of March, 1915, defendant Berry returned the bonds to Ransome-Crummey Company for the purpose of enabling this company to collect the amounts due thereunder; that judgment was entered in that action against the company in December, 1915, and that a new trial was denied; that an appeal was taken and determined, and that the judgment became final. It was further found in this connection that the attorney in the present suit was the attorney for the defendants in the former action, and that he had been such attorney for defendant Berry since January, 1914. Judgment was accordingly rendered in favor of plaintiffs herein, and defendant Berry appeals.

The findings of the trial court are fully supported by the evidence. With reference to the former suit had between the parties it appears therefrom that the action of *Bates v. Ransome-Crummey Co.* was prosecuted by plaintiffs herein except that three of the present plaintiffs are successors in interest to one of the former plaintiffs. The action involved the same property. It was commenced July 24, 1913. Defendant Berry succeeded to the interests of the Ransome-Crummey Company on August 2, 1913. He knew of the pendency of the action as early as January, 1914, when he attempted to collect the coupons on the bonds. This was long prior to the time of the filing of the answer. Under section 385 of the Code of Civil Procedure he could have been substituted as defendant in place of the company, or he could have elected, as he did, to have it continued in the name of the original defendant. In either case he was bound by the judgment. *Knobloch v. Associated Oil Co.*, 170 Cal. 144, 148 Pac. 938.

Section 1908 of the Code of Civil Procedure provides, in part, that the effect of a judgment or final order in an action or special proceeding is, in respect of the matter directly adjudged, conclusive between the parties and their successors in interest by title acquired subsequent to the commencement of the action, litigating for the same

thing, provided they have notice, actual or constructive, of the pendency of the action. The evidence establishes the fact that defendant and appellant herein had notice, and, in fact, it shows that he participated in the litigation by advancing money for its conduct. By participating in the former proceedings defendant is estopped by the judgment (15 R. C. L. 1010-1016; 23 Cyc. 1259). This being so, other questions become unimportant, and it is unnecessary to discuss them.

The judgment is affirmed.

We concur: ST. SURE, J.; RICHARDS, J.

(63 Cal. App. 477)

CHRISMAN v. SUPERIOR COURT IN AND FOR FRESNO COUNTY et al.
(Civ. 4695; S. F. 10863.)

(District Court of Appeal, First District, Division 1, California. Aug. 18, 1923. Hearing Denied by Supreme Court Oct. 16, 1923.)

1. Mandamus ⇨168(2)—All intendments in favor of action of court below.

On mandamus in the district court of appeal to compel superior court to dismiss criminal prosecution, order of the trial court, made upon petitioner's motion to dismiss, being silent as to what transpired at the hearing, all intendments are in favor of the action of the superior court.

2. Criminal law ⇨158(2)—Act of trial court in denying motion to dismiss prosecution sustained.

If the evidence presented on motion to dismiss a criminal prosecution was conflicting, the act of the trial court in denying the motion will be sustained on petition by the accused in the district court of appeal for writ of mandate.

On Hearing in Supreme Court.

3. Mandamus ⇨1—Not "writ of error" to review.

The writ of mandate is not a writ of error to review the action of the trial court in refusing to dismiss a criminal action, but is an original proceeding to be determined upon its merits.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mandamus; Writ of Error.]

4. Mandamus ⇨14(1)—Application in trial court prerequisite to application for writ to compel dismissal of prosecution.

As a prerequisite to an application for writ of mandate, to compel the superior court to dismiss a criminal prosecution it must be shown that the trial court had denied motion to dismiss.

5. Mandamus ⇨168(1)—Dismissal of prosecution for delay in trial not directed, where delay was for good cause.

Where it is shown, in response to petition for a writ of mandate to compel the superior

court to dismiss a criminal prosecution because of delay under Penal Code, § 1382, subdiv. 2 (Const. art. 1, § 13; U. S. Const. Amend. 6), that there was in fact good cause for the delay in trial of the case, it is immaterial whether or not such a cause was satisfactorily shown to the trial court, if it is shown to the satisfaction of the District Court of Appeal.

6. Mandamus ⇨168(4)—Effect of refusal of District Court of Appeal to issue peremptory writ of mandate.

Refusal of the District Court of Appeal to issue a peremptory writ of mandate to compel the superior court to dismiss a criminal prosecution amounts to a determination by that court that affidavits on behalf of the respondents show good cause for delay of the criminal prosecution which is not overcome by the showing made by the petitioner alleging improper delay.

Application by F. M. Chrisman for writ of mandate, prayed to be directed to the Superior Court of the State of California in and for the county of Fresno, J. E. Wooley, Judge, requiring dismissal of a pending criminal proceeding. Denied.

Herbert Chamberlain, of San Francisco, for petitioner.

George R. Lovejoy, Dist. Atty., and Denver S. Church, Deputy Dist. Atty., both of Fresno, for respondents.

ST. SURE. Petitioner seeks by mandamus to compel the superior court of the county of Fresno to dismiss a criminal prosecution pending against him.

Petitioner was indicted for felonies, to wit, grand larceny, embezzlement, and obtaining money by false pretenses. The cause was assigned for trial to a department of the superior court presided over by Hon. J. E. Wooley, as judge thereof, one of the respondents herein, and the cause is still pending in said court before said judge. After arraignment of petitioner, the cause was regularly set for trial on the 26th of June, 1922, but a trial was not then had, for the reason that petitioner had upon said date secured from this court an alternative writ of prohibition, arresting the trial. On the 10th day of October, 1922, a hearing was had by this court upon the alternative writ, when a peremptory writ was denied and the alternative writ discharged. 210 Pac. 632. A petition to have said cause heard and determined after decision by this court was thereafter, and on the 10th day of December, 1922, denied by the Supreme Court.

The petition herein alleges that petitioner has not been brought to trial within 60 days after said petition for a peremptory writ of prohibition was denied, and said alternative writ of prohibition discharged, or within 60 days after said petition for said hearing in said Supreme Court was denied, and final

judgment therein had been made and entered; and in this behalf it is further particularly alleged "that at no time or times since the 10th day of December, 1922, has the trial of said cause been postponed upon the application of your petitioner; and that at no time or times has the trial of said cause been postponed subsequent to the 10th day of December, 1922, upon the application of your petitioner; that at no time or times subsequent to the 10th day of December, 1922, has good or any cause existed why the trial of said cause should not have been had."

Petitioner moved the said superior court, respondent herein to dismiss the prosecution under the provisions of subdivision 2 of section 1382 of the Penal Code, and also under the provisions of section 13 of article I of the Constitution of the state of California, and the provisions of article 6 of amendments to the Constitution of the United States. The motion was heard on the 23d day of May, 1923, by said superior court, Hon. J. E. Wooley as judge thereof, presiding, when the following order denying the motion to dismiss and setting the cause for trial was made:

"Title of court and cause.

"The District Attorney, by his deputy, Claude H. Hogan, with the defendant and his counsel, J. K. Tuttle, are present in court.

"At this time counsel for defendand moves the court for an order dismissing the action against above-named defendant, F. M. Chrisman. The motion is objected to by the district attorney, and the motion is submitted to the court for a ruling, and after due consideration of the same by the court, it is ordered that defendant's motion for an order dismissing the above-entitled action be and it is hereby denied.

"It is further ordered that the above-entitled action be and it is hereby set for trial June 6, 1923, at 9:30 o'clock a. m."

[1, 2] The answer of respondents denies the allegations of the petition relative to the postponement of the trial upon the application of petitioner, and also as to whether or not good cause existed why the trial should not have been had. The answer is verified by the trial judge, who has at all times presided at the hearings in the court below. The supporting affidavits presented for our consideration by the respective parties disclose a sharp conflict upon questions of fact, which it is, therefore, unnecessary to discuss. The order of the trial court hereinabove quoted, made upon the motion to dismiss, is silent as to what transpired at the hearing. But all intentions are in favor of the action of the court below. *People v. Douglass*, 100 Cal. 1, 4, 34 Pac. 490. In *Matter of Ford*, 160 Cal. 334, 349, 116 Pac. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267, it is said that mandamus affords a remedy to correct a clear abuse of discretion on the part of the trial court in arbitrarily refusing to dismiss an indictment, but that a peremptory writ of

mandate will only issue where there was an entire absence of any showing constituting good cause presented in the superior court upon the hearing of the motion to dismiss. If the evidence presented on the subject was conflicting, the action of the trial court in denying the motion will be sustained. It, therefore, follows that the petition for a peremptory writ of mandamus must be denied, and that the alternative writ heretofore issued must be discharged.

It is so ordered.

We concur: TYLER, P. J.; RICHARDS, J.

Opinion of Supreme Court Denying Hearing.

PER CURIAM. [3-5] In denying the petition for a rehearing, we call attention to the fact that, although the judge of the trial court in denying the motion to dismiss acted upon his own knowledge of the facts and perhaps upon the assertions of the district attorney, not put in the form of an affidavit or verified by oath, nevertheless, upon the application for the writ of mandate in the District Court of Appeal, the evidence supporting the conclusion of the trial judge that there was good cause for the delay in the trial of the case was supported, not only by the affidavit of the trial judge verifying his answer in the matter, but also by three affidavits of district attorney deputies to the effect that the plaintiff waived the delay and asked for the continuances in the setting of the case for trial, which were acceded to by the district attorney. The writ of mandate is not a writ of error to review the action of the trial court in refusing to dismiss the criminal action, but is an original proceeding to be determined upon its merits. It is true that as a prerequisite to the application for the writ of mandate it must be shown that the more speedy remedy of a motion in the trial court has been invoked and that the trial court has refused to dismiss the case. Where it is shown, in response to the petition for a writ of mandate, that there was in fact good cause for the delay in the trial of the case, it is immaterial whether or not such a cause was satisfactorily shown to the trial court, for the appellate court will not direct the dismissal of a case where it is shown to its satisfaction that the delay in the trial of a case was for good cause.

[6] The refusal of the District Court of Appeal to issue a peremptory writ of mandate amounts to a determination by that court that the affidavits on behalf of the respondents show good cause for the delay, which is not overcome by the showing made by the petitioner.

Petition denied.

WILBUR, C. J., CONREY, Justice pro tem., and LAWLOR, KERRIGAN, and WASTE, JJ., concur.

63 Cal. App. 536

In re GROGAN'S ESTATE.**GROGAN v. STATE CONTROLLER OF CALIFORNIA.**

(Civ. 4289.)

(District Court of Appeal, Second District, California. Division 1. Aug. 27, 1923. Hearing Denied by Supreme Court Oct. 25, 1923.)

Taxation — 878(1)—Trust fund created by will which operates merely as a medium of transfer taxable under Inheritance Act; "property transferred by will."

A trust fund created by will consisting of one-half testator's property, the income of which is payable to his wife during her lifetime, pursuant to a prior written agreement, in consideration of her relinquishment of inheritance rights, is taxable under Inheritance Tax Act, § 2, as property transferred by will, though the will is merely a medium for transfer previously agreed upon.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Charles P. Grogan, deceased. Appeal by Grace Grogan from an order of the Superior Court fixing inheritance tax. Affirmed.

Lucius K. Chase, of Los Angeles, for appellant.

Louis B. Diavila and Adrian C. Stanton, both of Sacramento (Ralph W. Smith, of Sacramento and Erwin P. Werner, of Los Angeles, of counsel), for respondent.

HOUSER, J. This appeal has to do with the legality of an inheritance tax imposed upon a trust fund created primarily for the benefit of Grace Grogan, who was the former wife of Charles P. Grogan, now deceased.

It appears that the parties were husband and wife; that they were unhappy in their married life and, because of serious differences and disagreements existing between them, they were living separate and apart one from the other. On May 17, 1913, Charles P. Grogan entered into a contract with his wife, Grace Grogan, wherein a settlement of their respective property interests was effected, and in consideration of the surrender and renunciation by Grace Grogan of her right of inheritance as the wife of Charles P. Grogan, it was agreed between them that Charles P. Grogan should pay to Grace Grogan the sum of \$3,000 a year; furthermore, that Charles P. Grogan would "provide in his last will and testament for the creation of a trust fund in substance as follows: Said will and testament to provide for the creation of a trust fund consisting of one-half of all of the estate of said first party at the time of the death of said first party, provided said estate does not exceed one hundred thousand dollars (\$100,000). In the event the estate of said first party at his death exceeds the sum of one hundred thousand dollars, then

and in that event the trust fund created not to exceed fifty thousand dollars. The net income derived from this trust fund to be paid to and become the separate property of said second party during her lifetime. The trust estate herein created terminates and ends at the death of the said second party and the unexpended portion shall go to, belong to, vest in and be distributed to the said minor child if he be living, and if not to such person or persons as said first party may designate in said last will and testament." Thereafter Grace Grogan obtained a divorce from Charles P. Grogan, and the decree therein incorporated the terms of the agreement theretofore entered into between the said parties in substance as hereinbefore set forth. On the death of Charles P. Grogan and the probating of his estate, an inheritance tax report was filed in which Grace Grogan was taxed as a stranger for the value of the property bequeathed to her pursuant to the terms of said contract and the said decree of divorce.

This appeal is from an order of the court fixing the inheritance tax; and it is contended that the bequest contained in the will operates merely as the fulfillment of an obligation and the execution of a trust created by contract between the parties, and that it constitutes merely the satisfaction of an obligation theretofore existing between the parties and does not constitute a bequest or transfer within the meaning of the Inheritance Tax Act.

Section 2 of the California Inheritance Tax Act (Stats. 1921, p. 1500), under which the tax on the trust fund herein was imposed, reads in part as follows:

"A tax shall be and is hereby imposed upon the transfer of any property * * *

"(1) When the transfer is by will."

Decisions in other jurisdictions having an inheritance tax law similar to our statute on the particular point here involved are not entirely harmonious. In New York there are two cases holding with appellant. In the first New York case, entitled *In re Baker's Estate*, 83 App. Div. 530, 82 N. Y. Supp. 390, relied upon by appellant, it appeared that an antenuptial agreement provided for the payment of the sum of \$1,000 to the intended wife on or before the date of the marriage and the further payment of the sum of \$20,000 in the event that the wife survived the husband, which was to be taken by her in lieu of dower or other rights. It was held that the agreement, incorporated in the will, did not constitute a gift to the wife in contemplation of the donor's death and was not subject to the transfer tax.

In the matter entitled *In re Vanderbilt's Estate*, 184 App. Div. 661, 172 N. Y. Supp. 511 (affirmed by memorandum opinion in 226 N. Y. 638, 123 N. E. 893), it was held (syllabus)

that where testator made bequest to wife pursuant to and in full satisfaction of the covenants of the antenuptial agreement wherein he had agreed to give wife sum so bequeathed, the bequest was not subject to transfer tax, having been made in consideration of marriage and not in contemplation of death.

On the other hand, however, there are two New York cases holding to the opposite view. Where a testator for a valuable consideration agreed to bequeath and devise to his stepdaughter all the property he might have at his death, and failed to do so, the court in deciding that the stepdaughter was equitably entitled to have the agreement carried out, ruled that the estate was taxable, and in so doing said, in part:

"It [the agreement] was not a contract to convey, but a contract to make a will in her [the stepdaughter's] favor. Had the deceased performed his agreement and given her his property by will, the estate would have been subject to the tax." In *re Kidd's Estate*, 188 N. Y. 274, 80 N. E. 924.

In the other New York case (*In re Gould's Estate*, 156 N. Y. 423, 51 N. E. 287) it appeared that shortly before his death Jay Gould (the testator) agreed with his son George that the latter's services in his father's business for 12 years was reasonably worth the sum of \$5,000,000, and that the father owned him that amount of money in compensation therefor. Thereupon Jay Gould made a codicil to his will in which he recited the facts with reference to the service which had been performed by his son George and the agreed value thereof, for which payment was provided out of the assets of the estate in the manner thereafter set forth in the codicil to the will. After the death of Jay Gould the question of the right of the state to collect an inheritance tax on the bequest to George Gould was settled by the court of appeals holding that under the provisions of the inheritance tax statute (which is nearly identical with ours) the bequest was so taxable.

The New Hampshire case (*Carter v. Craig*, 77 N. H. 200, 90 Atl. 598, 52 L. R. A. [N. S.] 211, Ann. Cas. 1914D, 1179) holds that where property passes by a will executed in accordance with the terms of a contract by which the testator agreed to give all his property to the beneficiary in consideration of the support by the beneficiary of the testator and his wife for life, such devise was subject to an inheritance tax.

In a Kansas case (*State v. Mollier*, 96 Kan. 514, 152 Pac. 771, L. R. A. 1916C, 551) it was shown that more than 20 years before the death of the testator he had made an agreement with his niece that if she would make her home with him, act as his housekeeper, and look after his welfare as long as he lived, he would make a will and bequeath to her all his property. A will was made in accordance with the contract, and after the death of the

testator, in a proceeding to recover the tax upon the legacy, it was held that the property passing to the beneficiary was taxable.

In another Kansas case (*State v. Gerhards*, 99 Kan. 462, 162 Pac. 1149) the same principle was followed, as announced by the syllabus thereof, as follows:

"Where persons assume to take property by virtue of a will bequeathing it to them, they are liable for the inheritance taxes imposed on the exercise of their right of succession under the will, and it is immaterial that they might have otherwise established their right to the property through a contract or as *cestui que trust*."

In the case of *Clarke v. Treasurer*, 226 Mass. 301, 115 N. E. 416, L. R. A. 1917D, 800, it appeared that the testator made a contract with his housekeeper to employ her during the remainder of the testator's life, provided her service was satisfactory, for which he agreed to pay her \$3.50 for each week, and that thereafter he would make a will bequeathing to her the sum of \$2,000, with the additional bequest of \$500, or a proportional part thereof for the fraction of a year, for each and every year after April 1, 1907, until his decease. The will was made accordingly. In passing on the question of the taxability of the bequest the court held that the legacy was not a mere satisfaction of debt and was subject to excise tax provided by the statute in cases of property passing by will.

In another Massachusetts case (*Hill v. Treasurer*, 227 Mass. 331, 116 N. E. 509) an antenuptial agreement provided that in consideration of the contemplated marriage the intended wife should have out of the property and estate at the time of the death of the testator the sum of \$250,000 "as a debt" against his estate, and the intended wife agreed to accept the sum in discharge of all her rights in or to the property of the intended husband. The provision of the will was to the effect that the wife might elect to take either cash, bonds, stocks, or other evidences of value to the sum of \$250,000. It was held that because the wife elected to take stock instead of cash the legacy was taxable.

In still another Massachusetts case (*Richardson v. Lane*, 234 Mass. 403, 126 N. E. 44, decided January 10, 1920, and which is the last known case bearing on the subject) the decedent, in consideration of an agreement of certain persons to provide decedent suitable maintenance for life, agreed in turn to pay them \$300 in cash and to make a will devising to them a certain house in fee simple. It was held that the devise was subject to an inheritance tax.

The case of *People v. Bauder*, 271 Ill. 446, 111 N. E. 598, holds that under the inheritance tax law which provides that all real and personal property passing by will shall be subject to a tax, a bequest of \$5,000 to each of two persons named to act as trustees after the death of the widow of the testator for the

benefit of an adopted son until he should reach a certain age, when the property was to be turned over to him, on condition that they would not charge or accept any further sum for their services, was property passing to the donees by will and subject to taxation.

The principle announced in the foregoing cases is upheld in *Ransom v. United States*, 20 Fed. Cas. 296, No. 11574, and in *Turner v. Martin*, 7 De G. M. & G. 429.

Appellant's contention is that her right to receive the benefits arising out of the trust fund did not grow out of the will, but, on the contrary, that such rights as she possessed were the outgrowth of a contract which rested upon a valuable consideration and because of that fact could not be a bounty or benefaction and hence not taxable. The identical claim was presented in several of the cases to which attention has heretofore been directed and, as before indicated, was in each case overruled. The matter is especially discussed in *Matter of Gould*, 156 N. Y. 423, 51 N. E. 287, supra, where it is said:

"He could have refused compensation in this manner [under the terms of the will], and had he done so whatever sum he might have recovered against the estate under the agreement with his father would not have been taxable under the taxable transfer act, for there would have been in such case no transfer by will. This he did not do; but instead elected to accept a transfer of a certain amount of money, bonds and stocks under the will in compensation for his services, and the question is, is the money and property thus transferred taxable? To that question the statute must furnish the answer.

"The statute reads: 'A tax shall be and is hereby imposed upon the transfer of any property * * * when the transfer is by will.' It will be noted that the imposition of the tax is not limited to property gratuitously given by will, but is extended to all property so transferred. Was not the property mentioned in this codicil transferred by will? Certainly it was, for the title to the bonds and stocks described in the codicil was taken away from the estate of Jay Gould and vested in George J. Gould under and by virtue of the second codicil of the will and such property is, therefore, taxable under the express provisions of this statute. If Jay Gould did owe his son George \$5,000,000 for services, and we must assume that he did, he selected a method of payment which brought the transaction within the taxing provisions of the statute."

In *Clarke v. Treasurer*, 226 Mass. 301, 115 N. E. 416, L. R. A. 1917D, 800, supra, where the testator had agreed that in his will he would provide compensation to his housekeeper, the court said:

"The promise of this contract, if kept, does not give rise to a debt. * * * It simply creates an obligation to give a legacy by will. * * * The contract of the housekeeper was that she should receive in part payment of her services the transfer of property by will. That

contract implies that she was to take and receive it subject to the general laws respecting such transfers."

The language of the California statute is in itself free from ambiguity. It is to the effect that where a transfer is effected by means of a will a tax must be paid. In the *Gould Estate*, to which reference has heretofore been made, it is said:

"It will be noted that the imposition of the tax is not limited to property gratuitously given by will, but is extended to all property so transferred. * * * The question of motive on the part of the testator is not for our consideration. We are now dealing with a taxing statute which undertakes to tax all property transferred by will and which is applicable to every transaction of that kind, whether advisedly or mistakenly entered upon and carried out. * * * The duty of the courts is to read it as it is written. It is certainly within the constitutional power of the legislature to tax all property transferred by will, whether the motive of the testator be to make a gift or pay a debt, and the language [of the statute], absolutely unambiguous and free from saving clauses, which the legislature employed to accomplish that result, affords the best indication that the word 'transfer' in the statute is used advisedly and according to its ordinary legal signification, which is that the owner of a thing delivers it to another person with the intent of passing the rights which he has in it to the latter. * * * It matters not what the motive of a transfer by will may be, whether to pay a debt, discharge some moral obligation, or to benefit a relative for whom the testator entertains a strong affection, if the devise or bequest be accepted by the beneficiary, the transfer is made by will, and the state by the statute in question makes a tax to impinge upon that performance."

In the case of *Carter v. Craig*, 77 N. H. 200, 90 Atl. 598, 52 L. R. A. (N. S.) 211, Ann. Cas. 1914D, 1179, supra, it is said:

"The imposition of the tax is not limited to property passing gratuitously by will, but extends to 'all property' so passing. If the Legislature had intended to limit the imposition of the tax to property passing gratuitously, it could easily have said so; but, by providing that all property passing by will should be subject to the tax, it manifested an intention not to so limit it."

No exception of the character claimed by appellant here is mentioned in the California statute. Nothing is said about any transfer by will arising out of an agreement, or as compensation for services, or in consideration of anything whatsoever. It matters not whether the legacy be a gratuity or "for money's worth." There is nothing in the statute which would indicate an intention on the part of the Legislature that there should be any limitation on the apparently plain language contained therein, or that there should be any exception whatsoever thereto. Everything in the nature of a change of ownership

effected through a will is apparently included. The reason for such transfer is not taken into consideration. The result is all that is considered; that is, the transfer itself. Viewed from one standpoint, it might be said that Mrs. Grogan's right was one which rested in the agreement entered into between her and her husband; that she had in effect bought and paid for everything that she was to receive; and that nothing remained to be done but the turning over of the property to her through the medium of the will. But even that does not surmount the obstacle. The right to real property undoubtedly exists in every ordinary sale where the consideration is first paid. It is not a tax on the right to conveyance that is usually made, but it is a tax on the transfer by which the conveyance is consummated. The statute here does not provide for a tax because some one has a right arising out of a debt or otherwise, but only when a transfer of property is brought about by means of a will is a tax imposed. It is a tax upon the vehicle carrying the right, rather than a tax upon the right itself. It is in effect a declaration of law that when a will is used as a means of conveyance of property a tax must be paid for that privilege.

Relying upon what appears to be the great weight of authority as indicated by the cases herein cited, it must be held that the fund which passed to Mrs. Grogan through the will of Charles P. Grogan is taxable under the terms of the statute.

It follows that the order appealed from must be affirmed. It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

192 Cal. 180

**HART-WOOD LUMBER CO. v. BONALY
et al. (S. F. 10115.)**

(Supreme Court of California. Oct. 8, 1923.)

- 1. Sales ☞202(1)—Title does not pass until payment of price where contract provides for payment on delivery or is silent on subject.**

Where a contract calls for payment upon delivery or is silent as to time of payment, the title does not pass until the price is paid, unless it is apparent from other provisions of the contract that the intention of the parties is otherwise.

- 2. Sales ☞82(2)—Obligation to pay price on delivery of goods inferred where contract does not specify time of payment.**

Where the contract does not specify when payment is to be made, the obligation to pay the price on delivery of the goods will be inferred.

- 3. Sales ☞199—Where buyer is given right to resell, title passes when buyer is in position to resell.**

Where seller gives buyer the right to resell, and nothing is said in the agreement as to the time when title shall pass, the title passes with the execution of the instrument, or at least when the time arrives when buyer

is in a position to resell, because the right to resell presupposes the existence of a title which the buyer can pass to the new purchaser.

4. Logs and logging — 3(7)—Title to lumber manufactured by buyer of timber, and stored on seller's premises, held in buyer, notwithstanding seller's failure to receive price within specified time.

Where contract for sale of standing timber gave buyer the right to cut the timber and to handle, transport, and sell it "in whatever manner he saw fit," and to store lumber on premises provided he should pay therefor within seven days, and based the price upon the cord measure of the trees, and not upon the lumber manufactured therefrom, the title to lumber stored on premises was in buyer, though sellers did not receive price within the seven days.

In Bank.

Appeal from Superior Court, Mendocino County; R. L. Thompson, Judge.

Action by the Hart-Wood Lumber Company against V. G. Bonaly and others. Judgment for defendants, and plaintiff appeals. Reversed.

Oscar T. Barber, of San Francisco, for appellant.

Frank W. Taft, of Willits, for respondents.

KERRIGAN, J. This cause having been transferred to the District Court of Appeal, the judgment was by that court reversed, after which, upon the petition of defendants, a hearing in this court was granted. Upon further consideration we are satisfied that the conclusion arrived at by the District Court of Appeal is correct, and in this opinion we shall, in the expression of our views, resort freely to the opinion filed by that court.

Plaintiff sued in claim and delivery to recover from defendants the possession of 62,000 feet of lumber of the admitted value of \$3,000. A second cause of action for the recovery of a hoist and cables was conceded by the defendants. The trial was had upon the issue of the title and right to possession of the lumber, upon which issue the trial court found in favor of the defendants Booth and Bonaly. The appeal is confined to an attack upon the findings of the trial court.

The facts are that the defendant Booth was the owner of certain timber land located in Mendocino county which the defendant Bonaly had agreed to purchase; that upon his contract for the purchase of the land there remained unpaid to the defendant Booth the sum of \$10,000. While the title was in this condition the two defendants, Booth and Bonaly, on February 7, 1920, entered into a contract with one Rae, wherein they agreed to sell to Rae a minimum of 2,000 cords of

timber located upon said land, and to be selected by Rae, he to pay therefor the sum of \$1.50 for every cord of 128 cubic feet, "which is cut, sawed, chopped, or milled and moved from said property." The payments therefor were to be made to the Bank of Willits to the credit and for the account of the defendant Booth until the total amount of \$10,000 had been paid therefor, and thereafter the payments were to be credited to the account of the defendant Bonaly. No time for these payments was fixed except that they were to be made at the same time shipping receipts were deposited with the bank showing shipments through the Northwestern Pacific Railroad from the town of Willits. On the 28th day of February, and before the work of cutting the timber commenced, this contract was modified by all the parties thereto to the extent that Rae was given the option to pile any lumber or wood upon the land mentioned for a period of 60 or 90 days, provided that payment therefor should be made within 7 days after the same had been piled, and that such payments should be made at the Bank of Willits, as provided in the original agreement, and Rae was also authorized to retain the original shipping receipts and to leave a copy of the same at the Bank of Willits, thus relieving him of the necessity of depositing the original shipping receipts with the bank at the time of payment. By the agreement of the parties of February 7th Rae was given free access to the land "for the purpose of falling, chopping, cutting, sawing or milling the timber thereon, and of handling, transporting, hauling and selling or disposing of said wood or lumber in whatever manner he may see fit." On the 13th day of February following the execution of the original contract the defendant Bonaly alone and Rae entered into a private agreement, wherein Rae agreed to deliver to Bonaly, without charge, 25,000 board feet of rough lumber, "sizes and dimensions to be hereafter designated by Bonaly, within the period of one year from the date hereof." On the 3d day of March following plaintiff and Rae entered into a contract wherein Rae agreed to sell and deliver certain quantities of lumber from the property mentioned to plaintiff, at prices therein specified. Rae also agreed to pile the pine lumber cut by him on the premises until the same should be shipping dry and until he should receive an order from the plaintiff to make shipment. Plaintiff agreed to and did advance to Rae certain sums of money which were to apply on the purchase price of the lumber. Simultaneously with the execution of this contract of March 3d Rae assigned to the plaintiff his contract with the defendants Booth and Bonaly as security for all moneys advanced or to be ad-

vanced by the plaintiff to Rae. Rae entered the premises, erected a mill, installed machinery and proceeded to cut down trees and to manufacture the same into lumber. Nine carloads of this lumber were shipped by Rae to the plaintiff and 62,000 feet were piled at the mill on the premises. The full purchase price due the defendants for trees felled by Rae was paid to the Bank of Willits, but the payments, with the consent of Rae, were credited to a mortgage account by the cashier of the bank without authority from the defendants. Rae abandoned his contract with the owners on the 26th day of May, 1920, but work thereunder was continued under the direction of the plaintiff until some time in June, when the defendant Bonaly took 22,000 feet of the lumber so piled at the mill, and the plaintiff was prevented by defendants and their agents from removing any of that remaining. When this situation arose plaintiff abandoned further work under the contract, and commenced this proceeding for the recovery of possession of the 22,000 feet which had been taken by Bonaly and the 40,000 feet which still remained piled at the mill.

Upon this appeal the title or right of possession is the question to be determined, and this question rests upon the intention of the parties to the contract of February 7, 1920, between Booth and Bonaly on the one part and Rae on the other, as disclosed therein and by their interpretation of said contract by acts performed under it. As the evidence upon the subject is undisputed, the question to be decided is one of law alone.

[1, 2] According to the settled law in this state, where a contract calls for payment upon the delivery of goods, or is silent on the subject—when the obligation to make payment at that time will be inferred—title will not pass until the price is paid, unless it is apparent from other provisions of the contract that the intention of the parties thereto is otherwise. *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; *Browning v. McNear*, 158 Cal. 525, 111 Pac. 541.

[3] But payment is of little importance when from the face of the instrument it appears that the parties intended to pass title irrespective of payment. Thus, where the owner gives to the buyer the right to resell, and nothing is said in the agreement as to the time when title should pass, the rule is that title passes with the execution of the instrument, or at least when the time arrives when the buyer is in a position to resell, because the right to resell presupposes the existence of a title which the buyer can pass to the new purchaser. *Columbus Buggy Co. v. Turley & Parker*, 73 Miss. 529, 537, 19 South. 232, 32 L. R. A. 260, 262, 55 Am. St. Rep. 550; *Leigh Bros. v. Mobile & Ohio R.*

Co., 58 Ala. 165, 178. Under this view of the case, it is not necessary to give consideration to appellant's attack upon the finding of non-payment. The point is that both Rae and appellant had paid to the Bank of Willits for the benefit or respondents all the money which they were required to pay under the contract, but that the cashier of the bank, disregarding the written instructions of the defendant, had wrongfully deposited these moneys to the account of one Shelton, who held a first mortgage upon the property given by the respondent Booth. The cashier insisted that, as both Booth and Shelton were clients of the bank and as Booth had authorized the cutting of the timber and the consequent diminution of the security upon his mortgage, he was entitled to see that the money went to the mortgagee. He was permitted to testify that Rae agreed to this, though there was no evidence that when the appellant made subsequent payments to the same bank (these payments would cover the lumber in dispute) it agreed that they should be credited in any other way than as required by the contract. The evidence was that the money was still held by the bank subject to adjustment between Booth and Shelton; but the trial court held that neither Rae nor the appellant had paid the respondents, or either of them, the amounts due under the contract. We cannot say that there was not some evidence to support the finding. But, as we have heretofore said, the matter of payment is not determinative of the case.

In the case of *Browning v. McNear*, 158 Cal. 525, 111 Pac. 541, the court held that the mere fact that payment for certain grain was expressly deferred to the time of the shipment did not exclusively establish that there was no agreement for a present transfer of the property, the court saying:

"When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute, without actual payment or delivery, and the property and risk of accident to the goods vest in the buyer."

[4] Under the terms of the contract here in question Rae went upon the premises, erected a mill, felled trees, sawed them into logs, hauled them to the mill, converted them into lumber, and piled or stored the same upon the premises. The contract conferred upon him the right to handle, transport and sell the wood and lumber "in whatever manner he saw fit," the owners of the growing timber making no reservation of control, direction, selection or segregation except the right of inspection for the purpose of checking the shipments. In the modification of the contract the owners gave Rae the option to store the lumber on the premises after it came from the mill, provided he

should pay therefor within 7 days, but the penalty for nonpayment within that time was not forfeiture of the right to the possession or title to the lumber, but merely withdrawal of the right of storage. Under the original contract, no time having been fixed for the storage or piling of the lumber, a reasonable time for that purpose would be presumed. Shipping receipts or copies thereof were to be deposited with the Bank of Willits after the wood or lumber was hauled and delivered for shipment to the Northwestern Pacific Railroad Company. The furnishing of such receipts was clearly for the purpose of enabling Booth and Bonaly to check the amounts due from Rae. There was no provision in the contracts, either express or implied, for withholding title until payment was made. Rae was given the right to go upon the land, select trees, fell them, and by means of his labor and at considerable expenditure convert the logs into wood and lumber, and to sell and dispose of such product, from all of which it is apparent that the parties to the contract intended that the possession of and title to the trees when served from the land passed to Rae, and that the defendants at no time had either possession of or title to the personal property into which the cut timber was manufactured. While it was competent for them to stipulate for the title to such personal property as security for the payment of their stumpage, they did not do so; and the fact that, in moving the manufactured commodities through a prescribed channel, Rae was obligated to furnish Booth and Bonaly with copies of the shipping receipts, affords no inference of possession or title in the defendants of such manufactured articles. Moreover, the price to be paid by Rae for the trees selected and cut by him was based upon the cord measure of their contents—the measure commonly used for firewood—and not upon the basis of lineal feet, the measure used for mill lumber. This price was but \$1.50 a cord, and all that was due Booth and Bonaly was \$180 upon 184,000 feet, which was cut and sold to appellant at from \$25 to \$30 per 1,000 feet. Thus the owners of the land were to receive only \$180 upon lumber admittedly of the value of over \$4,500; they were to be paid about \$60 for the 62,000 feet involved in this action, of a value of \$3,000.

It follows from what we have said that the findings of the trial court that possession of and title to the lumber in question were in defendants are contrary to the evidence, and the judgment in their favor based thereon must be reversed. It is so ordered.

We concur: WILBUR, C. J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; RICHARDS, Justice pro tem.

192 Cal. 200

BARKHAUS v. PRODUCERS' FRUIT CO.
(Sac. 3383.)

(Supreme Court of California. Oct. 10, 1923.)

1. Landlord and tenant ⇨80(2)—To terminate privity with lessor, lessee must assign whole estate in entire premises for remainder of term.

A sublease, to operate as an assignment, must transfer the original lessee's entire term in all or part of the demised premises, and to terminate the privity of estate between assignor and the original lessor, the former's entire estate, in all the premises demised, must be assigned for a time at least equal to the remainder of the term.

2. Landlord and tenant ⇨80(2)—Lessee subletting held not relieved from obligations to lessor.

A "sublease," giving the original lessee entire control and supervision of the premises, with the right to direct the pruning, plowing, spraying, etc., and exercise its own judgment in the sale of fruits grown thereon, and providing for equal division of expenses and proceeds, did not convey all of the original lessee's estate, and hence did not relieve it of its obligations under the original lease.

3. Customs and usages ⇨17—Exclusion of evidence of custom as responsibility for treating pear blight held not error; "healthy condition."

In a lessor's action for breach of lessee's covenant to keep trees in a healthy condition, exclusion of evidence of the custom, as between landlord and tenant, with respect to responsibility for treating pear blight, where the lease is silent, held not erroneous, in view of the presumption, from the parties' long experience in fruit raising, that they were familiar with such custom and their practical construction of the lease as placing such responsibility on lessee, as trees infected with pear blight are not in a "healthy condition."

4. Appeal and error ⇨882(11)—Appellant cannot complain of adoption, on his own suggestion, of less reliable method of proving damages than that to which he objected.

Appellant cannot complain that a less reliable method of proving damages than that to which he objects was adopted on his own suggestion, especially where the damages exceed the sum awarded.

5. Appeal and error ⇨1073(7)—Appellant cannot complain of recovery of damages not alleged, where other elements of damage more than equal amount awarded.

Appellant cannot complain of an award of damages not alleged in appellee's complaint, where other elements of damage shown by the evidence total more than the amount of the judgment.

6. Trial ⇨62(2)—Admission of rebuttal testimony held not erroneous, in view of similarity to testimony on cross-examination.

In lessor's action for breach of lessee's covenant with respect to care of the crop, where plaintiff testified, on cross-examination

as to whether he permitted defendant to retain possession after such breaches because the rental was more than the value of the crop, that, "There was plenty there to pay the rent if I did put them off," admission of plaintiff's rebuttal testimony as to the value of the crop was not erroneous, being substantially the same as that brought out by defendant, and unimportant in any event.

7. Landlord and tenant ⚡135—Lessor held not required to exercise right of supervision as to care of orchard by lessee.

A provision in a lease, giving lessor the right to supervise the care of an orchard by lessee, being for lessor's benefit, did not impose on him the burden of caring for or supervising the care of the orchard.

8. Landlord and tenant ⚡136—Lessee held not released from obligations by provision as to supervision by lessor of work on and care of orchard.

A lease providing for supervision of the work on and general care of an orchard by lessor did not release lessee from its obligation to perform all the terms thereof with respect to such work and care, nor from liability for damages from failure to so perform.

9. Appeal and error ⚡1033(5)—Appellant held not entitled to complain of inconsistent instructions.

In a lessor's action on lease of an orchard, the general care of which the lease provided should be under lessor's supervision, an instruction to find for defendant if lessor neglected to supervise or to use the ordinary means at hand, or such skill and experience as he possessed, in such supervision, held too favorable to defendant, who could not complain of its inconsistency with a correct instruction given at plaintiff's request.

In Bank.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by F. W. Barkhaus against the Producers' Fruit Company. Judgment for plaintiff, and defendant appeals. Transferred from District Court of Appeal. Affirmed.

Raglan Tuttle and G. W. Hamilton, both of Auburn, and Devlin & Devlin, of Sacramento, for appellant.

Meredith, Landis & Chester, of Sacramento, for respondent.

MYERS, J. The petition herein for a transfer after decision by the District Court of Appeal was granted largely because it was believed that certain questions which were necessary to the determination of the instant case were involved to some extent in two other cases then pending before this court. In re Okahara, 216 Pac. 614, and Woodsend v. Chatom, 214 Pac. 965. We have arrived at substantially the same conclusions herein which were reached by the District Court of Appeal, and we shall make free

use herein of the opinion of that court, which was prepared by Mr. Presiding Justice Finch. We quote the following therefrom:

"Plaintiff recovered judgment against defendant for the sum of \$6,000 for damages alleged to have resulted from defendant's failure to perform the covenants of a lease. From this judgment the defendant appealed.

"It is admitted by the pleadings that on the 4th day of October, 1916, plaintiff leased to the Producers' Fruit Company, a South Dakota corporation, for a term of five years at a cash rental, 200 acres of orchard and 30 acres of vineyard and that on the 18th day of January, 1918, the lessee assigned the lease to defendant. The defendant did not expressly agree to carry out or perform the terms of the lease, and its obligations thereunder were such only as to arise from the acceptance of a simple assignment and its possession of the premises under the lease. The lease provided:

"It is hereby agreed and made a provision of this lease that the work on the said orchard and general care of same shall be under the supervision of the lessor or his agent and the said lessee hereby agrees to abide by the same. * * *

"The said lessee hereby covenants and agrees * * * to occupy, till, and properly prune, spray, cultivate, and irrigate the orchard hereby leased, furnishing all labor at his own expense, at the proper time and dates, never at any time allowing any tree or vine to suffer for lack of water or hoeing; to remove all noxious weeds; to keep all suckers off trees and vines and said trees and vines in a healthy condition, allowing none to stand in too wet soil, or for lack of proper drainage, or too much watering of berries or vegetables planted between rows; to prune the orchard trees in accordance with directions of lessor each season; * * * to quit and surrender the said premises at the expiration of said term in as good state and condition as reasonable use and wear thereof will permit, damage by the elements excepted.' It was further agreed 'that the lessee has the privilege of subleasing said premises but that said lessee is held responsible as per the terms and conditions herein stated; * * * that in the event of there still being fruit on the property on October 4, 1921, at the expiration of lease, the lessee shall have the privilege of harvesting same.'

"Plaintiff testified that at the time the lease was executed it was contemplated that the lessee would manage the orchard through their subtenants, who would occupy the property. Japanese, presumably subtenants, had charge of the orchard in the years 1917 and 1918 and Chinese during the remainder of the term, the subtenants, however, not being the same persons during any two successive years. Pear blight made its appearance in the orchard not later than the year 1919 and increased in destructiveness to the end of the term. In the fall of 1920 the plaintiff made the contention that the defendant had broken the terms of the lease by its failure to eradicate pear blight, by improper irrigation, erosion of the soil, and breaking limbs of trees, and, on the 25th of October, plaintiff wrote the defendant, calling attention to certain breaches of the lease and

declaring, 'I have treated and accepted these acts as a surrender and abandonment of the lease, and have taken possession of the property, and hereby elect to and do declare said lease surrendered and abandoned.' Thereafter the parties compromised their controversy over the question of damages by payment, on the 3d day of November, 1920, by defendant of the sum of \$1,500 in full compensation for 'all breaches of said lease * * * up to the date hereof.' The parties thereafter proceeded under the lease in all respects as if there had been no interruption of the term thereof.

"On the 15th day of October, 1920, the defendant executed an instrument which it alleges was a sublease of the premises to certain Chinamen, associated together as copartners, 'for the term of one cropping year from the 15th day of October, A. D. 1920, to the 4th day of October, 1921, for the share rental hereinafter mentioned.' By the terms of the instrument the Chinese company was required, among other things, to keep and maintain all buildings, fences, corrals, and improvements and personal property in good condition and repair; to perform all labor necessary in the care and cultivation of the orchard; to pick and pack the fruit grown on the premises and deliver the whole thereof to the defendant; to purchase all necessary supplies and materials from defendant; and to surrender possession of the premises to defendant at the termination of the lease. Other provisions of the instrument will be hereinafter stated.

"There is evidence to the effect that the orchard was in a healthy condition the first of the year 1921; that pear blight made its appearance about the 1st of May, and caused great damage during the remainder of the season; that plaintiff persistently insisted upon the eradication of the blight by defendant, and that the latter assumed the responsibility of removing it but did the work in so negligent a manner that many trees were destroyed by the blight and others greatly injured; that 241 eight year old trees were destroyed by the blight, and 190 cut back from three to five years; that 50 quince trees died from the same cause, and that 30 twelve year old apple trees were affected; that the orchard was damaged by overirrigation in some places and by insufficient irrigation in others; that defendant failed to irrigate the orchard after the fruit was picked, resulting in a decreased production during the following year; that 185 young trees died from insufficient irrigation; that suckers were not removed; that many large limbs were broken because not propped during the fruiting season; and that no steps were taken to prevent the spread of phylloxera in the vineyard.

"Appellant contends that, being merely an assignee, it was liable only for breaches of the lease during its possession of the premises; that the so-called sublease was for the remainder of the term of the original lease, and therefore constituted, in legal effect, an assignment thereof and not a sublease; that by such assignment the appellant parted with the entire estate and interest which it had in the premises, and is not liable for any subsequent breach of the original lease. If the premises stated be conceded, the argument appears to be faultless. By amendment to its answer, filed at the close of plaintiff's case in chief, the defendant

alleged that it 'sublet and subleased to other and third persons, for the remainder of the term, * * * the whole of the demised premises.' The conduct of the parties shows very clearly that neither the plaintiff nor the defendant thought that the so-called sublease constituted an assignment, and that both of them believed that the defendant was bound to perform the covenants of the original lease until the end of the term thereof. Plaintiff apparently did not know the terms of the agreement between the defendant and the Chinese company, and at all times insisted upon performance by defendant of the covenants of the lease. Defendant at no time suggested, prior to the termination of the lease, that it was not bound to such performance, but at all times assumed the burden thereof."

The circumstances last mentioned are significant only as showing the construction of the situation resulting from the so-called sublease, which was placed thereon by the parties by their conduct. In response to appellant's contention that the sublease for the remainder of the term of the original lease was, in legal effect, an assignment, respondent contends that the so-called sublease was not a lease at all, but a mere cropping contract. The District Court of Appeal arrived at the conclusion that whatever it might be called it was not, in legal effect, a lease, and therefore did not operate as an assignment of the term. The contract under consideration by this court in the *Okahara Case*, supra, while phrased in entirely different terminology, was nevertheless similar in nearly all essential respects to the so-called sublease herein, and we held that it amounted, at most, to a mere cropping contract, and did not operate to convey any interest in the land. But it is not necessary to go thus far in order to sustain the judgment herein in so far as this point is concerned.

[1] It is elementary that a sublease, in order to operate as an assignment, must transfer to the sublessee the entire term of the original lessee in the whole or some part of the demised premises; and, of course, the assignment of the term, in order to terminate the privity of estate between the assignor and the original lessor, must transfer his term in the entire premises. The term thus referred to is not measured alone by the length of time for which it runs, but is measured as well by the extent of the premises which it covers, and the nature and extent of the estate or interest therein which it embodies. The term which a tenant must assign, in order to terminate his privity of estate with the landlord, may be regarded as having three dimensions analogous to the spacial dimensions of length, breadth, and thickness. The term to be transferred to his assignee by such a tenant must be for a period of time at least equal to the remainder of the term of the original lease. It must cover all of the premises demised by the original lease, and it must include all of the

estate and interest in said premises possessed by the lessee under the original lease.

"To constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole or in a part of the leased premises which his assignor had therein. He must not only take for the whole of the unexpired time, but he must take the whole estate, or, in other words, the whole term; for, in the language of Blackstone, 'the word "term" does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease. * * *'. If by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions with a right of entry, or new causes of forfeiture are created, then the tenant holds by different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term." *Dunlap v. Bullard*, 131 Mass. 161, 162.

See, also, *United States v. Hickey*, 17 Wall. (84 U. S.) 9, 21 L. Ed. 559; *Davis v. Vidal*, 105 Tex. 444, 151 S. W. 290, 42 L. R. A. (N. S.) 1084; 1 Taylor, Landlord and Tenant (9th Ed.) § 16.

[2] The so-called sublease herein provided that—

"Party of the first part [defendant herein] is in entire control of the said premises and the operation of same, and shall have the right to supervise and direct, the pruning, plowing, spraying, cultivating, thinning, picking, and packing of said fruit, and all other work in connection with the handling of the premises and the crops of fruit grown thereon, and any failure on the part of the parties of the second part to obey and carry out the direction of the party of the first, or its agent, shall be deemed a violation of this agreement."

It further authorized the first party "to exercise its own judgment in the shipping, selling, and disposing of all fruits grown upon the said premises," and forbade the sale or disposal of any part thereof by second parties without the consent of first party, and, in the event of the failure of second parties to procure sufficient labor, the first party was given the right to secure such labor and charge the second party therewith, and deduct the amount from their portion of the net returns received for said fruit. It was agreed that in lieu of any cash rental each party was to bear one-half of the expense of certain materials and repairs and share equally the net proceeds from the sale of all fruit grown upon said premises. It is thus apparent that, whether the so-called sublease be deemed in legal effect a lease or a cropping contract, it at any rate did not operate to transfer and convey to the second parties named therein all of the estate and interest of the defendant in the demised premises. The defendant therefore continued to be obligated to the plaintiff upon the covenants of the original lease.

We quote again from the opinion of the District Court of Appeal:

[3] "The court sustained plaintiff's objection to the following question: 'What, if any, is the custom and usage in Placer county where fruit ranches are rented and nothing is said in the lease about pear blight as to the responsibility of the owner for treating the blight?' The ruling is assigned as error. The lease requires the lessee 'to keep all suckers off trees and vines and said trees and vines in a healthy condition, allowing none to stand in too wet soil, for lack of proper drainage, or too much watering of berries or vegetables between rows.' Trees infected with pear blight cannot be said to be in a 'healthy condition.' It must be presumed that, from their long experience in fruit raising in Placer county, both parties to the lease were familiar with any custom relative to the removal of pear blight as between landlords and tenants. During the years 1920 and 1921, the parties put a practical construction upon the terms of the lease in question, by placing the responsibility for the removal of blight upon the defendant. The defendant seems to have made no objection to the assumption of this obligation. Such practical construction, under the circumstances, is well nigh conclusive, even if it be conceded that the lease is uncertain in this respect, which it is not.

[4] "Appellant urges that the evidence upon the question of damages is insufficient, uncertain, and conjectural. Plaintiff was asked to state the fair market value of the premises when the ranch was returned to him at the end of the term, evidently with the intention of following it up with questions as to what the market value would have been at that time but for the damage of which complaint was made. Defendant objected to the question as not calling for 'the proper basis for an estimate of damages in a case of this kind.' The court asked: 'Your insistence is that the witness shall state the amount of damages in dollars?' Counsel for defendant replied in the affirmative, and the witness then testified without objection that the amount of damages suffered was between \$11,000 and \$12,000. The witness had previously stated in detail the elements of damage to his orchard. A party cannot be heard to complain that a less reliable method of proving damages is adopted on his own suggestion rather than a more certain method to which he objects. It was further testified, without objection, that eight year old pear trees were of the value of \$16 apiece, and that cutting back the growth of such trees four years reduced their value to the extent of \$8 apiece; that the quince trees were of the value of \$16 apiece and the young trees destroyed were worth \$2.50 each; and that damage to the extent of \$40 was caused by overirrigation. A simple computation shows that, based on such testimony, the damages suffered largely exceeded the sum of \$6,000, the amount of the judgment, leaving out of consideration all other elements of damage covered by the evidence.

[5] "Appellant contends that it was not liable for damages caused by phylloxera in the vineyard. It appears from the testimony that the only effective remedy for the eradication of phylloxera is to remove the affected vines, and, in order to prevent its spread, to remove two or three adjacent rows of healthy vines. In the year 1920 the defendant removed about

an acre of affected vines. It appears from plaintiff's testimony that vines adjacent to those removed in 1920 showed the effects of phylloxera in the early part of 1921 and, since vines do not show such effect for a considerable time after becoming infested, it is to be inferred that the pest must have attacked such vines prior to the settlement of November 3, 1920, and consequently that the damages to the vines were included in that settlement. The complaint alleges that in the spring of 1921 between six and seven acres of the vines became affected, that plaintiff requested defendant to take the necessary steps to exterminate the pest, and that defendant did not do so, 'and as a result thereof said vineyard on said six or seven acres has been destroyed, and the vines thereon will have to be taken up and removed.' Since the sole remedy for phylloxera is to remove the vines, the only damage alleged in this connection is the trifling cost of removal. Failure to remove the affected vines may have caused other vines to become infested, but there is no allegation to that effect in the complaint. As stated, however, other elements of damage, as shown by the evidence, were more than sufficient to make up the amount of the judgment.

[6] "The appellant claims that the court committed error in permitting plaintiff to testify, over defendant's objection, that the value of the fruit crop on the premises June 3, 1921, was about \$8,000 or \$10,000. This testimony was admitted in rebuttal of defendant's attempt, in cross-examination of plaintiff, to show that plaintiff permitted defendant to retain possession of the premises after breaches of the lease, because the rental amounted to more than the value of the crop. In such cross-examination plaintiff testified: 'There was plenty there with which to pay the rent if I did put them off.' It thus appears that the testimony, admitted over objection, was substantially the same as that theretofore brought out by defendant. In any event the matter objected to was unimportant.

[7] "Defendant requested the court to instruct the jury that under the supervisory powers given the plaintiff by the terms of the lease he was required to 'use and exercise such reasonable and ordinary means and methods as are at hand, and such common knowledge and experience as he may possess, firstly, to prevent loss or injury at all, and, secondly, to minimize the loss and injury as far as possible.' The court refused to give the instruction on the authority of *Doi v. McMurry*, 41 Cal. App. 515, 183 Pac. 211. The court instructed the jury, substantially, as requested by the defendant in another proposed instruction, as follows: 'In one of the terms and provisions of the lease and agreement it is provided: "It is hereby agreed and made a provision of this lease that the work on the said orchard and the general care of the same shall be under the supervision of the lessor, and the said lessee hereby agrees to abide by the same." This provision is intended to protect and preserve the right and estate of the lessor, and if you find from all the evidence, either that the lessor entirely neglected such supervision, or that he failed to use such usual and ordinary means as were at

hand, or such skill or experience as he possessed, concerning the supervision of such general work upon the premises, and for which plaintiff sues to recover, and that the damage and injury were caused by such failure and omission, your verdict must be in favor of the defendant.'"

The instruction given was more favorable to defendant than was warranted by the situation. The other one was properly refused because it might have caused the jury to believe that the duty of caring for the orchard rested primarily upon plaintiff. The provision in the lease giving plaintiff the right of supervision over the care of the orchard was for the benefit of plaintiff and not for the benefit of the lessee. It did not have the effect of imposing upon plaintiff the burden of caring for or supervising the care of the orchard. *Ash v. Soo Sing Lung*, 177 Cal. 356, 362, 170 Pac. 843; *Doi v. McMurry*, supra.

[8,9] "At plaintiff's request the court gave the following instruction: 'The lease of the premises provided that the work on the orchard and its general care shall be under the supervision of the plaintiff. I instruct you that this provision did not release defendant from its obligation to carry out each and all of the terms of the lease while it was a tenant thereunder, and did not release defendant from liability for any damages caused plaintiff by defendant, by defendant's failure to carry out the terms of the lease, if it so failed.' Appellant does not contend that this instruction is an incorrect statement of the law, but argues that the instruction last considered is inconsistent therewith. A party cannot complain of an instruction given at his own request on the ground that it is inconsistent with a correct instruction given at the request of the other party."

The giving of conflicting instructions upon a material point is undoubtedly error, but whether or not such error is prejudicial depends upon the particular circumstances of each case. In the instant case appellant cannot complain of the instruction which was given at plaintiff's request, because the same is a correct statement of the law. Neither can appellant complain of the giving of the other instruction, for the reason that any error therein must operate to appellant's advantage. If the jurors followed the one instruction, their deliberations were correctly guided. If they followed the other, the appellant must have gained an undue advantage therefrom. We find no error in the record which in our judgment could have operated to the substantial prejudice of appellant.

The judgment is affirmed.

We concur: WILBUR, C. J.; LENNON, J.; KERRIGAN, J.; SEAWELL, J.

192 Cal. 194

FIRST FEDERAL TRUST CO. v. SANDERS et al. (S. F. 10263.)(Supreme Court of California. Oct. 10, 1923.
As Modified Oct. 22, 1923.)**1. Mortgages ⇐33(3)—Deed executed contemporaneously with agreement to reassign held mortgage.**

Deed executed contemporaneously with an agreement to reassign held a mortgage and not a trust deed.

2. Exceptions, bill of ⇐20—Insufficiency of evidence to justify finding held sufficiently specified.

A bill of exceptions, specifying that the evidence was insufficient to justify a finding that a claim based on a contention that an instrument was a deed of trust instead of a mortgage and was not barred by the statute of limitations (Code Civ. Proc. § 337, subd. 1), and that the finding that the instrument was a deed of trust was against law, sufficiently specified the insufficiency of the evidence to justify the latter finding.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the First Federal Trust Company against Louis Sanders, as executor of the will of Pauline Sanders, deceased, and others, for two of whom Louis Sanders, individually, and A. J. Sabath were substituted. Judgment for plaintiff, and defendant Sanders, individually and as executor, appeals. Reversed in part, with directions.

Jos. C. Meyerstein, of San Francisco, for appellant.

Platt Kent, of San Francisco, for respondent.

WILBUR, C. J. This is an action for the foreclosure of a mortgage. A decree was rendered foreclosing the mortgage, and no question is made upon the validity of the mortgage or the judgment foreclosing the same, other than that arising out of the answer and cross-complaint of A. J. Sabath. This defendant, by way of cross-complaint, set up his rights growing out of the assignment to him of a note and the accompanying mortgage or deed of trust, and prayed that the validity of his claim should be established, and that upon the sale of the property the amount of the indebtedness due upon the note secured by the mortgage or deed of trust be paid to him from the proceeds of the sale.

Louis Sanders, the owner of the mortgaged property, subject to the administration of the estate of his deceased wife, Pauline Sanders, in his capacity as executor, and as an individual appealed from that portion of the judgment establishing the validity of the claim of A. J. Sabath.

The main question involved upon the appeal is whether or not the instrument under which A. J. Sabath claims was a deed of trust or a mortgage; it being conceded by the respondent that if the obligation securing the note held by him was a mortgage, that the claim is barred by the statute of limitations and that the judgment in his favor was erroneous. It is claimed, however, that the instrument in question was a deed of trust and not a mortgage and we will direct our attention to that claim.

On February 4, 1914, Louis Sanders executed a grant, bargain and sale deed in the ordinary form to Moore & Scott Iron Works, a California corporation, the grantee therein, purporting to convey to Moore & Scott Iron Works the property involved in this action, in consideration of the sum of \$3,423.11.

On the same date and as a part of the same transaction the parties to the deed executed an agreement designated as an "Agreement to reassign." In this agreement it was recited that the property described in the deed had been conveyed by Louis Sanders to the Moore & Scott Iron Works and that said "assignment," although absolute on its face, "was and is and at all times has been made and intended to secure the said party of the first part in the sum of \$3,423.11, together with a sum not exceeding \$1,000 for labor and materials furnished the Western Reclamation Company;" and recited a desire and intention of the grantee in the deed to reassign, transfer, and convey to the grantor the real property therein described upon the payment of a certain promissory note for \$3,423.11, set out in the last-mentioned agreement; and it was therein agreed that upon the payment of said sum and the further sum not exceeding \$1,000 as above mentioned, that the property would be reconveyed to the original grantor. It was further agreed that in the event of a failure to make the payments as therein provided "that the said real property be sold at public auction after ten days' written notice," and that the proceeds be applied upon the payment of the note.

[1] This agreement between the parties was an ordinary defeasance, and the transaction constituted a mortgage, namely, a deed given as security for the performance of an obligation. It is to be noted that nowhere in the deed or in the defeasance was there any statement that the title was to be held in trust by the grantee in the deed nor is the instrument of defeasance characterized as a declaration of trust, or the deed itself characterized as a conveyance in trust.

The situation is similar to that dealt with by this court in the case of Godfrey v. Monroe, 101 Cal. 224, 35 Pac. 761. There a deed of trust had been executed by the owner of the land, and subsequently the owner and the

trustee joined in a conveyance to the Los Angeles Improvement Company, and as a part of the transaction an agreement was entered into between the three parties—

"the terms of which states that the party of the first part, by and with the consent of his trustee, to secure payment of an indebtedness amounting to the sum of \$11,865.55, evidenced by notes and orders, had caused to be conveyed to the third party the property described in the deed of trust of September 24, 1886."

It was agreed that the property should be sold and out of the proceeds the indebtedness in question should be paid, and thereupon the balance of the unsold property was to be deeded to the original owner. The transaction was held by this court to be a mortgage with the power of sale. It was there said:

"If there be any doubt as to whether an instrument was intended as a mortgage or a deed of trust, such doubt should be resolved in favor of a mortgage with the power of sale. The intervention of a trustee is not always, but is generally a serious inconvenience and expense."

In *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225, a quitclaim deed had been executed by the owner of the property there involved and was made to J. H. Hoskins, and contemporaneously therewith an agreement was entered into that when the owner had repaid to the grantee the sum of \$408 that the property should be reconveyed to the owner. It was held that this transaction constituted a mortgage. The court upon that subject stated as follows:

"The defeasance, executed contemporaneously, shows beyond doubt that it was made to secure the payment of a sum of money loaned by the grantee to the grantor and payable at a future day, with interest. In such a case a deed absolute is held to be and is treated as a mortgage. *Farmer v. Grose*, 42 Cal. 169, *Montgomery v. Spect*, 55 Cal. 352."

The respondent relies upon the case of *More v. Calkins*, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128, as authority for the proposition that the transaction here involved constituted a deed of trust and not a mortgage. In that case, as in others, it was held that, although the conveyance was made directly to the creditor it could nevertheless be a deed of trust, but an examination of the deed which is set out in full in 85 Cal. 177, 184, 185, 24 Pac. 729, 731, where a previous appeal of that action was considered, shows that the deed was one in trust, so expressed upon the face of the conveyance as follows:

"To have and to hold the aforesaid lands, rights, easements, contracts, claims, demands, and other property hereby conveyed, assigned, or transferred to the party of the second part, his successor or successors and assigns, upon the trusts and confidences and subject to the powers hereinafter expressed, to wit."

Among the powers enumerated in this deed was the right to manage this property, hypothecate it, sell it from time to time, and apply the proceeds to the expenses of the management of the lands and the property and the execution of the trust, and to pay to J. W. Calkins, the grantee, the sum of \$15,000. This deed also provided that upon the payment of the full amount due to J. W. Calkins, the remainder of the property was to be transferred to the grantor.

Upon the first appeal the court did not determine whether or not the instrument was a mortgage with a power of sale or a deed of trust (see page 187 of 85 Cal., page 729 of 24 Pac.), but upon the second appeal (95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128) it was decided that the instrument was a deed of trust. It was there stated:

"Whether the conveyance is to be treated as a mortgage or as a deed of trust must depend upon its essential character, as shown by its terms, and not whether the grantee is a creditor whose debt is to be paid out of the proceeds to arise from the execution of the trust which is declared."

The respondent also relies upon the case of *Sacramento Bank v. Alcorn*, 121 Cal. 379, 383, 53 Pac. 813. The question presented to the court in that case was whether or not there could be a trust deed executed for the sole purpose of securing a debt and making conveyances of property in the event of non-payment of the debt. In that case the conveyance was made to a third person, but, as stated in *More v. Calkins*, supra, it is immaterial that the conveyance be made to the creditor. There was no question in the case of *Sacramento Bank v. Alcorn*, supra, as to the intention of the parties to execute a trust deed, as that intent was manifest. The question involved in the case at bar is whether or not the parties did in fact intend to or did in fact execute a trust deed. An inspection of the instrument executed between the parties shows that there was nothing more passed than an absolute grant with a defeasance, which is a common-law method of mortgaging property.

We conclude, therefore, that the transaction between the parties was a mortgage. In this connection it is proper to observe that the grantee in the absolute deed, the Moore & Scott Iron Works, did not execute a deed to the Chicago Bonding & Surety Company, when it attempted to transfer its interest, but assigned its interest in the indebtedness to that company, which company in turn assigned the note secured by the deed and executed a quitclaim deed to A. J. Sabath, the respondent. It was apparent therefrom that the grantee in the deed did not treat it as a trust deed but rather as a mortgage.

[2] Respondent objects to the consideration of the question which we have heretofore discussed, upon the ground that there are no

sufficient specifications of the insufficiency of the evidence to justify the finding that the instruments in question constituted a deed of trust. This question was incidental to the finding of the trial court as to the bar of the statute of limitations, and the bill of exceptions specified that the evidence was insufficient to justify the finding that the claim of the cross-complainant was not barred by the provisions of section 337, subd. 1, Code of Civil Procedure. This was the ultimate fact to which the consideration of whether or not the obligation was a mortgage or a deed of trust was germane. Furthermore, the bill of exceptions contained a specification that the decision was against law because of the erroneous conclusion that the defendant and cross-complainant is entitled to a judgment, "declaring the two instruments executed by the defendant Sanders to Moore & Scott Iron Works, on February 14, 1914, and thereafter assigned to A. J. Sabath, to be a valid and binding deed of trust securing the payment of the sum of \$1,848.74," etc.

The specifications of error, in the bill of exceptions were sufficient.

That portion of the judgment directing that the proceeds of the sale of the property after the payment of the mortgage indebtedness of the First Federal Trust Company be paid to A. J. Sabath, is hereby reversed, and the judgment in favor of A. J. Sabath is hereby reversed, and the trial court is directed to modify the judgment so that the amount received from the sale of the property over and above the claims of the plaintiff be paid to the defendant Louis Sanders, as executor of the last will and testament of Pauline Sanders, deceased, and that the judgment in favor of A. J. Sabath against Louis Sanders be eliminated from the judgment.

We concur: LENNON, J.; KERRIGAN, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.

192 Cal. 211

SACRAMENTO AND SAN JOAQUIN DRAINAGE DIST. et al. v. JOHNSON, State Treasurer, et al. (S. F. 10735.)

(Supreme Court of California. Oct. 10, 1923. Rehearing Denied Nov. 9, 1923.)

1. Levees and flood control ☞16—Rights of contract holders of claims determined by law existing as to sources of payment at time of contract.

The rights of contract holders of claims to be paid for reclamation work of the Sacramento and San Joaquin drainage district, entered into between the date of the passage and approval of the Act of 1917 (St. 1917, p. 1191), providing for the levy and collection of an assessment for the purpose of paying for such work, and the time of the passage and approval of St.

1919, pp. 1092, 1122, 1209, were bounded and confined by the law as it then existed providing for the means and sources from which the claims arising under such contracts were to be paid, that is, from the moneys to be derived from assessments to be levied upon the land-owners within the drainage district, and the only vested or enforceable right which the holders of such claims for work done under said contracts could have would be the right to require that the assessments be seasonably levied and collected, and rights of claimants for work done under contracts entered into after the passage and approval of the acts of 1919 were defined and bounded by those acts.

2. Levees and flood control ☞16—Contract holders with drainage district not in contractual relation with state and not entitled to relief therefrom.

As against the state itself, claimants for payment for work done under contracts with the Sacramento and San Joaquin drainage district had no right to demand the payment of their claims, nor the passage of any law providing for the same, since as between themselves and the state there existed no contractual relation.

3. Levees and flood control ☞16—Claims of contract holders reduced to warrants entitled to pay out of moneys actually reaching fund.

When the claims under contracts with the Sacramento and San Joaquin drainage district had been reduced to the form of registered warrants pursuant to the provisions of Reclamation Board Act, § 15, as adopted in 1913 (St. 1913, p. 272), and amended in 1915 (St. 1915, p. 1350, § 12), the rights of these contract claimants as general creditors were augmented so as to entitle the holders to have such warrants paid out of such moneys as had actually reached the drainage district fund from any source in the order of their registration, but they had no right either to compel the state to replete such fund by direct appropriations, or by the adoption of any other plan or method of repleting said fund.

4. Constitutional law ☞103—Levees and flood control ☞2—Claimants against drainage district held not to have vested right in fund, and statute regarding funds was valid.

Claimants and holders of warrants growing out of reclamation work of the Sacramento and San Joaquin drainage district had no vested right in funds created by St. 1919, pp. 1092, 1122, 1209, where none of the bonds authorized had been sold, and hence the amendment in 1923 of Reclamation Board Act, § 34, permitting a diversion of funds for emergency work in connection with such reclamation, was not invalid as violating obligations of contracts.

In Bank.

Application for writ of mandate by the Sacramento and San Joaquin Drainage District, by the Reclamation Board of the State of California, and another, to be directed to Charles G. Johnson, state treasurer, and another to compel cancellation of bonds. Writ granted.

Downey, Downey & Seymour, of Sacramento, for petitioners.

T. T. C. Gregory, of San Francisco, for warrant holders.

Edw. F. Treadwell, of San Francisco, for west side landowners.

U. S. Webb, Atty. Gen., and Robert T. McKisick, Deputy Atty. Gen., for respondents.

RICHARDS, Justice pro tem. The petitioner herein applied to this court for a writ of mandate commanding the respondents herein as state treasurer and state controller to cancel certain bonds issued under and in accordance with the act of the Legislature approved May 27, 1919, entitled "An act to authorize the issuance and sale of bonds of the Sacramento and San Joaquin drainage district," based upon assessments levied by the reclamation board upon land in said district (Stats. 1919, p. 1092) to the extent and in the sum of \$610,000, and further commanding said state treasurer to credit the sum of \$610,000 to the Sacramento and San Joaquin drainage district fund, particularly designated as "Sutter-Butte by-pass assessment No. 6, emergency fund," and further commanding the respondent Ray L. Riley, as controller of the state of California, upon compliance with the above commands on the part of the state treasurer, to issue a warrant drawn on the state treasury in the sum of \$7.67 in favor of the reclamation board and payable out of said sum of \$610,000 when credited to said emergency fund, and directing the said treasurer to pay said warrant out of said fund. The foregoing acts on the part of the respondents are sought to be compelled under and in compliance with the provisions of an act of the Legislature adopted on June 2, 1923, purporting to amend section 34 of the Reclamation Board Act, which latter act was originally adopted at the extra session of the Legislature in 1911 (St. 1911, p. 117), and has been from time to time amended, as will hereinafter appear. An answer to said petition has been presented by the respondents which raises the question of law as to the sufficiency of said petition and which further proceeds to set forth certain facts which do not contradict, but rather amplify, the facts set forth in the petition, and which answer also advances certain deductions on the part of said respondents furnishing reasons why, as a matter of law, said petition should not be granted. The chief issue presented for our consideration by these pleadings involves the validity of the said act of the Legislature approved June 2, 1923.

In order to a clear comprehension of the issues thus presented, it will be necessary to have in mind the history and course of state legislation upon the subjects of reclamation and flood control in the region affected by the course and overflow of the Sacramento river, and particularly of that portion there-

of which now constitutes the Sacramento and San Joaquin drainage district. The history of the conditions which evoked such legislation, beginning with the year 1911 and occupying the attention of every legislative session between that time and the year 1923, inclusive, is quite clearly set forth in our decision in the Matter of the Proceedings to Validate Sutter-Butte By-Pass Assessment No. 6, etc., 218 Pac. 27, recently filed.

The basis of respondents' refusal respectively, to do the acts required by the resolutions and orders of the reclamation board relative to the retirement of the unsold bonds of assessment district No. 6, to the amount and extent of \$610,000, and the deposit of the money so applied to the redemption of said bonds in the emergency fund in the state treasury upon which the warrant of the petitioner has been drawn, is that the statute of 1923, which proposes to legalize such a diversion of moneys of the state from the purposes and specific funds to which it is claimed that they had been devoted by previous legislation, is void for the reason, chiefly, that prior thereto and pursuant to such previous legislation, contracts had been entered into by the reclamation board, the execution of which had resulted in the creation of claims against said drainage district, which had taken on the form of warrants drawn upon the specific funds of said district and made payable out of such funds by the express provisions of such previous legislation; and that the diversion from said funds of the specific moneys provided for by the act of 1923 above referred to would amount to a violation of the obligations of said contracts and would thus be void under the federal and state Constitutions. A brief résumé of the particular legislation and of the acts of the reclamation board thereunder in pursuance of which said contracts were entered into, said claims created, and said warrants drawn, will be necessary in order to determine the merits of the foregoing contention.

The work of flood control of the waters of the Sacramento river and its tributaries, of improvement of navigation, and of the reclamation of the lands susceptible to overflow from said river and its tributaries, had its inception in the act of the Legislature passed at the extra session of 1911, to which reference has above been made. This act was amended and supplemented by the act of 1913 (Stats. 1913, p. 252) whereby the Sacramento and San Joaquin drainage district was created and its boundaries defined, and by which also the powers of the reclamation board called into being by the earlier act were greatly enlarged. By the terms of said last-named act the reclamation board was empowered to proceed by purchase, condemnation, or other lawful means, with the acquisition of all lands, rights of way, and other property and material necessary or requisite for by-passes,

weirs, cuts, canals, levees, overflow channels, and other ways and means for achieving the purposes of the act; and was also empowered to make contracts and to do all other things necessary to the accomplishment of such purposes. In order to the exercise of these powers and the achievement of these purposes, the reclamation board was, by section 13 of said act of 1913, directed to levy and collect an assessment upon the lands within said drainage district. All moneys collected by means of such assessment were in the first instance to be paid to the county treasurer of the county within which the lands affected thereby were situated and were by him to be deposited in the state treasury to the credit of said drainage district in a fund to be designated and known as the "Sacramento and San Joaquin drainage fund," and which moneys when so deposited were to be paid out upon warrants of the state controller issued upon said fund whenever drafts drawn upon said fund were presented by the reclamation board and when there was sufficient money in said fund to pay the same. The act expressly provided that all moneys raised by such assessment should be expended only for works of reclamation and other expenditures beneficial to the lands so assessed. In case there was not sufficient moneys in said drainage district funds to pay said warrants drawn for such purposes when presented, the state treasurer was directed to indorse on said warrants the date of presentation and to register the same and thereafter such warrants were to bear interest at the usual rate and were to be paid in the order of their registration, and were to be considered as contracts in writing for the payment of money by said district. Under the foregoing provisions of the statutes of 1911 and 1913, as further amended and amplified by the act of 1915 (Stats. 1915, p. 1338), the work of reclamation and flood control proceeded within the area covered by said drainage district; the preliminary stages of said work performed prior to the act of the reclamation board in the levy and collection of funds through the process of an assessment as provided for in said acts being paid for by special appropriation made by the Legislatures of 1911, 1913, 1915, and 1917. In November of the latter year the reclamation board had so far proceeded with the preliminaries as to be prepared to adopt, and it did then adopt, a plan or project for the carrying forward of the main work of reclamation and flood control within that certain portion of the general drainage district which it then designated as "Sutter-Butte by-pass project No. 6," and thereupon and at said time proceeded with the work of levying an assessment for the collection of funds to be applied in the manner above provided to the payment of the costs and expenses incident to the carrying out of such plan or project. Contracts were

thereafter from time to time entered into for the performance of such work, and as from time to time money came to be due and payable upon such contracts, the reclamation board drew its drafts upon the assessment district funds in the state treasury for the payment of the same and warrants were thereupon drawn upon the state treasurer for the same. For a reason which will presently appear, the particular drainage district fund upon which these warrants were drawn became presently depleted, with the result that said warrants when presented and unpaid were registered by the state treasurer in the manner above set forth as payable out of said fund. The depletion of said fund and consequent registration of said warrants were due to the delays and impediments in the course of the levy and collection of the assessment from which the funds were to be derived for the repletion of the said fund and the payment of the claims and the warrants payable out of the same. While the work of reclamation and flood control was thus proceeding and while the reclamation board was struggling with the delays and impediments in the way of collection of the assessment which was to provide the means of payment for such contract work, the Legislature of 1919 met and was promptly made aware of the delays and difficulties in which the district was involved.

In order to relieve the situation created by the urgent necessity of proceeding with the projected work of reclamation and flood control and by the fact that the claims and demands thus far incurred during the progress of said work were accumulating in the form of registered unpaid interest-bearing warrants, the Legislature adopted three enactments having special reference to the situation above outlined and intended to supply a means for relieving the same. These three acts were each approved on May 27, 1919, and were each to take effect on July 25, 1919, and since they had relation to the same subject-matter, and since they each referred to the other and were thus expressly interrelated, they should be read together for purposes of interpretation. The first of these acts to be considered is the act entitled "An act to authorize the issuance and sale of bonds of the Sacramento and San Joaquin drainage district based upon assessments levied by the reclamation board upon lands in said district." Stats. 1919, p. 1092. The second of said amendments (Stats. 1919, p. 1122) consisted of certain specific amendments to the act of 1911 and the later acts of 1913 and 1915 amending the same. The only one of said amendments which is germane to the question before us is that one which consisted in the addition of a new section to the Reclamation Board Act, numbered section 34, to be more particularly hereinafter reviewed. The third of said enactments (Stats. 1919, p.

1209) was an act making an appropriation of \$3,000,000 from the state treasury "for the purpose of co-operation in the construction of such works included in and provided for by that certain project heretofore adopted by the reclamation board known as Sutter-Butte by-pass project No. 6 of the Sacramento and San Joaquin drainage district." The intent and purpose of this act, as expressed in section 2 thereof, was to provide a total of \$3,000,000 for the purpose expressed in section 1 thereof, while by section 1 it was provided that such appropriation when paid to the reclamation board was to be applied to the purposes set forth herein "as it is now or may hereafter be provided by law." The said appropriation was payable as follows: \$10,000 upon the act becoming a law, \$300,000 upon the 1st day of July, 1921, \$300,000 on the 1st day of July, 1922, and \$300,000 on the 1st day of July of each year thereafter until the whole amount of said appropriation had been paid over to the reclamation board.

[1-3] Before dealing more particularly with these three contemporaneous acts of the Legislature of 1919, it will be proper to consider the state of the indebtedness of the drainage district which is represented in outstanding unpaid and registered warrants issued upon claims for reclamation and flood control work done during the past several years under contracts with the reclamation board. We are not precisely informed by the record before us as to the inception of said work, nor of the exact dates when these claims came into being thereunder which have ripened into the warrants which are at present outstanding and unpaid, nor are we exactly informed as to when such work ceased, nor as to when the last of said claims in point of time merged into a warrant and was registered by the state treasurer. We are informed by the petitioner herein that the first of said warrants to be issued on account of such work bore a date as early as January 5, 1918, and from this date it may be fairly inferred that all of the contracts under which reclamation and flood control work was done in said drainage district were entered into and proceeded with after the enactment of the act of 1917 (St. 1917, p. 1191) empowering the reclamation board to proceed with the levy and collection of an assessment upon the lands of said district for the purpose of paying for such work as could be lawfully charged against the property of the landowners within said district. Between said date and the date of the approval of the several acts of 1919, according to the averments of the petition herein, claims for approximately \$1,340,358.47 had been registered in the form of warrants for work done prior to the passage and approval of said acts. As to the rights of these contract holders to be paid for work done under their said contracts entered into between the date of the passage and approval of the act

of 1917 providing for the levy and collection of an assessment for the purpose of paying for such work, and the time of the passage and approval of said acts of 1919, it would seem to be clear that they were bounded and confined by the law as it then existed, providing for the means and sources from which the claims arising under such contracts were to be paid, viz.: From the moneys to be derived from an assessment or assessments to be levied upon the landowners within said drainage district in accordance with the provisions of the statute of 1917, and that the only vested or enforceable right which the holders of such claims for work done under said contracts could have would be the right to require that assessments should be seasonably levied and collected by the reclamation board for the purpose of providing a fund for the payment of their said claims. As to claimants for work done under contracts entered into after the passage and approval of the acts of 1919, the vested rights of these claimants are bounded and defined by the terms of those several enactments. Altogether these outstanding claims and warrants coming into being between January 5, 1918, and the date of filing the petition herein, amount, with interest calculated to July 1, 1923, to the sum of \$6,957,465.08. As against the state itself the claimants for payment for work done under contracts with the reclamation board had no right to demand the payment of their claims nor the passage of any law providing for the same, since as between themselves and the state there existed no contractual relation. Neither did these contract holders having claims antedating the passage and approval of the several acts of 1919 have any vested right to enforce their claims arising out of work done under said contracts against the reclamation board or the drainage district by any other method than that of an assessment for the payment of said claims, since that was the only statutory mode in existence at the time such contracts were entered into, and hence that mode was the measure of the powers of the board in entering into the same. When the claims of these contract holders had been reduced to the form of registered warrants pursuant to the provisions of section 15 of the Reclamation Board Act, as adopted in 1913 and amended in 1915, the rights of these contract claimants as general creditors were augmented so as to entitle the holders of registered warrants based upon said claims to have such warrants paid out of such moneys as had actually reached the drainage district fund from any source in the order of their registration. But said warrant holders had no right either to compel the state of California to replete said fund by direct appropriations of money from the state treasury or by the adoption of any other plan or method of repleting said fund and thereby

facilitating the payment of said warrants. Such, we think, must be held to be the extent and limitation of the vested rights of the contract claimants and warrant holders prior to the adoption of the several statutes which the Legislature enacted in 1919 in an endeavor to relieve the then entangled and embarrassing situation.

Pursuant to the act of the Legislature of 1917 empowering the reclamation board to proceed with the levy and collection of an assessment for the payment of claims arising out of the construction of the Sutter-Butte by-pass project No. 6, the said reclamation board in the month of November of that year initiated proceedings for the levy and collection of such assessment, and thereafter, somewhat tardily it is true, and in the face of protracted litigation challenging the legality of such assessment, has proceeded with the statutory steps toward the enforcement of the same. This assessment, through proceedings instituted in accordance with the provisions of the act of 1919 (Stats. 1919, p. 1092), was validated, and such validation was affirmed by this court upon appeal in its recent decision, to which reference has above been made. (Cal. Sup.) 218 Pac. 27. The amount of the estimated cost of completion of the construction of the Sutter-Butte by-pass project No. 6 as finally fixed by the reclamation board for the purposes of such assessment was \$8,155,798.70. The total amount of claims for work done upon said project under construction contracts and for which warrants have been issued and registered and are now outstanding is, with interest computed up to July 1, 1923, the sum of \$6,956,465.08. It would thus appear that the holders of these outstanding warrants for work done under contracts in the construction of the Sutter-Butte by-pass project No. 6, prior to the acts of 1919, have been accorded every right to which they were entitled under the statutes in force when such contracts were entered into, to be assured payment of their said claims through the levy and collection of an assessment which was to provide and which is in the course of providing ample funds for the payment of all outstanding warrants based upon such claims. As to the holders of claims or warrants for work done under contracts with the reclamation board subsequent to the passage and approval of the several acts of 1919, it is clear that the vested rights, if any, of this class of claimants, are to be measured by the provisions of the Reclamation Board Act as modified by these several acts.

The respondents herein, purporting to represent the holders of these outstanding and unpaid warrants of both classes, insist that the claimants for work done under contracts entered into with the reclamation board subsequent to the passage and approval of the act of 1917 have gained some additional rights by virtue of the provisions of one or

the other of the statutes of 1919, to the terms of which reference has above been briefly made. This claim will require a more particular consideration of the provisions of each of said acts relied upon as supporting the same. The first to be considered is the bonding act. Stats. 1919, p. 1092. By the terms of this act it was provided that whenever any assessment levied by the reclamation board upon lands within the Sacramento and San Joaquin drainage district had been completed to the point where the said board was ready to make its order approving the same, the said board might at the time of making said order and as a part thereof determine that in its judgment it would be for the best interests of the owners of land in said drainage district affected by said assessment to issue bonds for the purpose of obtaining money to pay the cost of the work or other expenses for which such assessment was levied; and in the event it did so determine, then the subsequent proceedings in and about the matter of such assessment and the collection thereof and all other proceedings for the raising of money to be used for the purposes for which said assessment was levied were to be as in this act provided, notwithstanding any other provisions in regard thereto in said Reclamation Board Act contained. The act then proceeded to provide that in the event the reclamation board did so determine to issue bonds, as above provided, its first step in relation thereto was to be that of instituting judicial proceedings for the validation of its said assessment upon which such bond issue was to be predicated, and that upon the validation of such assessment, by and in accordance with the judgment entered in such judicial proceeding, the said assessment and the list thereof conforming with such judgment should, by the reclamation board, be filed in the offices of the county treasurers respectively of the counties wherein lay the lands affected by such assessment, and such assessment and lists, when so filed, should constitute a lien upon such lands and the amounts due thereon should, within 30 days thereafter, be paid to such respective county treasurers by the owners of the lands subjected to such lien, whereupon the lien of such assessment should, as to the landowners paying said assessment, cease. At the expiration of said 30 days, if any portion of said assessment remained unpaid, the reclamation board was required to call an election in that part of said drainage district affected by said assessment for the purpose of determining whether the money necessary to pay the cost of the works and other expenses for which said assessment had been levied should be raised by calls upon the assessment remaining unpaid or by the issuance of bonds as provided in said act and as theretofore determined upon by said board; and if,

upon such election, a majority of the votes cast thereat was in favor of the issuance of such bonds, they should accordingly be issued, and when so issued should by the reclamation board be delivered to the state treasurer; and when so received by the state treasurer said bonds should be placed to the credit of the said drainage district, and thereafter said bonds should by the state treasurer be sold when and as directed by the reclamation board for the best price obtainable therefor, but in no event for less than 95 per cent. of the face value of such bonds and the accrued interest thereon; the money derived from such sale, if any, of said bonds, to be by the state treasurer placed to the credit of that portion of the Sacramento and San Joaquin drainage district affected by said assessment and in a fund to be designated as the construction fund of the assessment upon which said bonds were based and which fund was to be drawn upon and expended for the payment of warrants drawn by the state controller at the request of the reclamation board in payment for the work and other expenditures for which said assessment had been provided. The act then goes on to provide that when the bonds of the said drainage district have been authorized and issued as above set forth, the reclamation board should determine the amount of said assessment to be from time to time collected for the payment of the principal and interest of said bonds as the same should become due, and should proceed with the collection of the same by the procedure provided for in said act; the sum so received through the collection of said assessments to be paid in the first instance to the county treasurer of the county wherein the lands affected by said assessment were situated, to be by him transmitted to the state treasurer, and to be placed by the latter to the credit of the bond fund of said drainage district and to be devoted to the redemption of said bonds when due. The act finally provided that if within one year from the time when said bonds had been authorized to be issued as above provided, they should not have been sold or disposed of, the reclamation board might, in its discretion, cancel all proceedings in relation to such bond issue and thereafter call for the payment of assessments in such installments as it should then determine and in accordance with the terms of the Reclamation Board Act.

[4] From the foregoing résumé of the bond issue act of 1919, it will be seen that the state Legislature, in an apparent endeavor to hasten, not only the work of reclamation and flood control within said drainage district as projected and thus far carried forward under the previous enactments, but also to expedite the payment of claims already accrued under contracts for such work and of warrants issued in recognition of the

validity of such claims, attempted to make a radical change in the method theretofore provided for meeting the payments due or to become due upon such claims and warrants. The holders of such claims and warrants as were then outstanding for work done prior to the passage and approval of said bonding act might possibly have objected to such change in method as providing a less certain or more dilatory means for the payment of the same. No such objection, however, appears to have been made, and the fair inference is that the holders of such claims and warrants expected their chances for speedy payment of the same to have been enhanced thereby. It is difficult to perceive how any change, in what these claimants have been pleased to term their vested rights, has been effected by the provisions of said bonding act. It was a matter entirely within the discretion of the reclamation board to determine whether or not it would adopt and attempt to carry through a bond issue under the provisions of the said act, and this discretion could at no time have been compelled by these claimants prior to its exercise. Nor could they, after its attempted exercise, demand any advantage therefrom until the experiment of a bond issue had eventuated in the successful sale of the bonds and the deposit of the sum realized therefrom in the special fund against which the warrants of these claimants had been drawn. No such sale or deposit has ever been made, and hence the additional rights of these warrant holders, if any were created by said bond issue act, have never so far ripened as to have entitled them to receive any money whatever from the special fund in the state treasury upon which their warrants have been drawn, since the record herein discloses that none of the bonds provided for by said bonding act and authorized and issued in compliance therewith have ever been sold. The warrant holders have therefore been in no wise advantaged thus far by the adoption of the bonding act nor by any proceedings instituted thereunder for an issue of bonds which have thus far been barren of results. As to the claimants for work done since the passage and approval of said bonding act the same reasoning applies. Until such bonding act had been fruitful in the sale of bonds and the deposit in the particular fund in the state treasury upon which these warrants were drawn, they had no vested or enforceable right to receive any money in payment of their claims save that dependent upon the contingency of the sale of bonds and deposit of their proceeds as provided for in said act.

The respondents herein, however, claim that these warrant holders would have been advantaged by the adoption of the bonding act and by the proceedings taken thereunder by the reclamation board, had the provisions

of the three contemporaneous acts adopted by the Legislature of 1919 been given the effect contemplated by it at the time of their adoption.

The second of said acts of 1919 to be more particularly considered is the act adding section 34 to the Reclamation Board Act (Stats. 1919, p. 1122). The first paragraph of said section 34 as thus amended provides that all moneys which should thereafter be paid to the reclamation board by the state of California under the several previous acts making appropriations of money to be expended by or under the direction of said board to aid in carrying out the project adopted by said board for Sutter-Butte by-pass assessment No. 6, and all moneys paid to such reclamation board under any future modifications or amendments to said acts "or by any law of similar import which has been or may be hereafter adopted by the Legislature of the state of California, shall be applied on said Sutter-Butte by-pass assessment No. 6, by said reclamation board to the pro rata payment of such portions of said assessment as are based upon flood control benefits," in the manner specified in said section. The second paragraph of said section 34, referring to the provisions of the preceding paragraph thereof, reads in part as follows:

"The money so received by the reclamation board from the state shall, unless bonds based upon said assessment shall have been authorized by law, be by the reclamation board paid over forthwith to the state treasurer and" be "credited to the funds of said assessment to be used and expended in the same manner as funds collected from land owners upon said assessment. But if at the time of the receipt of any such money by the reclamation board from the state, bonds based upon said assessment shall have been authorized by law, the money so received from the state shall be deposited by the reclamation board with the state treasurer to be held as a special fund for the redemption of such bonds and shall, under the direction and as required by the reclamation board, be applied to the payment and cancellation of such bonds."

The remainder of the section proceeds to give in detail the manner of such application.

The third in the order of passage of the said acts of 1919 was the act providing for the appropriation of the sum of \$3,000,000 from the state treasury for the purpose, as expressed in section 1 of said act "of co-operation in the construction of public works included in and provided for by that certain project heretofore adopted by the reclamation board known as Sutter-Butte by-pass project No. 6 of the Sacramento and San Joaquin drainage district." The act providing for this appropriation does not in itself provide for the deposit of the sums of money to be paid in installments during the decade following the date of said appropria-

tion in any particular fund subject to the control and disposition of the reclamation board, nor does it provide for what particular purpose the moneys derived from said appropriation are to be used by said board other than by the general provision thereof that the money thus appropriated is to be paid to said reclamation board "for the benefit of said Sacramento and San Joaquin drainage district, in connection with said Sutter-Butte by-pass project No. 6, or any modifications or amendments thereof that may hereafter be made, in accordance with law, the same to be applied as it is now or may hereafter be provided by law." It is to be noted, however, in this immediate connection, that the contemporaneous act of 1919 amending section 34 of the Reclamation Board Act does contain a provision having direct reference to the appropriation provided for in the act immediately under review. It is embraced in that portion of said amendatory act which provides that all money which may be paid to the said reclamation board to be expended under the direction of said board in aid of carrying out the project adopted by the reclamation board for the Sutter-Butte by-pass assessment No. 6 under any statute then in existence "or by any law of similar import which has been or may hereafter be adopted by the Legislature of the state of California shall be applied on said Sutter-Butte by-pass assessment No. 6 by said reclamation board to the pro rata payment of such portions of such assessment as are based upon flood control benefits"; and said amendatory act further provides that—

"The money so received by the reclamation board from the state shall, unless bonds based upon said assessment shall have been authorized by law, be by the reclamation board paid over forthwith to the state treasurer and by him credited to the funds of said assessment to be used and expended in the same manner as funds collected from landowners upon said assessment. But if at the time of the receipt of any such money by the reclamation board from the state bonds based upon said assessment shall have been authorized by law the money so received from the state shall be deposited by the reclamation board with the state treasurer to be held as a special fund for the redemption of such bonds and shall, under the direction and as required by the reclamation board, be applied to the payment and cancellation of such bonds."

Such was the condition of the law relating to the execution of the plan or project of the reclamation board for reclamation and flood control within the Sacramento and San Joaquin drainage district No. 6 prior to and including the legislation of 1919, a résumé of which has just been made. The holders of the claims for work done from the year 1917 on and up to the adoption of the several acts of 1919 were to be paid the

sums due them under the terms of their respective contracts for such work primarily derivable from an assessment or assessments to be levied and collected from the landowners of the drainage district benefited by said work when such assessment or assessments had been paid into the state treasury and credited to the particular fund upon which warrants representing their said claims had been drawn. By the bonding act of 1919 a substitute method of payment was devised by which bonds of the drainage district were to be voted, issued, and sold; the money derived therefrom to be deposited in the state treasury to the credit of the particular fund upon which these warrants were to be drawn. In the event of the authorization, issuance, and sale of such bonds, the moneys of said drainage district derivable from such assessment or assessments as had been approved and ordered by the reclamation board was not to be paid immediately into the fund devoted to the payment of the claims of said warrant holders, but was to be paid into a fund in the state treasury known as the bond fund, and was to be applied to the redemption of such of the bonds of the drainage district as had been sold and the proceeds applied to the payment of said warrants. As to appropriations made by the state in aid of such project, these, in the absence of any other express direction, were to be applied to the payment of claims and warrants arising out of the prosecution of said project, unless bonds had been authorized by law and by the reclamation board as the substituted source for the funds to be applied in payment of such claims; but in the event that such bonds had been so authorized, such state appropriations were to be deposited by the reclamation board with the state treasurer to be by him held as a special fund for the redemption of such bonds, with the reservation, however, made by the Legislature in the appropriation act of 1919, that the appropriation of \$3,000,000 therein made was to be applied "as it is now or may hereafter be provided by law." While the law was in this condition; while the assessment which had been authorized and approved by the reclamation board as the primary source from which the claimants of moneys due for work done under said construction contracts were to be paid was being delayed by litigation; while the reclamation board had determined upon and authorized a bond issue from the sale of which bonds a more immediate resource was expected to provide a means for the payment of outstanding warrants for work done upon said project—the funds of the reclamation board were enriched by the payment of certain installments on account of the said appropriation of \$3,000,000 as provided in said appropriation act. This sum of money amounted, in the spring of 1923, to \$610,000 and was in the way of

being further replenished by the payment of an additional installment of \$300,000 on July 1, 1923, when the fourth payment fell due according to the terms of the act making said appropriation. This sum of \$610,000 had not been deposited in any particular fund for the apparent reason that none of the bond issue of the drainage district had been sold and there was, therefore, as yet no occasion for the sequestration of this or any other money in the special bond fund provided for by the amendment to section 34 of the Reclamation Board Act; nor was said money derived from said appropriation available for the payment of outstanding warrants at said time under the expressions of said amendment to section 34 of said Reclamation Board Act. This being the state of the law and of the facts with respect to said sum of \$610,000, it is impossible to conceive what basis the holders of outstanding warrants, for work done either before or after the adoption of these several acts of 1919, could have for their claim of a vested right to an application of said sum of \$610,000 or of any portion thereof to the payment of their warrants unless it might be held to consist in the claim that if said bonds were not sold or salable, and if for that reason their issue was withdrawn under the terms of the act providing for their issuance, said warrant holders would be entitled, to fall back upon the assessment for the payment of their claims, in which event they would have become entitled under the terms of said amendment of the Reclamation Board Act to the application of all moneys derived from state appropriations to the special fund of the drainage district from which they were entitled to have their warrants paid in the order of their registration. This argument might have a certain persuasiveness were it not for the particular terms of the act by which said appropriation was made and by which it was expressly provided that said appropriation was to be applied "as it is now or may hereafter be provided by law." This express reservation of power in the Legislature to direct the application of this particular appropriation to other uses by the reclamation board in the course of construction of said public works negatives the possession of any vested right in the holders of outstanding warrants to have the same or any portion thereof irrevocably applied to the payment of their warrants whenever it shall appear that the Legislature has made application thereof to other uses in the exercise of its reserve of power so to do. It is to be noted in this connection that the bonding act in at least one essential respect denies, to claimants and warrant holders for contract work thus far done, the right to have the entire amount of said bond issue of, or any sum derived from the sale of such bonds, applied preferentially to the payment

of their claims, since the act provides in section 40 thereof:

"With the money received from the sale of bonds, or with said bonds as hereinbefore provided, the reclamation board as the managing body of said Sacramento and San Joaquin drainage district shall proceed with the construction and completion or carrying into execution of the works or project for the purpose of which the assessment upon which such bonds are based was levied, in order that the same may be carried out and completed according to the best judgment of said board and without unnecessary delay."

When this section of said act is read together with its contemporaneous act making the \$3,000,000 appropriation, it will appear that the Legislature intended that the funds derivable by the reclamation board from either source might be used to pay for either past or future construction work untrammelled by any vested rights in the holders of claims or warrants for work already done.

We come now to a consideration of the act of the Legislature approved June 2, 1923, the provisions of which the petitioner herein seeks to have enforced by a writ of mandate issued in the instant proceeding. The Legislature by the terms of said act undertook to exercise the power expressly reserved to it by the provisions of the acts of 1919 above considered. It did so by the adoption of a further amendment to the Reclamation Board Act as enacted in 1919 by adding thereto the following provision:

"If, however, bonds based upon said assessment shall have been authorized, but said bonds or any of them, shall not have been sold, upon the receipt of any sum of money under said act or acts of similar import, and thereafter and prior to the sale of said bonds, or any of them, the reclamation board may order the cancellation of such number of said bonds so authorized, but not sold, as will, at par, equal the amount of money then on deposit in the state treasury, which may legally be used for the purpose of canceling such unsold bonds as hereinbefore provided and the total of the bonds to be issued shall be reduced by such amount of the money on deposit in the state treasury, and no bonds shall be sold to an amount in excess of the amount originally authorized, as reduced by the bonds so canceled at par. The landowners shall be credited with an amount equal to the amount of bonds so canceled, said sum to be applied on the Sutter-Butte by-pass assessment No. 6 in the pro rata payment of such portions of said assessment as are based upon flood control benefit set opposite any tract of land in the same manner and to the same extent as hereinbefore provided, so that the total amount credited on said assessment for flood control benefit shall equal the money on deposit in the state treasury. The money on deposit in the state treasury at the time these bonds are so canceled, shall thereupon be credited to a fund entitled 'Sacramento-San Joaquin drainage district fund, Sutter-Butte by-pass assessment No. 6, emergency fund,' which fund is

hereby created and shall be paid out on warrants of the controller on said fund upon order of the reclamation board, and the controller is hereby directed to issue warrants upon said fund whenever drafts of the reclamation board on said fund shall be presented to him, and the state treasurer is hereby directed to pay such controller's warrants when there is sufficient money in said fund."

The intent of this amendment to section 34 of the Reclamation Board Act as expressed in the further provision of said act of 1923 was as follows, viz.:

"To make said funds available for the immediate use of the reclamation board in contracting for the completion of Sutter-Butte by-pass project No. 6, and the reclamation board shall contract on a cash basis for additional work included in said project and assessment, but not yet done, and the pay for which funds are not available, and shall meet the payment on said contract or contracts out of said emergency fund hereby created to the extent thereof."

The act of 1923, by the provisions of section 2 thereof, was made an urgency measure to go into immediate effect, for the reason, as declared therein, that—

"The Legislature hereby declares that it deems it necessary for the immediate preservation of the public health and safety that this act shall go into immediate effect by reason of the following facts, to wit: That unless sufficient levees included in project No. 6 but not yet built and to construct which funds are not available, are constructed without delay, the effect will be to overflow and greatly damage a large area of valuable land within the boundaries of project No. 6 and damage levees already constructed, all of which will imperil the property and safety of the inhabitants within said boundaries and the land owners assessed by said assessment No. 6," etc.

It is impossible for us to conceive how any vested rights of the holders of claims or warrants for contract work already done under any of the previous acts providing for the reclamation and flood control of the Sacramento and San Joaquin drainage district can be injuriously affected by the provisions of the foregoing act. These claimants have never at any time been entitled by the provisions of any previous acts, as we have seen, to receive any money whatever from the state or from the drainage district until the source from which such moneys were to be derived for the payment of their claims or warrants, whether that source was an assessment or a bond issue and sale or a direct appropriation from the state treasury, had resulted in the actual deposit in the special fund expressly set apart and designated as the fund to be devoted to the payment of their said claims and of their said warrants based thereon in the order of their registration. So long as the assessment method was the only means provided for the repletion of said special fund from which these claims were

payable, the utmost right of said claimants was that of insisting that such assessment should be ordered, levied, and collected, and the amount realized therefrom deposited in said special fund, as provided by law. When the Legislature by the bond issue act of 1919 undertook to substitute said authorization and issue of bonds in the manner and to the extent provided in said act, the utmost right of those of said claimants holding claims or warrants for contract work done prior to the passage of said act was either to object to said proceeding as an invasion or postponement of their rights under the previous assessment method, or to accept said substitute therefor as the method more likely to expedite the payment of their claims, in which event they must be held to have consented to await the sale of said bonds, which these claimants could by no means compel, and the deposit of the moneys derived therefrom in the particular fund upon which their warrants had been drawn; and even this contingent right was subject to the power of the reclamation board, under the express terms of section 40 of the bonding act, to apply said bonds or the moneys derived from the sale thereof to future construction work. In the event said bonds were not sold within one year after the authorization of their issue and were for that reason canceled by the reclamation board, or in the event that any portion thereof not sold were applied to other construction work, or in the event that said bonds were sold and the money derived from such sale devoted to other construction work, these contract claimants had no other recourse but to fall back upon the assessment, require its collection and the application of its proceeds to the proper fund from which fund claims were to be payable and against which their warrants had been drawn. As to appropriations by the state in aid of said project, these were matters of grace which these contract claimants could by no means compel the state to exercise and over which the Legislature had complete control. In the case of the particular appropriation of the sum of \$300,000 by the Legislature of 1919, such control over the destination of its installment payments was expressly reserved in the act making the appropriation, and it therefore follows that the Legislature of 1923, in directing the devotion of the sum of \$610,000 already paid into the state treasury under the terms of the former act but not as yet deposited in any special fund, to the emergency uses provided for in said act, was not only acting entirely within the scope of its reserve powers, but was not invading any right possessed by these claimants to any other disposition of said fund. It is contended, however, that the application of said sum of \$610,000 to the cancellation of said unsold bonds to an extent equal at their

par value to said sum of \$610,000 has diminished to that extent a resource upon which these claimants were entitled to rely for the ultimate payment of their claims; that resource being the gross amount of the bond issue. There are several answers to this contention, the first of which is that already suggested, that these contract claimants have no vested right to payment out of any resource provided by these several statutes for the raising of moneys to be devoted to the payment of their claims, at least until the moneys to be derived therefrom have finally reached the special fund out of which alone their registered warrants are to be paid. Whether that fund shall be replenished through the sale of the unsold bonds and the deposit of the money derived therefrom in the said special fund is a pure contingency, the happening of which they have no power to compel and upon which no vested right could be predicated. There is another, and it would seem sufficient, answer to this contention. It is that the amount at par value of the unsold bonds, after the deduction therefrom of the block of bonds to be retired and canceled under the provisions of the act of 1923, is approximately \$7,418,147.75. The total amount of registered and outstanding warrants with interest computed to July 1, 1923, amounts to a sum not in excess of \$6,957,465.08. If these remaining bonds should be sold for a sum not less than 95 per cent. of their par value, as provided in the statute, there would still be realized therefrom an amount amply sufficient to pay the warrants of these claimants in full. Their rights, if any, would not therefore be injuriously affected by the proposed cancellation of said bonds to the extent of \$610,000 at their par value, as provided for in said statute and proposed by the reclamation board. It is, however, further urged by the respondents herein that in addition to the aforesaid sum of outstanding warrants payable through the sale of said bonds there has been another and further indebtedness created by the reclamation board and made chargeable upon the funds of said drainage district, and which, added to the amount of such warrants, has rendered the entire sum payable out of the bond issue in question much larger than the original amount of such bond issue. The indebtedness referred to is that arising out of a contract entered into on July 28, 1922, between the reclamation district, representing said drainage district, and reclamation district No. 1500, whereby it has been agreed that the drainage district shall take over the reclamation works of said reclamation district for the purchase price of \$2,876,566.60, of which sum it was agreed that a sum of \$1,000,000 was to be immediately paid, the balance to be payable at a later date, out of the assessment which had therefore been ordered and levied

upon the lands within said drainage district. It appears, however, from the record before us, that the claim of the reclamation district No. 1500 for the aforesaid sum of money had not yet been reduced to the form of a registered warrant drawn against any particular fund of said drainage district at the time of the approval of the act of 1923 in question, and that with regard to said claim the said reclamation district No. 1500 was up to said time merely a general creditor of the drainage district, holding no registered warrant for its said claim. It could not, therefore, be affected injuriously by the operation and effect of the act of 1923, nor could the existence of its claim as a general creditor of the drainage district be held to in any wise affect the rights of such contract claimants, whatever they may be, whose warrants had been registered prior to the making of said contract and who had thereby become entitled to priority in the payment of their claim out of the particular fund upon which their warrants were drawn, when the same had been repleated upon the sale of the bonds provided for in said bond issue.

The respondents herein make certain other contentions which we do not deem to have sufficient merit to deserve separate consideration. Our conclusion is that the act of 1923, upon which the petitioner herein relies, is valid, and hence that said petitioner is entitled to the relief which it seeks upon this application. The claim upon which the petitioner's said application is predicated is one arising out of a contract for work done within said drainage district under and in pursuance of the emergency provisions of the statute of 1923. It is ordered that the writ of mandate issue as prayed for in said application.

We concur: WILBUR, C. J.; LENNON, J.; LAWLOR, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.

192 Cal. 186

MONK v. EHRET. (S. F. 10199.)

(Supreme Court of California. Oct. 8, 1923.
Rehearing Denied Nov. 6, 1923.)

1. False imprisonment ☞20(1)—Complaint held to state cause of action.

A complaint alleging that defendant seized plaintiff and called a police officer, and that defendant and the officer forced plaintiff into an automobile and took him to a police station where he was confined, *held to state* a cause of action for false imprisonment, though it did not allege that the imprisonment was unlawful.

2. Malicious prosecution ☞47—Allegation of want of probable cause and favorable termination necessary.

A complaint for malicious prosecution must allege a want of probable cause for instituting

the prosecution and that the proceedings terminated favorably to plaintiff.

3. False imprisonment ☞20(1)—Surplusage relating to malicious prosecution may be disregarded.

Where it is apparent from the face of a complaint that it was the purpose of the pleader to state a case of false imprisonment, surplusage allegation, usually found in actions for malicious prosecution, not necessary to a statement of the cause of action, will be disregarded.

4. Appeal and error ☞762—Points raised first in reply brief on appeal not considered.

Points raised for the first time in a reply brief filed in the District Court of Appeal will not be considered by the Supreme Court unless some meritorious reason is shown why they are not made in the opening brief.

5. Venue ☞8—Defendant in false imprisonment action entitled to change of place of trial; "injury to person."

Notwithstanding Code Civ. Proc. § 395, as amended in 1911, providing that actions for injury to person may be tried in county where injury occurred, a defendant in an action for false imprisonment is entitled to a change of place of trial to the county of his residence, as "injury to person" refers to wrongful or negligent acts causing physical injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Injury to the Person.]

6. Evidence ☞28—Notice taken of legislative history.

Courts will take notice of legislative history.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Timothy I. Fitzpatrick, Judge.

Action by Max Monk against Louis D. Ehret. From an order granting motion for change of place of trial, plaintiff appeals. Affirmed.

Lucius L. Solomons and Fred C. Peterson, both of San Francisco, for appellant.

White, Miller, Needham & Harber, of Sacramento, for respondent.

SEAWELL, J. The complaint in the action before us forms the basis of the order granting respondent's motion for a change of the place of trial from the county in which it was commenced, to wit, the city and county of San Francisco, to the county of respondent's (defendant's) residence, Sacramento county, from which order this appeal is taken. The importance of said complaint is a sufficient justification for its reproduction at length. It follows:

"Plaintiff complaining of defendant for cause of action alleges:

"I. That heretofore, to-wit, on the 30th day of August, 1920, in the city and county of San

Francisco, at the intersection of Stockton and O'Farrell street in the city of San Francisco, while plaintiff was walking along the street in pursuance of his usual business, defendant seized upon his person, accused him of theft and larceny of certain property belonging to defendant, and, after so seizing upon his said person, called a police officer of the San Francisco municipal police force and caused his arrest; wherefore said defendant and said police officer together forcibly took hold of plaintiff's person and, against his will and over his protest, forcibly threw him into an automobile owned and operated by defendant, and with force and arms held him in said vehicle and drove him to the police station of the said city and county of San Francisco, where defendant again charged and accused plaintiff of the crime of larceny and caused his imprisonment, and immediately thereafter plaintiff was imprisoned and confined in said police station and detained therein for one hour upon said charge and thereafter was released.

"That said charge of larceny was wholly false, and plaintiff did not at any time commit larceny or theft or any crime or offense against defendant or his property and was wholly innocent of any charge made against him by said defendant and had not committed any act which made him subject to arrest or imprisonment.

"That in making said false charge and causing said arrest and imprisonment, defendant acted with deliberate and premeditated malice.

"That by reason of the premises plaintiff has been damaged in the sum of five thousand dollars (\$5000.00) no part of which has been paid."

Here follows the prayer.

[1] Appellant contends that the complaint fails to state a cause of action for malicious prosecution, and respondent insists that it fails to state a cause of action for false imprisonment. The affirmative sequela of appellant's proposition is, therefore, that the complaint states a cause of action for false imprisonment, while that of respondent is that it states a cause of action for malicious prosecution. While the elements of both causes of action are somewhat mixed by the pleadings, we are of the opinion that the common-law distinctions of the two causes of action are not important, as the question must be determined by the application of section 395, Code of Civil Procedure, as amended in 1911. We are satisfied that the complaint states a cause of action for false imprisonment. It is not necessary to allege that the imprisonment was unlawful. *Ah Fong v. Sternes*, 79 Cal. 30, 21 Pac. 381; *People v. McGrew*, 77 Cal. 570, 20 Pac. 92; *Sebring v. Harris*, 20 Cal. App. 56, 128 Pac. 7; *Raymond v. Corrigan*, 37 S. D. 609, 159 N. W. 131; 25 C. J. 530, 531. In the case of *Davis v. Pacific T. & T. Co.*, 127 Cal. 312, at page 320, 57 Pac. 764, at page 765, it was said:

"In order for the complaint to state a cause of action under the above definition [of false imprisonment] it would have to show that the

defendant unlawfully arrested the plaintiff without legal authority."

This statement is obiter dicta, because in that case the complaint affirmatively alleged that the plaintiff was arrested by legal process. There was in that case no intention to overrule the decision in *Ah Fong v. Sternes*, supra, for that case is cited on page 322 of 127 Cal., on page 766 of 57 Pac., in connection with the following statement:

"We have carefully examined the cases cited by appellant's counsel and find nothing in them in conflict with what has been said."

[2, 3] All of the elements essential to constitute a cause of action for false imprisonment are to be found in the complaint; segmentally appearing, it is true, but nevertheless existing. The elements essential to constitute a cause of action for malicious prosecution are absent, to wit, an allegation of a want of probable cause for instituting the prosecution and an allegation that the proceedings terminated favorably to plaintiff. These elements are essential to an action for malicious prosecution. *Nelson v. Kellogg*, 162 Cal. 621, 123 Pac. 1115, Ann. Cas. 1913D, 759. While it is true that the complaint contains allegations not necessary to a statement of a case of false imprisonment, and confessedly takes on the color of allegations usually found in actions for malicious prosecution, it is apparent upon its face that it was the purpose of the pleader acting in good faith to state a case of false imprisonment, and whatever of surplage allegations there are to be found not necessary to a statement of said cause of action are to be disregarded. This is a general rule of pleading. Specifically in point is *Deason v. Gray, Sheriff, et al.*, 189 Ala. 672, 66 South. 646.

It is the position of appellant that false imprisonment is a common-law trespass, while malicious prosecution is a trespass on the case. Both come within the class of common-law injuries to person. The effort of appellant, therefore, is to make a distinction between false imprisonment and malicious prosecution, so as to avoid the effect of *Graham v. Nixon*, 177 Cal. 88, 169 Pac. 1003, L. R. A. 1918F, 1023. That case holds that libel, which is also an injury to person at common law, and classified as a trespass on the case, is not such an injury to person as would entitle a plaintiff to resist a motion to change the place of trial to the county in which the defendants, or some of them, resided at the commencement of the action.

[4] Appellant for the first time made the point in his reply brief filed in the District Court of Appeal for the First District, Division 2, that whether or not the complaint stated a cause of action for either false imprisonment or malicious prosecution it nevertheless stated a cause of action for assault and battery, and, this being true, it is suffi-

cient to defeat respondent's motion. Points raised at this state of the proceeding for the first time have been refused consideration by this court unless some meritorious reason is shown why they were not made in the opening brief. *Kahn v. Wilson*, 120 Cal. 643, 53 Pac. 24; 2 Cal. Jur. 734, § 424. There appears to be no good reason for making an exception to the rule there announced. The allegations were of appellant's selection and the effect of the same were just as patent when the case was presented to the superior court as when presented on appeal. So far as the merits of the controversy are concerned this point is rendered immaterial, inasmuch as the allegations of false imprisonment present the same question that would be raised by a complaint alleging an assault and battery. Both are alike trespasses. Therefore no injury comes to appellant by a failure to consider the latter point. It will be observed, however, that the complaint contains no allegation of corporeal or physical injury by reason of any battery or violence.

Section 395 of the Code of Civil Procedure, as amended in 1911, and which is determinative of the question of venue, provides as follows:

"In all other cases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action, [or if it be an action for injury to person, or property, or for death from wrongful act, or negligence, in the county where the injury occurs, or the injury causing death occurs, or in the county in which the defendants or some of them reside at the commencement of the action.] * * *

That portion of the section inclosed by brackets is the amendatory language added to the section by the Legislature of 1911. The portion without brackets presents the section precisely as it stood before amendment, so far as the point presented by this appeal is concerned.

It is conceded by appellant that prior to said amendment respondent would have had the right to have the cause tried in the county of his residence, whether the facts constituted a cause of action for false imprisonment, malicious prosecution, or any other sort of trespass. The section must be examined, then, with reference to the question as to whether the Legislature intended in cases of false imprisonment to change the law as it had long existed so as to deprive a defendant of a right which he formerly enjoyed.

Former Chief Justice Shaw, in *Gridley v. Fellows*, 166 Cal. 765, 138 Pac. 355, in discussing the constitutionality of this amendment in its relation to specified classifications of cases, and whether or not such classifications characterized it as a local or special law, expressed the opinion that the

injuries to persons which gave the choice of one of two counties to a plaintiff were limited to those injuries which were of a physical or bodily character, as a distinct class, and did not include such injuries to persons as merely affect reputation or character. It is there said:

"The sole question for consideration is whether causes of actions for bodily injuries or for injuries to property are so like in all respects to other causes of actions, such as actions for slander or libel or actions on contract at law or in equity, that no reasonable basis can be found for a provision allowing the former to be tried in the county where the injury occurred, which is not the residence of the defendant, which does not apply with equal force to the latter actions mentioned. * * * *Actions to recover damages caused by bodily injuries, or by injuries to property, are well known as distinct classes of actions.* They are each separately treated in the text-books of law. Each forms a distinct and well-known class with attributes and qualities of its own and each is or has been affected and controlled to some extent by distinct and different rules of law, evidence, and procedure. They are so clearly distinguished from other actions that there is no difficulty in recognizing and classifying them. We think they are sufficiently distinguished by the probable interests and convenience of the parties and by considerations of public convenience and policy, not applying so strongly to other actions, to justify the Legislature in providing, as it has, that the defendant shall not have the absolute right to demand that the cause be removed for trial to the county of his residence, in case it is not the county in which the injury occurred." (Italics ours.)

Again, Mr. Justice Melvin, in *Graham v. Mixon*, supra, quoting at considerable length from *Gridley v. Fellows*, supra, concluded his review of the section as follows:

"It will thus be seen that this court has never regarded the section as one which applies, so far as actions for personal injuries are concerned, to any but those based upon physical lesions. It is also to be remembered that although injuries are classified as injuries to property and injuries to the person (Code Civ. Proc. §§ 28, 29), causes are more elaborately differentiated in designating the classes of actions which may be united. Those for 'injuries to character' and 'injuries to person' are separately enumerated. (Code Civ. Proc. § 427.) It will thus be seen that in the Code itself the expression 'injuries to persons' is not always used with the same broad significance as respondent would have us give to it, following section 29 of the Code of Civil Procedure."

[5] We are of the opinion that the words "injury to person" are, by the language which follows in the Code section, limited to the wrongful or negligent act of another, and that it was not intended by said amendment to extend the right of place of trial to such a trespass as is described by the complaint in the instant case. The specific terms indicate that the injuries to person

within the contemplation of the Legislature were those which cause physical injury or incapacity or which result in death.

[6] There can be but little doubt that the increasing number of bodily injuries and deaths and injuries to property brought about by the general use of motor vehicles gave legislative suggestion for the amendment. And, further, it is a part of our legislative history, which we take notice of, that the amendment under discussion was passed in 1911, the same year that the first Industrial Accident Board Act was passed. The legislation had to do with bodily or physical injuries or deaths resulting from injuries received in the line of various employments as by said act provided. The legislative mind at that session of the Legislature was intensely engrossed with the subject of personal injuries, and was not at all concerned with common-law trespasses. This is shown by the extent and character of legislation on the subject of physical injuries as contrasted with the fact that not a single Code section defining false imprisonment, malicious prosecution, assault and battery, libel or slander was amended or revised.

Upon examination of the Code language, and aided by the construction given it by the decisions heretofore cited, and from a consideration of the legislative situation, we are of the opinion that no such radical change was made, or intended to be made, by the amendment as is contended for by appellant.

Because of the conclusion reached on other grounds, it becomes unnecessary to discuss the rule as to a commingling of causes of action as affecting the right of a change of place of trial and which is treated in *Ah Fong v. Sternes*, supra, and *Warner v. Warner*, 100 Cal. 11, 34 Pac. 523, or its application to the pleadings in the instant case.

The order appealed from is affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; LENNON, J.; LAWLOR, J.; WASTE, J.

63 Cal. App. 589

KIRKLAND v. LEVIN (two cases).
(Civ. 3786.)

(District Court of Appeal, Second District, Division 2, California. Aug. 31, 1923.)

1. Corporations — Seller of corporate stock impliedly warrants his title.

Shares of corporate stock being declared personalty by Civ. Code, § 324, are within the provisions of section 1765, providing one who sells or agrees to sell personal property as his own thereby warrants his title, so that a seller of stock purchased at an assessment sale impliedly warrants the validity of the sale, section 1774 relating to warranties on sales of written instruments, "purporting to bind any

one to the performance of an act," being inapplicable.

2. Corporations — Breach of implied warranty in sale of stock held sufficiently pleaded.

A complaint, in an action to recover the purchase price of corporate stock because of the invalidity of the seller's title, which alleged facts showing a breach of the implied warranty of title, held sufficient, though no actual breach was alleged.

Appeals from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Two actions, one by James Kirkland against Z. Levin, the other by Alexander W. Kirkland against the same defendant. From judgments for plaintiffs, defendant appeals; the cases being heard together by stipulation. Judgments affirmed.

A. W. Sorenson, of Los Angeles, for appellant.

Donald Barker, of Los Angeles (Wm. H. Neblett, of Los Angeles, of counsel), for respondents.

WORKS, J. The two actions above entitled were tried upon the same evidence, although there was in the trial court no order for their consolidation. There is here, however, a stipulation that they may be heard together, and the appeals stand before us under one number. The cases will therefore be treated in a single opinion.

Each of the plaintiffs was at one time a stockholder in a certain corporation. The stock holdings of each were advertised for sale for unpaid assessments. Defendant purchased at the assessment sale the stock thus advertised. Shortly thereafter plaintiffs repurchased the stock from the defendant at a total paid price of \$650. It transpired that the assessment sale was void, and plaintiffs commenced the above-entitled actions for the purpose of recovering from defendant the amount named. In the respective actions plaintiffs had judgment, and defendant appeals.

The complaint in each of the actions contains the following allegations: "That defendant then and there," that is, when the sale was made by him to plaintiffs, "represented to plaintiff that the said sale of plaintiff's shares [at the assessment sale] was a good and valid sale and that he (defendant) then and there by virtue of his purchase at said alleged sale had become and that he was then the owner of said * * * shares of stock. * * * That plaintiff * * * then and there believed the representations made by defendant to the effect that said sale was a good and valid sale, * * * that relying upon the representations of defendant as to the validity of said alleged sale and not otherwise plaintiff paid

defendant [his part of the \$650].” The trial court found that these averments were true, and it is contended by appellant that the finding was not sustained by the evidence. That the finding is not supported is conceded by respondents, but they take the view that the allegations which we have quoted are surplusage, and that any finding either that they were true or untrue was immaterial to the real controversy between the parties.

[1] Respondents contend that they were entitled to judgment upon either of several theories. They insist, in the first place, that the judgments in their favor were properly recoverable as upon an implied warranty under the terms of Civil Code, § 1765, which provides:

“One who sells or agrees to sell personal property, as his own, thereby warrants that he has a good and unincumbered title thereto.”

We are convinced that this contention is sound. Shares of stock are personal property (Civ. Code, § 324; 6 Cal. Jur. 732), and they are therefore directly within the letter of section 1765. They seem as clearly to come within the spirit of the enactment. Such is the rule in other states. 14 C. J. 690. Appellant advances the argument that certificates of stock are covered by the terms of Civil Code, § 1774, providing for a certain warranty in the case of sales of instruments “purporting to bind any one to the performance of an act,” but a certificate of stock does not come within the description evidenced by these quoted words. Such a paper contains no covenant or promise, being but a muniment of title to shares of stock. Moreover, the transaction between the parties to the present actions concerned shares of stock and not mere certificates of stock. In reaching the conclusion at which we have arrived as to the applicability of section 1765, Civil Code, in the present instance, we have not failed to consider that in *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670, it is said that “shares of stock in a corporation are not negotiable but, like other kinds of personal property, have the doctrine of caveat emptor applied to their transfer.” The question now before us, however, was not before the court in that case, and the language used in the opinion is not susceptible of the construction to which appellant seeks to subject it. This view is apparent from the language itself. The clause, “like other kinds of personal property,” if the meaning attributed to the opinion by appellant were taken, would serve to nullify completely the provisions of section 1765. An interesting statement on this entire subject may be found in the *California Law Review* for March, 1921, vol. 9, p. 197.

[2] Appellant makes the point that the complaints do not state a cause of action un-

der section 1765, in that no breach of the implied warranty is alleged. The pleadings do not aver a breach in terms, it is true, but they do allege facts showing that there was a breach.

Respondents contend that they were entitled to judgment upon theories other than the one above discussed. It is, of course, not now necessary to examine those contentions.

The judgments are affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(63 Cal. App. 609)

PEOPLE v. GOLSH. (Cr. 965.)

(District Court of Appeal, Second District, Division 2, California. Sept. 1, 1923. Hearing Denied by Supreme Court Oct. 29, 1923.)

1. Homicide ⚡232—Deliberate purpose to kill may be inferred from facts and circumstances.

To justify a conviction of first degree murder it is not necessary that there be express evidence of a deliberate purpose to kill, but it may be inferred from such facts and circumstances as reasonably warrant an inference of its existence.

2. Homicide ⚡332(3)—Conviction of first degree murder will not be disturbed, where evidence conflicting.

Where, on appeal from conviction of first degree murder, there is substantial though conflicting evidence to support the verdict, it will not be disturbed.

3. Criminal law ⚡1036(1)—Error in admission of evidence will not be considered, where admitted without objection.

In a murder prosecution, admission in evidence of a letter written by defendant shortly after his arrest will not be considered, where defendant's counsel, when the letter was offered by the prosecution, expressly stated that he made no objection to its introduction.

4. Homicide ⚡181—Evidence that defendant would be more readily excited to blinding passion than average man held not admissible as to penalty for first degree murder.

Evidence that, by reason of a sunstroke, a sudden quarrel would more readily excite in defendant a blinding passion than in the case of the average man, was not admissible to enable the jury to determine whether the death penalty or life imprisonment should be imposed, in event that defendant should be found guilty of murder in the first degree.

5. Homicide ⚡181—Evidence that defendant was more readily excited to passion than average man inadmissible to reduce murder to manslaughter.

Evidence that, by reason of a sunstroke, a sudden quarrel would more readily excite in defendant a blinding passion than in the case of the average man, was not admissible as bearing on defendant's contention that the killing was

done in the heat of passion and was at most manslaughter.

6. Homicide ⚡42 — Provocation for heat of passion must be that which would have such effect on a man of ordinary self-control.

The provocation which will stir in the heart of the slayer that heat of passion which reduces the homicide from murder to manslaughter must be such as would have a like effect upon the mind and emotions of the average man, the man of ordinary self-control.

7. Witnesses ⚡246(1)—Extent of duty and power of trial judge to examine witnesses stated.

The duty of a trial judge, particularly in criminal cases, is more than that of an umpire, and though his power to examine witnesses should be exercised with discretion and so as not to prejudice either party, he is not compelled to sit quietly by and see one wrongfully acquitted or unjustly punished when a few questions asked from the bench might elicit the truth; it being his primary duty to see that justice is done.

8. Criminal law ⚡824(3)—Failure to affirmatively define legal provocation not error, in absence of request.

In a prosecution for murder, where the defendant tried to show that the offense was merely manslaughter, it was not error to fail affirmatively to define "legal provocation," Pen. Code § 1093, making it the duty of the court to charge on any fact pertinent to the issue, if requested by either party, and defendant having made no request for such an instruction.

9. Homicide ⚡40—"Cooling time" defined.

"Cooling time," as respects manslaughter, is not the time it would take an ideal man or the defendant, but the time it would take the average man, or the ordinarily reasonable person, under like circumstances, to cool, and does not, as stated in requested instruction, "differ with different persons according to the constitution of their nature."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cooling Time.]

10. Criminal law ⚡830—If part of single instruction should not have been given, rejection of whole will be affirmed.

If any part of a single instruction should not have been given, the action of the court in rejecting the whole will be affirmed.

11. Criminal law ⚡1163(6)—Conversation between juror and father of deceased held not to raise presumption of improper influence.

That a jurywoman in a murder trial was seen talking to the father of deceased in a highly excited manner and gesticulating violently did not raise a presumption that she was improperly influenced, in the absence of a showing that the conversation related to the case on trial, and, while a grave impropriety, was not legal misconduct calling for a reversal.

12. Criminal law ⚡959—Refusal to continue motion for new trial in murder prosecution for absence of witness held not abuse of discretion.

In a murder prosecution, it was not error to refuse to continue defendant's motion for new trial for two weeks to enable him to procure the affidavit of an absent witness, who had testified on the preliminary examination, and who was claimed to have stated that he saw a revolver in decedent's hand before defendant fired the fatal shot; the court having given a 9-day continuance, and the matter of allowing a continuance resting in the sound discretion of the trial judge, and defendant not having sought a continuance before trial to obtain such evidence.

13. Criminal law ⚡959—Refusal to continue motion for new trial not prejudicial error, in absence of showing that evidence could have been procured within reasonable time.

Refusal to continue a motion for new trial for two weeks in a murder prosecution, to enable defendant to procure an affidavit of an absent witness, was not prejudicial error, in the absence of a showing from which the trial judge could fairly have inferred that such affidavit could have been procured within a reasonable time.

14. Criminal law ⚡919(3)—Perfervid argument of prosecuting counsel not alone sufficient to justify new trial.

A perfervid argument of counsel for the people, in a prosecution for murder, is alone not sufficient to justify a new trial.

Appeal from Superior Court, San Diego County; Spencer M. Marsh, Judge.

Frank B. Golsh was convicted of murder in the first degree, and he appeals. Affirmed.

Claude M. Shell, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant was convicted of murder in the first degree, the jury fixed his punishment at life imprisonment, he was sentenced accordingly, and he now appeals from the judgment and from the order denying his motion for a new trial.

[1, 2] Appellant's first point is that the evidence shows that the slaying, which was admitted, was committed upon a sudden quarrel and in the heat of passion, and that therefore it was at most but manslaughter, and was lacking in the elements from which malice may be presumed. The testimony, as is usual in such cases, was more or less contradictory, and it only need be said that there was evidence which, if credited by the jury, demanded from them the verdict rendered. Appellant's counsel insists that the version of the homicide as given by certain of the people's witnesses was improbable and in contradiction of other testimony in the

record. A consideration of all of the evidence shows that the facts as described by these witnesses were not inherently impossible. The jurors were the sole judges of the degree of credit to be given the testimony. It was not necessary that there should be express evidence of a deliberate purpose to kill. It may be inferred from such facts and circumstances in the case as reasonably warrant an inference of its existence. *People v. Machuca*, 158 Cal. 64, 109 Pac. 886. If the people's witnesses told the truth, there can be no question that a cruel and deliberate murder was committed. As there was substantial evidence to support the verdict, and it is not within our province to pass upon the evidence where it is conflicting, the verdict finding defendant guilty of first degree murder cannot be disturbed.

[3] Appellant complains of the admission in evidence of a letter written by him shortly after his arrest. Unfortunately for this position, defendant's counsel, when the letter was offered by the prosecution, expressly stated that he made no objection to its introduction.

[4-6] Defendant offered to show that, by reason of a sunstroke, suffered by him about a year and a half prior to the homicide, a sudden quarrel would more readily excite in him a blinding passion than would be the case with the average man. The court admitted the evidence, but solely for the purpose of enabling the jury to determine whether the death penalty or life imprisonment should be imposed, in the event that defendant should be found guilty of murder in the first degree. Defendant did not contend that he was insane—the defense of insanity was expressly disclaimed by him. What he did claim was that the evidence of sunstroke and its consequent effect upon his mental and emotional nature should be received and considered by the jury as having a bearing upon his contention that the killing was done in the heat of passion, and that at most his crime was manslaughter and not murder. The evidence was not admissible for the purpose for which it was received (*People v. Witt*, 170 Cal. 110, 148 Pac. 928); nor was it admissible for the purpose for which it was offered. The provocation which will stir in the heart of the slayer that heat of passion which reduces the homicide from murder to manslaughter must be such as would have a like effect upon the mind and emotions of the average man—the man of ordinary self-control (*People v. Hurtado*, 63 Cal. 289; *Commonwealth v. Cleary*, 148 Pa. 26, 23 Atl. 1110; *Rex v. Lesbini*, [1914] 3 K. B. 1116, 7 British Rul. Cas. 272, and note). See, also, *People v. Bruggy*, 93 Cal. 480, 29 Pac. 26; *People v. Worthington*, 122 Cal. 586, 587, 55 Pac. 396; and *People v. Logan*, 175 Cal. 45, 164 Pac. 1121. In the *Hurtado* Case the trial court refused to instruct the jury

that, if a defendant accused of murder be not insane in the legal sense of the term, he nevertheless should be found guilty of manslaughter only—

"if * * * at the time he was laboring under such a mental unsoundness as to cause him to be easily aroused to a sudden heat of passion."

In holding that the instruction was properly refused, our Supreme Court said:

"If defendant was so far in possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any partial defect of understanding which might cause him more readily to give way to passion than a man ordinarily reasonable, cannot be considered for any purpose. To reduce the offense to manslaughter the provocation must at least be such as would stir the resentment of a reasonable man. It cannot be urged that the homicide is manslaughter because it was committed in an unreasonable fit of passion. In an abstract sense anger is never reasonable, but the law, in consideration of human weakness, makes the offense manslaughter when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person; one of ordinary self-control." 63 Cal. 292. (Italics ours.)

[7] The next assignment of error is that the court conducted an independent examination of the accused while he was a witness in his own behalf.

The duty of a trial judge, particularly in criminal cases, is more than that of an umpire; and though his power to examine the witnesses should be exercised with discretion and in such a way as not to prejudice the rights of the prosecution or the accused, still he is not compelled to sit quietly by and see one wrongfully acquitted or unjustly punished, when a few questions asked from the bench might elicit the truth. It is his primary duty to see that justice is done both to the accused and to the people. He is, moreover, in a better position than the reviewing court to know when the circumstances warrant or require the interrogation of witnesses from the bench. As was said by the Georgia Court of Appeals in *Hart v. State*, 14 Ga. App. 364, 80 S. C. 909:

"While great caution should be used in its exercise, the trial judge has the right, in his discretion, to question the witnesses during the progress of a trial, in order to elicit the truth, and this discretion will not be controlled except where it appears that the manner in which the judge exercised his right tended unduly to impress the jury with the importance of the testimony elicited, or would be likely to leave the jury to suppose that the judge was of the opinion that one party rather than the other should prevail in the case."

See, also, *People v. Hunt*, 26 Cal. App. 514, 147 Pac. 476.

After a careful examination of the record before us, we are unable to say that

the learned judge who tried this case transgressed the proper limits of judicial discretion in essaying to elicit from the witness all of the truth respecting the matters as to which he had voluntarily testified in response to his counsel's questioning. Our attention has not been called to any question asked by the judge which was properly subject to any objection other than that it was being asked by the court instead of by counsel. The action of the court was therefore without prejudicial error to the accused.

[8] Though carefully and correctly instructing the jury that certain enumerated facts would not amount to that provocation which reduces the crime to manslaughter, the court, it is claimed, failed affirmatively to define the term "legal provocation." Wherefore the point is made that the instruction as given was entirely negative and failed to point out the elements which constitute adequate provocation. But defendant made no request for an affirmative or comprehensive definition of provocation. If his counsel deemed it essential that the jury should be given a more elaborate definition, it was his privilege and duty to request such an instruction. Section 1093 of the Penal Code makes it the duty of the court to charge the jury on any fact pertinent to the issue, "if requested by either party."

A defendant in a criminal case is in no position to complain of the court's failure to instruct upon a point, even though it be pertinent to an issue, where the instruction was not requested. *People v. Lopez*, 21 Cal. App. 192, 131 Pac. 104. If the rule were otherwise, the trial judge would practically be required to instruct on every question which the accused might have the right to have submitted to the jury, without his attention being called to questions which counsel, alive to the interests of their clients, would think of and the trial judge would not. It would open the door for counsel to sit silently by and allow the court to commit error in failing to instruct on points which their duty to their client should prompt them to request. The following cases support our conclusion that, in the absence of a request therefor, appellant cannot complain of the court's failure to define affirmatively the term "legal provocation." *People v. Haun*, 44 Cal. 96; *People v. Ah Wee*, 48 Cal. 237; *People v. Christensen*, 85 Cal. 568, 24 Pac. 888; *People v. Balkwell*, 143 Cal. 260, 76 Pac. 1017; *People v. Rogers*, 163 Cal. 476, 484, 126 Pac. 143; *People v. Williams*, 184 Cal. 590, 594, 194 Pac. 1019.

[9, 10] Appellant complains of a refusal to give a requested instruction on "cooling time." The instruction, as requested, was as follows:

"Cooling time, or that space of time which will be deemed sufficient for a man to cool after a conflict, may differ with different persons, according to the constitution of their nature.

No uniform rule can be laid down as the length of time when a man shall have 'cooling time.' It is for the jury, under all the evidence, to decide as to the actual conditions of the mind of the actor."

The instruction was properly refused. A part of the instruction misstates the law, and the rule is that, if any part of a single instruction should not have been given, the action of the court in rejecting the whole will be affirmed. *People v. Davis*, 64 Cal. 440, 1 Pac. 889. That part of the requested instruction which, if given, would have advised the jury that "cooling time" may differ with different persons "according to the constitution of their nature" is not a correct statement of the law. What is meant by the use of the words "according to the constitution of their nature?" Do they mean that each individual has a disposition peculiar to himself? Do they mean that, whilst one man is phlegmatic and cool, never acting except with deliberate purpose, another, by inherited or acquired tendencies, or as the result of some accident which has induced a mental infirmity, falling short of insanity in the legal sense, is passionate and irascible, the creature of impulse, whose hot flames will continue flaring up long after they would have subsided in the man of ordinary self-mastery? If this be the meaning of the phrase—and it would seem that counsel intended that such should be the significance to be attached to it—then it contravenes the doctrine as established in this jurisdiction by such cases as *People v. Bush*, 65 Cal. 129, 132, 133, 3 Pac. 590. In that case our Supreme Court held that "cooling time" is the time in which an *ordinary* man, in like circumstances, would have cooled. The rule approved by the majority of our courts is that "cooling time" is not the time it would take an ideal man or the defendant, but the time it would take the average man or the ordinarily reasonable person, under like circumstances. The Supreme Court of Oklahoma in *Re Fraley*, 3 Okl. Cr. 719, 722, 109 Pac. 295, 296, 139 Am. St. Rep. 988, 990, states the rule thus:

"And the authorities are all agreed that the question is not alone whether the defendant's passion in fact cooled, but also was there sufficient time in which the passion of a *reasonable* man would cool. If in fact the defendant's passion did cool, which may be shown by circumstances, such as the transaction of other business in the meantime, rational conversations upon other subjects, evidence of preparation for the killing, etc., then the length of time intervening is immaterial. But if, in fact, it did not cool, yet if such time intervened between the provocation and the killing that the passion of the *average* man would have cooled and his reason have resumed its sway, then still there is no reduction of the homicide to manslaughter." (Italics ours.)

In *Small v. Commonwealth*, 91 Pa. 304, an instruction practically identical with that

under consideration here was carefully considered and condemned as unsound.

[11] It seems that the jurors were allowed to separate during the trial, and it was shown by affidavits that a jurywoman was seen talking to the father of the deceased in a highly excited manner and gesticulating violently. It does not appear that the conversation related to the case on trial. It therefore is not of itself a circumstance sufficient to raise a presumption that the juror was improperly influenced. It was, of course, a grave impropriety, exposing the juror to suspicion and reflecting upon the administration of justice, but, in the absence of any showing as to the nature of the subject-matter of the conversation, we cannot say that it was legal misconduct, calling for a reversal of the judgment. *People v. Dunne*, 80 Cal. 34, 21 Pac. 1130; *People v. Phelan*, 123 Cal. 551, 567, 568, 56 Pac. 424.

[12, 13] Appellant urges that the trial court erred in refusing to continue his motion for a new trial for two weeks to enable him to procure the affidavit of one Fred B. Bender. It seems that Bender was a witness for the prosecution at the preliminary examination, and that, when the case was tried in the superior court, he was living in the city of Seattle, state of Washington. Because of Bender's absence from the state at the time of the trial, counsel stipulated that the transcript of his testimony before the committing magistrate might be, and it was, read to the jury by the prosecuting attorney as a part of the people's case. Defendant moved for a new trial on the ground, among others, of newly discovered evidence. In support of his motion for a new trial on this ground he filed an affidavit by his wife, wherein the latter stated that following defendant's preliminary examination Bender told her that just before her husband fired the fatal shot he (Bender) saw a revolver in decedent's hand, which had been drawn from its holster. In view of the testimony which he thus expected to be able to elicit from Bender, defendant requested the court to continue his motion for a new trial for two weeks, so as to afford him time within which to procure from Bender his affidavit as to the facts so revealed by the affidavit of defendant's wife. The court continued the motion for a new trial for 9 days, but refused to grant a further continuance. The matter of allowing a continuance was one which rested in the sound discretion of the trial judge, and we cannot perceive that it was in any wise abused. Defendant's preliminary ex-

amination before the committing magistrate was concluded on July 17, 1922. His trial in the superior court did not commence until October 2, 1922. There is no pretense that in the meantime he had not been fully informed by his wife of what Bender had told her after the preliminary examination. Assuming, therefore, that the evidence which defendant believed that Bender would give may be regarded as "newly discovered," within the meaning of subdivision 7 of section 1181 of the Penal Code, still the fact remains that, if the affidavit of defendant's wife, presented in support of his motion for a new trial had been presented before the trial in support of a motion for a continuance, it doubtless would have been granted. Defendant cannot thus neglect to ask for a continuance of his trial, speculate upon obtaining a favorable verdict at the hands of the jury, and then complain because his motion for a new trial was not continued for a longer period than 9 days. Moreover, if we may assume that the continuance for 9 days was not sufficient to afford defendant a reasonable time within which to procure Bender's affidavit, still no prejudicial error has been disclosed, since defendant made no showing of any fact or facts from which the trial judge could fairly have inferred that Bender's affidavit could have been procured within a reasonable time. *People v. Lewis*, 64 Cal. 401, 1 Pac. 490; *People v. Breen*, 130 Cal. 78, 62 Pac. 408.

[14] Complaint is made of misconduct on the part of the district attorney. In the brief filed on behalf of appellant we are told that the prosecuting officer, in the course of his argument to the jury, referred to defendant as "a black hearted murderer" and a "cold blooded assassin." This assignment of error is not warranted by anything in the record before us. It contains naught of the argument before the jury. Moreover, a fervid argument of counsel for the people is alone not sufficient to justify the granting of a new trial. *People v. Owens*, 132 Cal. 469, 64 Pac. 770.

The gravity of the case has moved us to give painstaking consideration to the points advanced by appellant. A careful examination of the record reveals nothing in the way of substantial error. Defendant had a fair trial, and there is sufficient evidence to support the verdict.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

(63 Cal. App. 592)

WEINMANN v. FACTOR. (Civ. 4441.)

(District Court of Appeal, First District, Division 2, California. Sept. 1, 1923.)

Appeal and error — 771—Relief from default on failure to file opening brief denied.

Where appellant's opening brief was not filed until two days before hearing on motion to dismiss the appeal, which was more than five months after the time for filing had expired, a showing of illness of counsel during part of such period of delay held not to warrant denial of the motion to dismiss, notwithstanding the court might in its discretion grant relief from defaults occurring through inadvertence or excusable neglect such as would warrant relief under Code Civ. Proc. § 473, if that section applied to the appellate court.

Action by L. R. Weinmann against Harry Factor. On motion to dismiss defendant's appeal. Motion granted.

E. F. Conlin, of San Francisco, for appellant.

Homer R. Spence and Augustin Donovan, both of Alameda, and Burbank & Spence, of San Francisco, for respondent.

NOURSE, J. Respondent has moved to dismiss the appeal upon the ground that appellant's opening brief had not been filed within the time prescribed. The notice of motion to dismiss was made and filed on the 14th day of July, 1923, and on the 11th day of August, 1923, two days before the date set for hearing thereof, appellant filed his opening brief. The motion is covered by Coats v. Coats, 146 Cal. 443, 80 Pac. 694, and Berendsen v. Babdaty (Cal. App.) 216 Pac. 385. In the former case the brief was on file at the time the motion was granted, but it had been filed a few days after the time for filing had expired. In this case the delay was much longer. Judgment was recovered in the superior court by respondent on January 27, 1922, and notice thereof was given the same day. On February 4th of the same year a notice of motion for a new trial was given, and on April 27th following the motion was denied. On May 18th following a notice of appeal to the Supreme Court was filed, though under the Constitution the action was one within the jurisdiction of the District Court of Appeal. This necessitated an order of the Supreme Court transferring the cause to this court for decision. The transcript, prepared under section 953a of the Code of Civil Procedure, was filed on December 27, 1922, the delay being caused by appellant's failure to pay the required fees therefor. The time for filing appellant's brief expired on January 26, 1923, but was continued to February 27th of the same year by three different stipulations given by counsel for respondent upon the express assur-

ance of appellant's counsel that his brief would be filed within the time allowed. No further time for the filing of said brief since the 27th of February, 1923, was requested or allowed, and the only excuse for the failure to do so is that the attorney of record for appellant was sick. It appeared, however, at the oral argument that the sickness did not cover the full period of the delay, and that another attorney was attending to some of the legal business of the attorney of record, and no showing was made why this attorney or some other could not have filed the brief in this case, or at least obtained a stipulation or order protecting the time to file.

It is true that when such delays have occurred through inadvertence or excusable neglect such as would be the basis for a motion for relief under section 473 of the Code of Civil Procedure, if such section applied to the appellate court, the court has exercised its discretion in granting relief from the default. Estate of Keating, 158 Cal. 109, 115, 110 Pac. 109; Yolo, etc., Co. v. Edmands, 45 Cal. App. 410, 414, 187 Pac. 755. The showing which appellant has made in this case would not justify relief under that section of the Code.

Appeal dismissed.

We concur: LANGDON, P. J.; STURTEVANT, J.

(63 Cal. App. 572)

SILVEIRA et al. v. ASSOCIATED MILK PRODUCERS. (Civ. 4548.)

(District Court of Appeal, First District, Division 2, California. Aug. 31, 1923. Hearing Denied by Supreme Court Oct. 29, 1923.)

1. Evidence — 417(12)—Where contract allowed buyer milk association freight and marketing charges, evidence tending to show character of buyer as entitling it to other allowances not admissible.

Where contract for sale of milk provided that seller should be paid for the milk, less freight and marketing charges, and it nowhere appeared that buyer, a milk association, was not allowed such freight or marketing charges, evidence offered by buyer to show that it was a co-operative, nonprofit, milk-marketing corporation was not admissible to support claim of right to make deductions to cover expenditures for a plant, etc., as this would not interpret but vary the contract.

2. Corporations — 519(2) — By-law properly excluded when not at variance with sale contract sued on.

In an action on a contract for the sale of milk to a co-operative corporation, where the form of marketing contract given in its by-laws was not at variance with the contract made, there was no error in excluding the by-law.

3. Corporations ⚡3—Nature of corporation ascertained from charter.

The nature of a corporation depends upon the provisions of its charter, and not upon what in fact the corporation is actually engaged in doing.

4. Agriculture ⚡6—Contract with co-operative association held not to authorize deduction for cost of milk plant.

An agreement for sale of producer's milk to a co-operative association, providing that it is contingent on causes beyond the control of the parties, and specifically authorizing buyer to withhold only freight and marketing charges, does not authorize buyer to withhold in addition a balance due seller to cover expenditures incurred by it in building a milk plant and buying an interest in another.

5. Evidence ⚡448—Parol evidence not admissible to vary unambiguous terms of written contract.

Language of a contract, clear and unambiguous, may not be added to by interpretation, since such attempt would be to vary its terms.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Antonio F. Silveira and others, copartners, doing business under the name of A. F. Silveira & Co., against the Associated Milk Producers. From a judgment for plaintiff, defendant appeals. Affirmed.

Jordan & Brann, of San Francisco, and F. I. Lemos, of Hayward, for appellants.

George H. Harlan, of San Rafael, for respondents.

STURTEVANT, J. The plaintiffs sued for, and by the trial court were awarded, a judgment for a balance alleged to be owing to them on the sale of milk. The defendant, being dissatisfied with the judgment, has appealed, bringing up a bill of exceptions. The dealings between the parties were had under a written contract, a copy of which is as follows:

"Agreement, made this 20th day of March, 1919, by and between the Associated Milk Producers, a California corporation, with its principal place of business at No. 53 Clay street, San Francisco, Cal., hereinafter called 'the association,' and A. F. Silveira & Co., hereinafter called 'the producer,' witnesseth:

"That the producer hereby agrees to market all the milk produced by him, beginning June 1, 1919, and ending September 20, 1921, exclusively through the association; he agrees to produce and deliver twice daily to the association at San Francisco, Cal., or to such other place as the association shall direct, in all not less than 2,666 hundred pounds of market milk, and not more than 2,924 hundred pounds of market milk, for which, on the 20th day of each month, he is to be paid for all milk shipped on the preceding month, less freight charges from the point of shipment thereof to San Francisco aforesaid, and the association's charges for marketing said milk, which marketing charge

shall in no case exceed 15 cents per hundred pounds.

"The board of directors of said association is hereby given full power to fix the price of said milk from time to time, and the association hereby agrees to market all of said milk at the prices so fixed by its said board of directors.

"For all milk furnished in excess of the maximum amount above set forth, producer shall receive monthly, as above specified, the prevailing butter fat price received therefor by the association, less freight charges and less whatever expenses may be incident to the handling, manufacture, and sale thereof by the association.

"Should the producer fail at any time to twice daily deliver to the association the minimum amount of market milk hereinbefore specified, he hereby authorizes the association, as his agent, at its option, to go into the open market and buy whatever milk shall be deemed necessary to make up his shortage to the minimum amount hereinbefore specified, and to charge the extra cost thereof to him, and he hereby promises to pay the same on demand.

"All milk delivered under this contract must be produced by the producer at San Rafael, Cal., be properly cooled, pure, sweet, marketable, and conform to the laws of the state of California, and to the ordinances of the city and county of San Francisco, state of California, or any other municipality where the association does business, governing the same, and shall not contain less than 3.4 per cent. butter fat, and not less than 11 per cent. of total solids, including butter fat. It shall be optional with the association to either accept or reject milk not conforming to the foregoing standards.

"The association agrees to cause to be furnished all tanks necessary for the shipment of milk, which shall be of such size, form, material, and condition as to comply with all requirements of state, county, city and county, city, and local laws, regulations, and ordinances governing the same, but a failure to furnish such tanks shall not be construed as a breach of this contract, and upon such failure the producer shall furnish such tanks as may be needed for his several shipments, and the expense shall be paid by the association.

"This agreement is contingent on acts of God, strikes, delays of carriers, and other causes or delays beyond the control of the parties, or either thereof.

"The producer cannot assign this contract without the written consent of the association.

"This agreement shall inure to the benefit of the heirs, executors, administrators, successors, or assigns of the parties hereto.

"In witness whereof, the association has hereunto caused these presents to be executed and its corporate seal to be thereunto attached by its president and secretary thereunto duly authorized the day and year first above written, and the producer has likewise executed this contract."

[1] Neither in the trial court nor in this court was it claimed that the defendant was not allowed "freight charges from the point of shipment thereof to San Francisco," nor

that it was not allowed 15 cents per hundred pounds for marketing.

[2-5] Nevertheless the appellant claims that, as to it, the judgment was incorrect, and that the error therein arose by reason of the refusal of the trial court to receive in evidence certain testimony which the appellant offered. In this behalf it may be stated that during the trial the appellant offered in evidence its by-laws; it offered to show that appellant had 153 stockholders, and that it had a similar marketing agreement with each one of them, and that in short the appellant was "a co-operative, nonprofit, milk-marketing California corporation," and that during the term of the contract it became necessary for the defendant "to build a milk plant at Holt, Cal., at a cost of \$125,000, and that it became necessary to buy an interest in the San Francisco Dairy Company at a cost of \$150,000, in order to market" some of the milk so purchased from its stockholders, and that some milk was sold on a basis solely of its butter fat content. From other sources there was already some evidence in the record that the defendant was a corporation, that it had a capital stock, that the stock was sold to dairy-men only, and then only to dairymen who in turn executed a contract similar to the contract hereinabove set forth. Article 3 of the by-laws deals with the subject of the forms of marketing contracts which the defendant may execute. Section 6 of that article provides for the making of the form of contract hereinabove set forth. Our attention has not been called to any other passage having any pertinency to this case. As there is nothing in the by-law that is at variance with the contract as written, the objection was properly sustained. The defendant also offered to show that each remaining stockholder held a similar contract. This offer was apparently for the purpose of showing the kind of business the defendant was transacting, and therefore to show the kind of a corporation the defendant was. The evidence was not material for the purpose for which it was offered. The nature of a corporation depends upon the provisions of its charter and not upon what in fact the corporation is actually engaged in doing. *People v. Binghamton*, 139 N. Y. 185, 34 N. E. 898; *Mitchell v. Beckman*, 64 Cal. 117, 122, 28 Pac. 110; *City of Los Angeles v. Loan, etc., Co.*, 109 Cal. 396, 402, 403, 42 Pac. 149.

The appellant further claims that its expenditures in building at Holt and in purchasing an interest in the San Francisco

Dairy Company were authorized by the clause of the contract which provides:

"This agreement is contingent on * * * causes * * * beyond the control of the parties, or either thereof."

In this contention we think it is in error. The clause does not cover such a claim. The claim of the appellant, if good, must find its support in the language of one of the first paragraphs which is directly addressed to the moneys the defendant may withhold. Those moneys are expressed in the contract as follows:

"Less freight charges from the point of shipment thereof to San Francisco aforesaid and the association's charges for marketing said milk, which marketing charge shall in no case exceed 15 cents per hundred pounds."

That language is clear and unambiguous. It is a cardinal rule of interpretation that a writing free of ambiguity and uncertainty needs no interpretation. The defendant has already received 15 cents per hundred pounds for marketing the plaintiff's milk. To allow the defendant further moneys on this claim, under the guise of interpretation, is to do violence to the express language used by the parties in framing their contract.

The paper fully quoted above is the marketing agreement between the parties. Whether with the utmost care and precision and conformance to the provisions of the statutes, state and federal, the defendant was organized as a nonprofit, co-operative, marketing corporation, nevertheless, as between it and its members there is in the nature of things a marketing contract. In this particular case that contract was reduced to writing. On its face it purports to enumerate the moneys which the defendant might deduct from the sale price of the milk. It does not even purport to provide a fund for purchasing lots and buildings, nor for the purpose of purchasing agencies for distribution, except as such distribution cost may be covered by the 15-cent charge, nor does the contract purport to cover the contingency of an excessive supply of milk excepting as that matter may be covered by the same provision in the contract. These elements may not be added by interpretation. That is a misnomer. Instead of interpretation such an attempt would be to vary the terms of a written instrument as the trial court properly held.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

63 Cal. App. 649

JONES v. KEYES, Dist. Atty. (Civ. 4500.)

(District Court of Appeal, Second District, Division 1, California. Sept. 7, 1923.)

1. Courts — 209(2)—Application for writ of mandate must show proper reasons for not making an application to lower court, or Supreme Court or appellate court will deny.

Under Supreme Court rule No. 2 (176 P. vii), the application for a writ of mandate must furnish a proper reason for not making the application to the lower court, or the Supreme Court or the appellate court, in the exercise of its discretion, will deny the writ.

2. Courts — 209(2)—Reason why application for writ of mandate not made to lower court held not to warrant issuance by District Court of Appeal.

An application to the appellate court for a writ of mandate, reciting a previous similar application to a superior county court, the issuance of an alternative writ, and the granting of a nonsuit on hearing, and reciting that applicant's case has never been determined on its merits, and that the time for appeal from the order granting the nonsuit has expired, under Supreme Court rule No. 2 (176 P. vii) held not sufficient reasons why the application should not be made to the lower court.

Application by Ida Wright Jones for a writ of mandate, to be directed to Asa Keyes, District Attorney of Los Angeles County. Writ denied.

A. J. Bledsoe, of Los Angeles, for petitioner.

Asa Keyes, of Los Angeles, for respondent.

CONREY, P. J. Petitioner asks for a writ of mandate commanding respondent, as district attorney, to certify to the county civil service commission of the county of Los Angeles the name of petitioner as one entitled to a stated salary claimed by her for services as juvenile investigator in the department of the district attorney of said county, and to commend the respondent to admit the petitioner to the use and enjoyment of her right to perform the duties of said office of juvenile investigator.

It is alleged in the petition that in January, 1923, petitioner commenced an action in the superior court of Los Angeles county for a writ of mandate, directed against Thomas Lee Woolwine, then district attorney of said county, to compel said district attorney to restore her to her said position and to certify her name to the civil service commission of said county for the payment of her salary; that an alternative writ of mandate was issued out of said court; that, upon the hearing thereof, a nonsuit was granted by said superior court, and that said action was never heard or determined upon its merits; that findings were never made or

signed by said court, but that said action was disposed of by the granting of a nonsuit; that the time for appeal from said order granting a nonsuit has expired, and petitioner now makes this application to this court for the reason that her case has never been tried or determined upon its merits, and for the further reason that a further application to said superior court would be useless and of no effect.

[1] It is provided by rule 2 of the Supreme Court (176 Pac. vii) that when an application is made to the Supreme Court or a District Court of Appeal for a writ of mandamus, and such application might have been lawfully made to a lower court in the first instance, the petition shall set forth the circumstances which, in the opinion of the applicant, render it proper that the writ should issue originally from the court to which such application is made, and not from such lower court.

The necessary inference from such rule is that if the stated circumstances do not furnish a proper reason for not making the application to the lower court, the Supreme Court or this court, in the exercise of its appropriate discretion, will decline to issue the writ. In *re Mulholland*, 13 Cal. App. 734, 110 Pac. 585; *Matter of Application of W. J. Burt*, 17 Cal. App. 309, 119 Pac. 674; *Wood v. Board of Fire Commissioners*, 50 Cal. App. 593, 195 Pac. 739.

[2] It is our opinion that the facts stated in this petition do not furnish a sufficient reason to excuse petitioner from applying to the superior court for the demanded writ. Assuming that her cause of action as pleaded in the superior court was in all substantial respects identical with the cause of action stated in her present petition, it may be that the evidence at the hearing before the superior court was not the same as the evidence which she would now be able to produce. Her own statement in this petition that her case has never been tried or determined upon its merits contradicts her additional statement or conclusion that a further application to that court would be useless. It is quite likely that issues of fact would arise in the case upon which evidence would have been taken in the usual manner. We think that, where no sufficient reason appears for a different course to be taken, such cases should be heard in the superior court, which is well equipped for the trial of issues of fact. The constant pressure of other business of the court makes it inadvisable that we should encourage the bringing of such proceedings originally in this court, unless it appears that the public interest or fact of inadequacy of the remedy in the superior court justifies us in allowing an exception to the usual practice.

The petition is denied, without prejudice

to the right of petitioner to institute a similar proceeding in the superior court.

I concur: CURTIS, J.
HOUSER, J., absent.

63 Cal. App. 594

MILLS v. RICHMOND CO., Inc.
(Civ. 4688.)

(District Court of Appeal, First District, Division 2, California. Sept. 1, 1923.)

1. Appeal and error ⇐842(1)—Materiality of covenant to improve street held for trial judge.

The importance and materiality of vendor's covenant to improve a street on which lots sold were located *held* for the trial judge, irrespective of the probable cost of the work.

2. Appeal and error ⇐1010(1)—Finding not disturbed, if sustained by any evidence, though qualified on cross or redirect examination.

The Supreme Court should not weigh or analyze the testimony nor disturb the finding, if sustained by any evidence in the record, though qualified or explained on cross or redirect examination.

3. Vendor and purchaser ⇐110—Breach of material covenant to perform street work sufficient ground for rescission.

Breach of vendor's covenant to perform street work, if a material consideration of the contract, is a sufficient ground for rescission by vendee.

4. Vendor and purchaser ⇐117—Vendee, on rescinding, must restore property to vendor's assignee.

Vendee, on rescinding a contract assigned by vendor, must restore the property to assignee.

5. Vendor and purchaser ⇐214(6)—Vendee, rescinding contract assigned corporation owned by vendor, held entitled to restoration of entire consideration by vendor's assignee.

On vendee's rescission of a contract, assigned by vendor to a corporation in which he owned all except two qualifying shares of stock, assignee must restore the entire consideration; the difference between individual and corporate entities being disregarded.

6. Appeal and error ⇐1099(11)—Finding as to truth of allegations held conclusive on issue of laches, in absence of evidence thereof.

The trial court's finding, based on a stipulation that allegations of a complaint, which was held sufficient, on a former appeal, to state a cause of action, were true, *held* conclusive on the issue of laches, in the absence of evidence thereof, in view of defendant's concession that the former decision controlled to the extent that the complaint did not show laches as a matter of law.

7. Costs ⇐234—Appellant not calling error to trial court's attention not entitled to costs on appeal, because of modification of judgment.

Appellant *held* not entitled to costs on appeal, because of modification of a judgment by striking interest erroneously allowed, the error being correctable without appeal if it had been called to the trial court's attention.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Mrs. L. Mills against the Richmond Company, Incorporated. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

A. L. Weil and Forrest A. Cobb, both of San Francisco, for appellant.

Lovett K. Fraser of San Francisco, for respondent.

NOURSE, J. This is an action for rescission of a contract for the purchase of two lots in the city of Richmond, Contra Costa county. The grounds of rescission are defendant's breach of its covenant to perform street work. The case was before this court on a previous appeal (56 Cal. App. 774, 206 Pac. 486), wherein it was held that the complaint pleaded a cause of action, and the order of the trial court sustaining a demurrer thereto was reversed. On the trial of the case the parties stipulated to the material facts in controversy, but offered some evidence showing that the actual cost of the street work in front of these two lots would have been \$50, but that the plaintiff had been led to believe that the entire street would be improved at the time the work in front of her lots was done. It was then stipulated that these lots were in a subdivision and that no street work had been done on the street where they were located except some grading. On these stipulations, and on the evidence offered, the trial court found that the covenant to perform the street work was a material consideration of the contract, and that the plaintiff would not have agreed to purchase said lots except for said covenant. It also found that the allegations of the complaint in general were true, and that the plaintiff was not guilty of laches.

On this appeal the appellant presents four points for consideration: (1) That the evidence is insufficient to support the finding that the covenant was material; (2) that, as the appellant is the assignee of the original vendor and as such has received only a portion of the payments for the lots, it could be required to return, on rescission, only what it received; (3) that the respondent is guilty of laches; and (4) that respondent was not entitled to interest on the purchase installments prior to the date of rescission.

[1] (1) On the prior appeal this court said:

"No one, we take it, would have the temerity to claim, as a matter of law, that the cost of the street work fronting a city lot could be treated as *de minimis*. Again, so far as the item may be said to be trivial, the question seems to be settled in California against the contention of the respondent. *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773."

[2] It might be added that no one taking a contract for the purchase of lots in a new subdivision tract of land would assume from a covenant such as we have here that the vendor would lay a sidewalk and pave the street in front of the lot sold only, and leave the purchaser sunk in the midst of the tract without either street or sidewalk approaches. But, irrespective of the probable cost of the work in front of the two lots, the question of the importance and materiality of the covenant was one for the trial judge. Appellant insists that the evidence is insufficient because the respondent in some way qualified her testimony on cross-examination and adds that—

"It is elementary that when a witness makes an unqualified statement on direct examination and then qualifies or explains it on cross-examination, or on redirect, that the original unqualified statement is not the testimony of the witness; the testimony is the statement together with the qualification or explanation given. A finding which is supported by the unqualified testimony of a witness, given on direct examination, but which is contrary to the testimony of the witness as qualified or explained by the witness on cross-examination, or on redirect, is not supported by the testimony of such witness."

[3] We do not understand this to be a correct statement of the law so far as the function of an appellate court is concerned. The Supreme Court has repeatedly held that we should not weigh or analyze the testimony of witnesses called at the trial, but that, if any evidence is found in the record to sustain the finding we should not disturb it. We cannot say that there is not some evidence to support the finding that the covenant for street work was a material consideration of the contract, and, this being so, the breach of the covenant was a sufficient ground for rescission.

[4, 5] (2) Appellant has not referred us to any authority holding that the assignee of a contract of sale of real property may not be required to restore the entire consideration under a judgment of rescission. The vendee, of course, is required to restore the property to the assignee, and it would seem to follow, as a matter of equity, that he would not have to depend upon a divided liability on account

of the assignment. We do not have to decide the question here, because the court found that the original vendor Brown owned all the stock of the appellant corporation at the time of the assignment of the contract, with the exception of the two shares. Through a long line of decisions the rule has been announced that, when an individual conducts his business under a corporate name, owning all the stock of the corporation except a few qualifying shares, the difference between the individual and corporate entities will be disregarded, if necessary, to work out equitable ends.

[6] (3) Upon the question of laches, the appellant argues that the evidence shows "indolence, folly, and a careless indifference to ordinary and accessible means of information on the part of respondent." She replies that this issue is closed by the former decision of this court holding that the complaint pleaded a cause of action, and by the findings of the trial court that these allegations were true. The appellant concedes that the former decision is the law of this case, if respondent "establishes the allegations of her complaint and if appellant does not establish any competent legal defenses." Assuming, in accord with this concession, that the former decision controls to the extent that the complaint does not show laches as a matter of law, then the issue becomes a matter of special defense, the burden of proving which falls upon the appellant. It offered no evidence of any kind to prove this defense, and thus the finding of the trial court, based upon the parties' stipulation that the allegations of the complaint were true, leaves the case the same as it was on the consideration of the demurrer on the former appeal.

[7] (4) Respondent concedes that interest should run from the date of rescission and not from the time of payment of each installment. The amount of the excess interest allowed in the judgment does not appear. The judgment will therefore be modified by striking therefrom all interest allowed prior to April 6, 1921, the date of rescission, the exact amount to be ascertained by the trial court when the remittitur goes down, and, as so modified, the judgment is affirmed. Appellant insists that because of this modification it should have its costs on this appeal. But if the error had been called to the attention of the trial court it could have been corrected without an appeal.

Judgment modified and affirmed, with costs to respondent.

We concur: LANGDON, P. J.; STURTEVANT, J.

63 Cal. App. 1920

FERRY v. O'BRIEN et al. (Civ. 4113.)

(District Court of Appeal, Second District, Division 1, California. Sept. 5, 1923. Hearing Denied by Supreme Court Nov. 1, 1923.)

1. Appeal and error ⇨82(4)—Order fixing costs on appeal made after judgment held appealable.

An order fixing costs on appeal, made after judgment, is appealable under Code Civ. Proc. § 963.

2. Appeal and error ⇨113(1)—Order refusing to vacate order fixing costs on appeal not appealable.

An order refusing to vacate an order fixing costs on appeal held not appealable.

3. Appeal and error ⇨843(1) -- On appeal from two orders one of which is not appealable appellate court will consider transcript applicable to appealable order only.

Where an appeal is taken from two orders one of which is not appealable, the appellate court will confine itself to those portions of the transcript on appeal which apply to the appealable order.

4. Appeal and error ⇨936(1)—In view of presumption, showing held insufficient to disclose that order fixing costs was made without hearing of motion on which based.

Where on plaintiff's motion a memorandum of costs on appeal was stricken, leave given to file a new one, and an order fixing costs was entered, held, that a showing by defendant was insufficient to disclose that the order was granted without a legal hearing of the motion; the presumption that the order was made only after a legal hearing of the motion on which based being sufficient to sustain it in the absence of a satisfactory showing to the contrary.

5. Appeal and error ⇨226(1)—Objection that order allowing new memorandum of costs on appeal should have been made on terms too late when first made on appeal.

Where defendant failed to make any showing before the trial court authorizing such court to impose terms as a condition on which a motion to strike a memorandum of costs on appeal and to file a new one was entered, and failed to intimate to the court that terms should be imposed, error cannot be predicated on failure to impose terms where such demand is made for the first time on appeal.

6. Costs ⇨264—Procedure for obtaining order taxing costs on appeal upon new memorandum of costs held permissible.

A successful plaintiff may obtain an order fixing costs on appeal by motion to strike out a prior memorandum of costs and for leave to file a new one, although the better practice might be to move to amend the memorandum of costs.

7. Costs ⇨264—Order taxing costs on appeal effective on day of date and not on day of filing.

An order taxing costs on appeal held to become effective on the day of its date and not on the day of its filing.

8. Costs ⇨264—Failure to file memorandum of costs on appeal within statutory time a waiver thereof.

By failure to file a memorandum of costs on appeal within the 30 days prescribed by Code Civ. Proc. § 1034, the successful party waives all his claim for costs.

9. Costs ⇨264—Order taxing costs on appeal held properly vacated for "inadvertence and mistake."

Where the successful party filed a memorandum of costs on appeal and subsequently moved to strike such memorandum and for leave to file a new one, a showing that an appeal had been taken in each of two cases between the same parties, and that the costs for presenting petitions for rehearing had been interchanged in the two cases, held to present a case of inadvertence and mistake entitling plaintiff to relief under Code Civ. Proc. § 473.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inadvertence.]

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by Peter L. Ferry against William O'Brien, Winifred F. Marr, and others. From an order fixing costs and an order refusing to vacate such order, defendant last named appeals. Order fixing costs affirmed, and appeal from order refusing to vacate dismissed.

Winifred F. Marr, in pro. per.

Hartley Shaw, of San Francisco, for respondent.

CURTIS, J. Upon a former appeal of this action the judgment was affirmed and respondent was awarded his costs. The remittitur was filed with the clerk of the trial court May 17, 1922. On May 19th respondent filed with the clerk of said court his memorandum of costs and disbursements, amounting to \$29.50. On May 26, 1922, respondent gave notice that he would, on June 2, 1922, move the court for leave to file a new and further memorandum of costs and disbursements, on the ground that the former one served and filed by him was, by reason of inadvertence and mistake on the part of respondent, incorrectly drawn, and that the items therein were not correct. With this notice of motion respondent served a new memorandum of costs and disbursements, together with the affidavit of his attorney setting forth certain facts which he relied upon as constituting inadvertence and mistake on his part. The only difference between the two memorandums of costs was in the two items for printing the petition for rehearing in the District Court of Appeal and printing the petition for rehearing in the Supreme Court. The amount of these items as given in the first cost bill was \$13.50, and in the second cost bill filed was \$71.80. In the affidavit of re-

spondent's counsel, accompanying his notice of motion, it was stated that besides the present action there was another action pending in said court entitled "Peter L. Ferry v. Winifred F. Marr"; that the two actions were tried together, and on appeal were heard at the same time in the Supreme Court, and that the decisions of the Supreme Court affirming the judgments in said actions in favor of the respondent were made on the same day; that the items to be inserted in each of said cost bills were the same, except as to the amounts thereof; that the items for printing the petitions for rehearing in the District Court of Appeal and the Supreme Court were interchanged, and those items which should have been included in the cost bill in the present case were omitted therefrom, and those in the case of Ferry v. Marr erroneously inserted therein.

Before said motion came on for hearing respondent gave notice of a second motion to vacate and set aside the judgment for costs on appeal, amounting to \$29.50, which had theretofore been entered by the clerk, on the ground that said judgment had been taken and entered for a less amount than the costs actually due respondent by reason of the inadvertence and mistake of respondent. This motion was noticed for hearing for June 14, 1922. After various continuances of these motions, the court on June 16, 1922, made and signed an order striking out respondent's memorandum of costs and granting respondent leave to file a new memorandum of costs and setting aside the judgment for costs amounting to \$29.50 entered by the clerk upon the first memorandum of costs. On July 6, 1922, appellant made a motion, after due notice to respondent, to vacate this order, which last-named motion was denied by the court. Appellant now appeals both from the order made and signed June 16, 1922, and the order refusing to vacate the same made July 6, 1922.

[1, 2] The order of June 16th, having been made after judgment, is appealable. Code Civ. Proc. § 963. The order of July 6, 1922, being simply an order refusing to vacate the order of June 16, 1922, is not appealable. *Henly v. Hastings*, 3 Cal. 341; *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103; *Doyle v. Republic Life Insurance Co.*, 125 Cal. 15, 57 Pac. 667; *Smith v. Questa*, 58 Cal. App. 1, 207 Pac. 1036; *Reynolds v. Reynolds* (Cal.) 216 Cal. 619. [The appeal, therefore, from the order of July 6th, should be dismissed.

[3] The appeal from the order of June 16, 1922, is the only matter that we can consider, and on the hearing of this appeal we must confine ourselves to those portions of the transcript on appeal which apply to the appeal from this order of June 16th. This will preclude us from considering the affidavit of Winifred F. Marr filed July 5, 1922, and used on her motion to set aside

the order of June 16th. It was not before the court on said last-named date, and has no place in the record on appeal from the order of June 16th.

[4] Appellant's first objection to the order of June 16th is that it was made without any hearing of respondent's motion to strike out the first memorandum of costs and for leave to file a new memorandum of costs. This order is presumed to have been made only after a legal hearing of the motion upon which it is based. This presumption is sufficient to sustain the order unless a satisfactory showing is made to this court that the lower court granted the same without a legal hearing of respondent's motion. No such showing has been made. The order itself recites that it was given "on motion of the plaintiff made after due service of notice thereof on the defendant Winifred F. Marr." The minutes of the court of June 16th are as follows:

"On hearing of motion of plaintiff to strike out cost bill and retax costs, Hartley Shaw appearing as counsel for plaintiff, and Winifred F. Marr appearing in propria persona, order signed."

There is nothing in this recital in the judgment, nor in this minute entry, to indicate that the court granted the order without the necessary preliminary hearing; but, on the other hand, both the recital and the minute entry tend to support the regularity of the order. Even in the affidavit of Winifred F. Marr, which, as we have before observed, is not properly before the court on this hearing, we do not find anything that would justify this court in declaring the order invalid for failure of the court, granting the same, to hold a proper hearing of said motion. It appears from said affidavit that the two motions of respondent—one to set aside the memorandum of costs already filed and to permit the filing of a new one in its place, and the other to set aside and vacate the judgment for costs amounting to \$29.50—came on for hearing at the same time. The court indicated that it would hear first the motion to strike out and vacate the judgment. Upon the hearing of this motion the appellant was present and opposed the granting of the same. She introduced evidence, and both she and the attorney for the respondent argued the matter before the court. This motion was based upon the same affidavit upon which respondent based his motion to strike out the first memorandum of costs and for permission to file a new memorandum of costs. The grounds relied upon by the respondent were the same in each motion—inadvertence and mistake in preparing the first memorandum of costs. The facts relied upon by respondent to show this inadvertence and mistake were the same in each proceeding. By her own affidavit appellant has shown that she offered no valid

defense to the granting of the motion to vacate the judgment, nor does she show in this affidavit or otherwise that any facts existed or did exist at the time of said hearing which would constitute a defense to the granting of the motion to strike out the first memorandum of costs filed. We are satisfied that the court considered that both motions were before it at the time of said hearing and were submitted upon the evidence and argument produced at that time, and we are also satisfied that the lower court was justified in arriving at such a conclusion. We, therefore, cannot agree with appellant's contention that said motion was granted without a hearing upon the same.

[5] As to appellant's contention that the court should have granted said motion, if at all, only upon the imposition of such terms as might be just, it is sufficient to say that appellant not only failed to make any showing before the lower court that would authorize the court to impose terms as a condition upon which said motion would be granted, but the record clearly shows that she never intimated to the court that terms should be imposed upon the granting of said motion. Such demand comes too late when made for the first time in this court.

[6-8] Appellant insists that respondent's remedy was by a motion for leave to amend his memorandum of costs, rather than by a motion to strike out his first memorandum of costs and for leave to file a new one. As conceded by respondent's counsel, the proceeding by motion to amend might have been the better practice, but our attention has not been called to any authority holding that the practice followed in this instance was not permissible. Practically the same results would be accomplished by following either proceeding. It is not shown that appellant has sustained any injury by the adoption of the practice pursued. The only suggestion made by her, whereby she claims to have sustained damage, is that there is no limit in the order as to the time within which respondent may file his new memorandum of costs, and that respondent may by his failure to file his new memorandum of costs continue a cloud upon appellant's property until the time when the judgment ceases to be a lien upon her real property, which would be five years from the date of the docketing of the judgment. As to this suggestion, we think appellant is in error. The order does not attempt to extend the time within which respondent may file his memorandum of costs on appeal, which, by section 1034 of the Code of Civil procedure, is 30 days after the remittitur is filed with the clerk of the superior court. As we have already seen, the remittitur in this case was filed May 17, 1922. Therefore, respondent's last day within which to file his memoran-

dum of costs would be June 16, 1922, the date of the order appealed from. Appellant refers to the order both in her notice of appeal and in her brief as of date June 17, 1922. The order was granted and signed on June 16th, but not filed until June 17th. It became effective the day of its date and not the day of its filing. *Fresno Estate Co. v. Fiske*, 172 Cal. 583, 597, 157 Pac. 1127. June 16th, the date of the order, was the last day under the statute within which respondent could file his memorandum of costs. By failure to file his memorandum of costs within this time, if he did so fail, he waives all claim for costs. *Riddell v. Harrell*, 71 Cal. 254, 261, 12 Pac. 67; *Galindo v. Roach*, 130 Cal. 389, 62 Pac. 597.

[9] The facts set forth in the affidavit of respondent's counsel, and filed with his motion to strike out the first memorandum of costs and for permission to file a new memorandum of costs, presented a case of inadvertence and mistake, entitling respondent to relief under section 473 of the Code of Civil Procedure. *Watson v. S. F., etc., R. R. Co.*, 41 Cal. 17; *O'Brien v. Leach*, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105; *Vinson v. Los Angeles Pac. R. R. Co.*, 147 Cal. 479, 82 Pac. 53; *Haviland v. Southern California Edison Co.*, 172 Cal. 605, 158 Pac. 328.

The appeal from the order of July 6, 1922, is dismissed, and the order of June 16th is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

(63 Cal. App. 518)

MILLSAP v. ALDERSON et al.
(Civ. 3951; L. A. 7870.)

(District Court of Appeal, Second District, Division 1, California. Aug. 25, 1923. Hearing Denied by Supreme Court Oct. 22, 1923.)

1. Physicians and surgeons ⇨5(1)—Practice of medicine and surgery and of naturopathy distinct systems.

In view of Medical Practice Act 1876 (St. 1875-76, p. 794) and Amendment thereto by St. 1877-78, p. 920, § 5, which was repealed by St. 1901, p. 56, and of the new Medical Practice Act of 1913 (St. 1913, p. 722), the Legislature, by Act March 4, 1907 (St. 1907, p. 252) § 16, and St. 1909, p. 418, adding a paragraph to said section, recognized and intended to provide for two distinct systems for the treatment of the sick and afflicted, when it made provision for the granting, by the board of medical examiners, of certificates to practice medicine and surgery to one class of applicants and certificates to practice naturopathy to another class.

2. Physicians and surgeons ⇨5(1)—"Physician and surgeon" is one holding unlimited certificate.

Under St. 1913, p. 722, a physician and surgeon is one who holds an unrevoked, un-

limited certificate from the board of medical examiners to treat the sick and afflicted.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Physician.]

3. Physicians and surgeons ⚡11(3)—Articles of incorporation admissible to prove meaning of naturopathy.

In a proceeding to revoke a certificate to practice naturopathy, it is reasonable to assume that the Legislature, in providing, by St. 1909, p. 418, for the issue of certificates, was cognizant of the practice of naturopathy as shown by articles of incorporation of the Association of Naturopaths, on file in the office of the secretary of state, but in any event, such articles are admissible in evidence to define the practice of naturopathy.

4. Physicians and surgeons ⚡5(1)—Practice of "naturopathy" limited.

Under St. 1909, p. 418, St. 1913, p. 722, a doctor of naturopathy is a person who holds an unrevoked certificate from the board of medical examiners, authorizing him to treat the sick and afflicted by the use of light, air, water, clay, heat, rest, diet, herbs, electricity, massage, Swedish movements, suggestive therapeutics, chiropractic, magnetism, physical and mental culture, etc.

5. Physicians and surgeons ⚡5(1)—Board of medical examiners could not indirectly permit naturopath to practice medicine and surgery.

Since the board of medical examiners was without authority to grant a naturopath a certificate to practice medicine and surgery, upon his diploma from the Association of Naturopaths, it could not do so indirectly, by "recognizing" his certificate to practice naturopathy as one entitling him to practice medicine and surgery.

6. Physicians and surgeons ⚡5(4)—Court not bound by determination of board of examiners as to meaning of naturopathy.

The court is not bound by a determination of the board of medical examiners, as to the meaning of the word "naturopathy," and need not hold that such practice included the practice of medicine and surgery.

7. Physicians and surgeons ⚡5(4)—Naturopath not entitled to practice medicine and surgery.

One was not entitled to engage in the general practice of medicine and surgery under a certificate to practice naturopathy, under St. 1909, p. 418, and St. 1913, p. 722.

8. Physicians and surgeons ⚡11(2)—Certificate of naturopath revoked because he engaged in general practice.

A certificate to practice naturopathy may be revoked where the holder thereof engaged in the general practice of medicine and surgery.

9. Statutes ⚡166—Re-enactment with modifications held not to work repeal.

Medical Practice Act, § 14, was not repealed by its amendment in 1921 (St. 1921, p. 1009) where the amendment was a re-enactment

with modifications, in view of Pol. Code, § 325, which provides for such contingency.

10. Certiorari ⚡5(1)—Not proper remedy, if appeal will lie.

Certiorari is not a proper remedy, where an appeal will lie.

11. Constitutional law ⚡56—Act attempting to confer appellate jurisdiction upon superior court unconstitutional.

The amendment of 1921 (St. 1921, p. 1009) to Medical Practice Act, § 14, in so far as it attempts to confer appellate jurisdiction upon the superior court, is unconstitutional; such jurisdiction being fixed by Const. art. 6, § 5.

12. Physicians and surgeons ⚡11(3)—Certiorari remedy to test validity of order of board of medical examiners.

Certiorari in the superior court is the proper remedy to test the validity of an order of the board of medical examiners, revoking a certificate to practice naturopathy.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Certiorari by Roy Millsap, to review an order of the Board of Medical Examiners, composed of Harry E. Alderson and others. From a judgment annulling the order, the defendants appeal. Reversed.

Harry A. Encell, of San Francisco, and Frank M. Smith, Charles D. Ballard, and H. J. Castellaw, all of Los Angeles, for appellants.

H. C. Millsap and Millsap & Kendall, all of Los Angeles, for respondent.

CURTIS, J. This is an appeal from a judgment annulling on certiorari an order of the board of medical examiners, revoking respondent's certificate to practice naturopathy in the state of California.

Respondent was licensed to practice naturopathy on August 6, 1909, and immediately thereafter entered upon the practice of his profession, and has ever since continued said practice. During all of said time respondent, in addition to the practice of naturopathy, and without any other license from said board of medical examiners, has engaged in the practice of medicine and surgery, and was so engaged on the 5th day of January, 1921. On January 11, 1921, a verified complaint was filed with said board of medical examiners, charging that respondent, on the 5th day of January, 1921, and for six months prior thereto, had practiced a system and mode of treating the sick and afflicted not authorized by his said certificate, and asking for a revocation of his certificate. A hearing was had upon this complaint, and at its conclusion said board made and entered its order finding the respondent guilty of the charge preferred against him, and as a penalty revoked his certificate to practice naturopathy. This order of the board of medical examiners

was annulled by a judgment of the superior court, and from said judgment appellants have perfected this appeal.

The contention of respondent is that the certificate to practice naturopathy, issued to him by the board of medical examiners on August 6, 1909, authorized him to engage in the practice of medicine and surgery.

The agreed statement of facts herein shows that on August 8, 1904, the Association of Naturopaths of California was incorporated under the laws of the state of California. Immediately after its organization said association established a college in the city of Los Angeles, where students were enrolled, and after completing the required course of study were given diplomas or certificates conferring upon them the degree of doctor of naturopathy. The officers authorized by said association to sign and issue said diplomas or certificates were known as the "state board of examiners of the naturopathic physicians" or "board of examiners of the association of naturopaths of California." On March 1, 1908, said board issued to Roy Millsap, the respondent herein, a diploma or certificate conferring upon him the degree of doctor of naturopathy. At the time respondent received said diploma or certificate, conferring upon him said degree of doctor of naturopathy, an act regulating the practice of medicine and surgery, osteopathy, and other systems and methods of treating the sick, approved March 4, 1907 (St. 1907, p. 252), was in effect in this state. This act provided for the issuance of three different forms of certificates by the board of medical examiners of the state of California. First, a certificate authorizing the holder to practice medicine and surgery. Second, a certificate authorizing the holder to practice osteopathy. Third, a certificate authorizing the holder to practice any other system or mode of treating the sick and afflicted, not otherwise referred to. The act further provided that, in order to procure a certificate to practice medicine and surgery, the applicant for such certificate should file with said board a diploma issued by some legally chartered medical school, possessing certain prescribed requirements; applicants for a certificate to practice osteopathy should file a diploma from a legally chartered college of osteopathy; applicants for a certificate to practice any other system or mode of treatment should file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or pretends to follow.

By section 16 of said act, any person who, at the date of the adoption of said act of 1907, held a certificate from the board of medical examiners created under any of the previous acts of the Legislature regulating the practice of medicine and surgery, was entitled to practice medicine and surgery in this state the same as if it had been issued

under said act, and any person who, on said date, held a certificate from the board of osteopathic examiners under the act regulating the practice of osteopathy was entitled to practice osteopathy in this state the same as if it had been issued under said act.

In the year 1909, by an act of the Legislature, approved March 19th of that year (St. 1909, p. 418) a new paragraph was added to said section 16, which provided that any person who then held an unrevoked certificate issued by the board of examiners of the association of naturopaths of California, incorporated under the laws of the state of California August 8, 1904, and who was practicing naturopathy prior to the passage of said amendment of 1909, would be entitled to practice naturopathy in the state of California, the same as if it had been issued under said amendment. This law further provided that the board of medical examiners should indorse such certificates at their first meeting after said amendment became a law, or at any subsequent meeting within six months thereafter, by the signature of its president and secretary, and affixing its official seal.

It does not appear that the respondent ever attempted to comply with the law of 1907, but on August 6, 1909, his diploma or certificate, authorizing him to practice naturopathy, was presented to said board of medical examiners and indorsed by it as provided by said amendment of 1909, and this certificate, so indorsed by the board of medical examiners, is the only certificate or license ever issued to respondent by the board of medical examiners of the state of California, and it was this certificate or license which was revoked by said board of medical examiners under the complaint filed with said board on January 11, 1921.

It will thus be seen that at the date respondent received his said certificate from the board of medical examiners of the state of California, the laws of this state regulating the practice of medicine and surgery, osteopathy, and other systems of treating the sick, as enacted in 1907 and amended in 1909, provided for at least three kinds of certificates: First, a certificate to practice medicine and surgery; second, a certificate to practice osteopathy; and, third, a certificate to practice naturopathy. While there have been various amendments to the Medical Practice Act since respondent received his said certificate from said board of medical examiners, none of said amendments in any way affected the legal status of respondent, nor enlarged his powers under said certificate.

[1] In providing for these three distinct forms of certificates, the Legislature must have had in mind three distinct systems for the treatment of the sick and afflicted. If the practice of naturopathy is the same as that of the practice of medicine and surgery, why

make any distinction in the form of certificates which the followers of the two systems must procure from the board of medical examiners? Why was it provided in section 16 of the 1909 law that those persons who held certificates from the board of medical examiners, created under the acts of the Legislature adopted prior thereto, should be entitled to practice medicine and surgery, and that those persons who held certificates from the board of examiners of the Association of Naturopaths should be entitled to practice naturopathy, if the practice of medicine and surgery and the practice of naturopathy were one and the same system? Why did the Legislature not provide that any person holding a certificate from the board of medical examiners or from the board of examiners of the Association of Naturopaths should be entitled to practice medicine and surgery, if the practice of naturopathy meant the same thing as the practice of medicine and surgery? We cannot escape the conclusion from the reading of these statutes that the Legislature recognized, and intended to provide for, two distinct systems for the treatment of the sick and afflicted when it made provision for the granting by the board of medical examiners of certificates to practice medicine and surgery to one class of applicants, and certificates to practice naturopathy to another class. Just what the distinction between these two systems is we will now endeavor to ascertain. Neither the statute of 1907, in its original form, nor as amended in 1909, defines either a physician or surgeon or a naturopath. Neither does it define what is meant by the practice of medicine and surgery, nor what is meant by the practice of naturopathy. Section 11 of the Medical Practice Act of 1876 (Stats. 1875-76, p. 794), being the first statute enacted in this state for the regulation of the practice of medicine, provided that—

"Any person shall be regarded as practicing medicine, within the meaning of this act, who shall profess publicly to be a physician and to prescribe for the sick, or who shall append to his name the letters 'M. D.'"

This section was amended by the Medical Practice Act of 1878 (St. 1877-78, p. 920, § 5), and as amended read as follows:

"Any person shall be regarded as practicing medicine, within the meaning of this act, who shall profess publicly to be a physician, or who shall habitually prescribe for the sick, or who shall append to his name the letters 'M. D.'"

This statute was repealed by the Medical Practice Act of 1901 (Stats. 1901, p. 56). In section 16 of this latter statute we find the following definition:

"Sec. 16. Definition. The following persons shall be deemed as practicing medicine or surgery within the meaning of this act:

"1. Those who profess to be, or hold them-

selves out as being, engaged as doctors, physicians or surgeons in the treatment of disease, injury, or deformity of human beings.

"2. Those who, for pecuniary or valuable consideration, shall prescribe medicine, magnetism, or electricity, in the treatment of disease, injury, or deformity of human beings.

"3. Those who, for pecuniary or valuable consideration, shall employ surgical or medical means or appliances for the treatment of disease, injury, or deformity of human beings, except dealers in surgical, dental and optical appliances.

"4. Those who, for a pecuniary or valuable consideration, prescribe or use any drug or medicine, appliance, or medical or surgical treatment, or perform any operation for the relief or cure of any bodily injury or disease."

[2] This section does not appear to have been directly repealed until 1921, but in 1913 a new medical act was enacted. Stats. 1913, p. 722. By section 8 of this act it was provided that the board of medical examiners shall issue a form of certificate to read as follows:

"A certificate authorizing the holder thereof to use drugs or what are known as medicinal preparations in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, or other physical or mental conditions, which certificate shall be designated 'physician's and surgeon's certificate.'"

This section, in so far as it provides for the form of a "physician's and surgeon's certificate," remains the law up to the present time. We think it apparent from these statutes, particularly since the passage of the Medical Act of 1901, which was in effect at the time respondent was granted his certificate or license to practice naturopathy by the board of medical examiners, that it was intended to confer upon those holding physician's and surgeon's certificates unlimited authority to prescribe for and treat the sick and afflicted, and to use any and all methods in such treatment. We therefore conclude that a physician and surgeon is one who holds an unrevoked, unlimited certificate from the board of medical examiners to treat the sick and afflicted.

[3] Having ascertained the meaning of the terms "physician and surgeon," let us turn our attention to the words "naturopathy" and "naturopath." Not only are these terms not defined in the statutes of 1907 and 1909, as we have before observed, but we fail to find that the Legislature has ever attempted to define either of these terms. Not only so, but if our information is correct neither of these words is to be found in any medical work or dictionary. Nevertheless, we believe that the record in this proceeding furnished a satisfactory method of ascertaining a correct definition of these terms. As we have before seen, the amendment to the Medical Practice

Act of 1907, enacted in 1909 (Stats. 1909, p. 418) provided that—

"Any person who holds an unrevoked certificate issued by the board of examiners of the Association of Naturopaths of California, incorporated under the laws of the state of California, August eighth, 1904, * * * shall be entitled to practice naturopathy. * * *

By the passage of this statute the Legislature gave its official recognition to the work of the Association of Naturopaths of California, a corporation formed under the laws of this state. The Legislature did not attempt to define the system nor prescribe the powers and privileges of one holding a certificate so to practice. Neither did it recognize all certificates to practice this system of healing, but only those issued by a certain association incorporated under the laws of the state of California, to wit, the Association of Naturopaths of the state of California. The articles of incorporation of this association were on file in the office of the secretary of state and were a public record at the date of the passage of this amendment, and it is only reasonable to assume that, in officially recognizing the holders of certificates issued by said association as competent to practice a system of treating the sick and afflicted, the Legislature was cognizant of the purposes of this association as set forth in its articles of incorporation, and that it authorized the board of medical examiners to recognize such certificates, having in view the purposes of the association as contained in its articles of incorporation, and that, in placing its stamp of approval upon such certificates, it did so with the understanding that the system of treatment to be followed by its certificate holders would be in conformity to the expressed purposes of said association as set forth in its articles of incorporation. But even if we are not justified in so assuming, we are of the opinion that these articles of incorporation, in so far as they attempt to define the practice of naturopathy, or if they shed any light upon the meaning of the words "naturopathy" or "naturopath," are not only competent evidence, but, in view of the absolute dearth of information from other sources, they are as just and as satisfactory a source of evidence as we can resort to in our endeavors to ascertain the true meaning of the terms involved.

The articles of incorporation set forth the purposes of the Association of Naturopaths of the state of California, in paragraph II thereof, as follows:

"II. The purposes for which this corporation is formed are fundamentally to seek, teach and embody truth, principally to study nature, mind and man, and ultimately to enable the individual human being to bring within right the highest possible attainments consistent with his inborn qualities, tendencies and desires, to interpret

nature, to unfold humanity and to teach naturopathy, 'in its theoretical, practical modes of restoring and maintaining health,' to raise the standard of qualification, to increase the proficiency of its members, to promote the science of naturopathic therapeutics and for the interchange and discussion of matters of mutual interest, and to give the members legal protection. The materia medica shall consist of light, air, water, clay, heat, besides rest, diet, herbs, electricity, massage, Swedish movements, suggestive therapeutics, chiropractic, magnetism, physical and mental culture, etc. The board of examiners shall examine all applications for active membership. All members who shall have passed a satisfactory examination before the board may be issued a diploma, conferring the degree of doctor of naturopathy upon them; such diploma shall be signed by the members of the board, president and secretary."

[4] By reference to the above paragraph of said articles of incorporation, it will be observed that one of the purposes of said association is "to teach naturopathy in its theoretical and practical modes of restoring and maintaining health," and that "the materia medica shall consist of light, air, water, clay, heat, rest, diet, herbs, electricity, massage, Swedish movements, suggestive therapeutics, chiropractic, magnetism, physical and mental culture, etc." "Materia medica" is defined as "the substances employed as remedial agents." Therefore, the substances employed by one practicing naturopathy in the treatment of the sick and afflicted would be light, air, water, etc., and a naturopath or a doctor of naturopathy would be a person who holds an unrevoked certificate from the board of medical examiners, authorizing him to treat the sick and afflicted by the use of the substances above enumerated.

From these definitions of a physician and surgeon and of a naturopath it must be evident that the calling or profession of one differs materially from the calling or profession of the other; that the system of healing employed by the naturopath has little in common with that employed by the physician and surgeon, and that, while the physician and surgeon is authorized to treat the sick and afflicted by any and all methods and means, the naturopath is limited in his treatment to his particular system.

It is true, as suggested by respondent, that among the acts which the law permits a physician and surgeon to perform is to prescribe medicine, magnetism, and electricity, and that herbs, electricity, and magnetism are included among the substances which compose the materia medica of naturopathy, and therefore are permitted to be prescribed by a naturopath or doctor of naturopathy. Conceding that a naturopath has the right to prescribe herbs, electricity, and magnetism to the same extent as that exercised by a physician and surgeon, yet the possession of this right or privilege by the naturopath does not constitute him a physician and surgeon, in

the absence of any right to exercise the other duties of a physician and surgeon. The optometrist may test the eyes for glasses in the same manner as a physician and surgeon may do, yet this right in no way constitutes him a physician and surgeon, or authorizes him to practice medicine and surgery. The chiropodist may perform certain surgical operations upon the feet, as now provided by statute, yet it would not be claimed that when this power was conferred upon him he was created a physician and surgeon. There is no doubt but that the practice of osteopathy and the practice of medicine and surgery overlap to a certain extent, but still it would not be claimed that a license to practice osteopathy constituted the holder thereof a physician and surgeon.

Respondent further claims that the board of medical examiners, by a certain course of procedure indulged by it during the time that respondent was practicing his profession under his certificate, both recognized him as a physician and surgeon, and by its conduct clearly showed that said board construed respondent's certificate as a certificate entitling him to practice medicine and surgery. The statute passed in 1917 (Stats. 1917, p. 93) required every holder of a license under the medical practice act to pay an annual license fee. This fee the respondent paid for each of the years 1919, 1920, and 1921, and for each of said payments received a receipt from said board of medical examiners, which recited the payment of said fee and that respondent "was thereby entitled to practice as a physician and surgeon." By the same statute the board of medical examiners was authorized and directed to publish annually a directory, giving the addresses of all persons in the state who held unrevoked licenses to practice under any medical practice act of the state. This directory was to contain, in addition to the names and addresses of said persons, and other information, a statement of the form of certificate held by each of said persons. The directory was made prima facie evidence of the right of the persons named therein to practice. In compliance with the provisions of said statute the board of medical examiners published such a directory, and in addition to the matters provided by law included therein for each of the years 1920 and 1921 a tabulation of all certificates issued between August 1, 1901, and August 10, 1913, as follows: "To practice medicine and surgery, 2,233, to practice osteopathy, 258, to practice any other system none." Respondent's name in said directory was followed by the letter "N." Other names were followed by the letter "O." A note preceding said names explained that the letter "N" stood for naturopath, and the letter "O" for osteopath. Respondent argues that his certificate having been issued between the dates above indicated, and not be-

ing a certificate authorizing the holder thereof to practice osteopathy, as his name was followed by the letter "N" and not by the letter "O," must be included in the 2,233 certificates first enumerated, and being those authorizing the holders to practice medicine and surgery.

Therefore respondent insists that the board of medical examiners by these acts, both in issuing said receipts in the form in which they were issued and in the preparation of said directory in the manner hereinbefore set out, recognized respondent's certificate to practice naturopathy as one conferring upon him the right to practice medicine and surgery, and that the construction thus placed upon the word "naturopathy" by the board of medical examiners, a board composed of men learned in the medical profession, should be accepted by this court as the true meaning of the word "naturopathy." This especially should be the rule to be adopted by this court in this case, respondent insists, for the reason that the word "naturopathy" is a technical word, and does not appear in any medical work or dictionary, and has not been defined by the Legislature.

[5] We cannot agree with the respondent in his contention, either that the board of medical examiners had recognized his certificate as one authorizing him to practice medicine and surgery, or that said board by any of its acts had placed a construction upon certificates of naturopathy which would entitle the holders thereof to practice medicine and surgery. In the first place, the record in this case would not justify the court in holding that said board had any intention of recognizing, or, in fact, ever did recognize, respondent's certificate as one entitling him to practice medicine and surgery, nor does this record show that the board ever placed such a construction on the word "naturopath" as claimed by respondent. Furthermore, the powers of the board of medical examiners are defined and limited by the various statutes passed by the Legislature upon this subject, and we fail to find in any of these statutes any authority given said board to grant a certificate to any person to practice medicine and surgery except he possess a diploma or certificate from certain recognized medical colleges, and by his complying in other respects with the requirements of the statutes. If the board was without authority to grant respondent a certificate to practice medicine and surgery upon his diploma from the Association of Naturopaths of California, it surely could not do indirectly what it is prohibited from doing directly, by "recognizing" his certificate to practice naturopathy as one entitling him to practice medicine and surgery.

[6] As to the construction or interpretation of the word "naturopathy," claimed by re-

spondent to have been placed thereon by the acts of the board of examiners, as we have already observed, we do not find anything in the record in this proceeding which would justify the conclusion that the board of medical examiners ever intentionally placed any such construction or interpretation upon said term as claimed by respondent. But even if the record was otherwise, we would not feel that this court was bound by the determination of such question by said board of examiners, in view of what we have already said regarding the stated purposes of the Association of Naturopaths of California, as set forth in its articles of incorporation, and the weight that should be given this statement in determining the meaning of the word "naturopathy."

[7, 8] We are therefore of the opinion that respondent, under his certificate to practice naturopathy, was without any right or authority to engage in the general practice of medicine and surgery, and that the board of medical examiners, having upon competent proof found that he had so engaged in the practice of medicine and surgery, at the time alleged in said complaint, was justified in revoking his said certificate. This conclusion, we believe, is in harmony with the views expressed by the Supreme Court in the case of *In re Rust*, 181 Cal. 73, 183 Pac. 548, and with those of the Court of Appeal as expressed in *Shoults v. Alderson*, 55 Cal. App. 527, 203 Pac. 809, and *Harlan v. Alderson*, 55 Cal. App. 263, 203 Pac. 1014. Our views, however, may not be in entire agreement with the decision in *In re Gerber*, 57 Cal. App. 141, 206 Pac. 1004, which we are unable to reconcile either with the cases above referred to or with our own interpretation of the provisions of the Medical Practice Act.

[9] Counsel for respondent further contends that, the proceedings against respondent having been commenced prior to the enactment of the amendment of section 14 of the Medical Practice Act of 1921 (St. 1921, p. 1009), and the order revoking his certificate having been made and entered subsequent to the time said amendment went into effect, the board was without jurisdiction to make or enter said order of revocation. This contention is advanced upon the theory that, by the amendment of 1921, section 14, as it stood when said proceedings were instituted, was repealed, and therefore no further proceedings could be had thereunder. Section 14 as amended was a re-enactment of said section in its original form, with two modifications, one relating to the punishment which the board was authorized to impose upon persons holding certificates under the Medical Practice Act, and the other relating to appeals from the orders of said board. The mere re-enacting of section 14 with these changes would not work any repeal of that portion of said section re-enacted. Sec-

tion 325 of the Political Code provides for just such a contingency, and is as follows:

"Where a section or part of a statute is amended, it is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment."

See, also, *Fletcher v. Prather*, 102 Cal. 413-419, 36 Pac. 658; *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, 177 Cal. 249, 170 Pac. 426. There may be some California cases which appear to hold a contrary doctrine, but we believe the correct rule is expressed in said section 325.

[10-12] As we have already seen, the respondent in this case, being dissatisfied with the order of the board of medical examiners in revoking his certificate, brought this proceeding in the superior court by certiorari. We have also seen that by the amendment of section 14 of the Medical Practice Act, as enacted in 1921 (Stats. 1921, p. 1009), an attempt was made to provide for an appeal from the order of the board of medical examiners to the superior court in cases of this kind. If an appeal would lie from the order of said board of medical examiners to the superior court, then proceedings in certiorari would not be a proper remedy. It is apparent, however, that said amendment of 1921 to said section 14, in so far as it attempts to confer appellate jurisdiction upon the superior court, is unconstitutional. The appellate jurisdiction of the superior court is fixed by article 6, § 5, of the Constitution. Therefore, any attempt on the part of the Legislature to either enlarge or limit the appellate jurisdiction of said court would be unconstitutional and void. *Chinn v. Superior Court*, 156 Cal. 479, 105 Pac. 580. The proceeding in certiorari, therefore, instituted by the respondent herein, was, in our opinion, the correct proceeding in order to test the validity of said order of the board of medical examiners.

For the reasons above stated, judgment is reversed, with directions to the superior court to dismiss said proceeding.

We concur: CONREY, P. J.; HOUSER, J.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. The application for transfer to this court, after decision by the District Court of Appeal of the Second Appellate District, Division One, is denied.

The application is based, in part, on a conflict between this decision and a decision rendered by the Second Division of the Second District Court of Appeal, in *Re Gerber*, 57 Cal. App. 141, 206 Pac. 1004. In so far as that case is inconsistent with the decision in the above-entitled case, we disapprove of the decision in *Re Gerber*.

63 Cal. App. 601

FOSTER v. GORHAM et al.

THOMPSON et al. v. SAME.

(Civ. 4057.)

(District Court of Appeal, Second District, Division 2, California. Sept. 1, 1923. Hearing Denied by Supreme Court Oct. 29, 1923.)

1. Pleading ⚡433(8)—Complaint held sufficient though payment of balance of purchase price not alleged.

In an action for damages for fraudulent misrepresentations in sale of land, a complaint alleging plaintiffs' performance of all covenants and conditions except payment of the balance of the purchase price was not insufficient for failure to allege readiness, ability, etc., to make such payment where plaintiffs attempted, though inartificially, to plead that such payment was withheld because plaintiffs insisted on their right thus to recoup any damages for which they might obtain judgment, where defendants' cross-complaints showed the amounts due and they were credited at the trial.

2. Appeal and error ⚡731(5) — Assignments of error held insufficient.

An assignment of error in that there was no evidence to support a finding, for the reasons set forth in certain specifications found in the transcript at specified pages, is insufficient.

3. Appeal and error ⚡768—Finding of knowledge of untruth of statement held supported by statements in defendants' brief.

A finding that the vendor knew his statement to vendee that "a flow of water of 20 miner's inches" would be available for irrigation was untrue when made was sustained by statements in defendant's brief that after making the contract he constructed a tunnel, built a cement reservoir, contracted with water experts to develop one of the wells at great expense, and consulted other experts, since if the statement were true such acts would be unnecessary.

Appeals from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Two separate actions by A. Foster against H. N. Gorham and others, and by Joseph Thompson and another against the same defendants. From judgments in favor of both parties plaintiff, defendants appeal. Affirmed.

Kennicott & Williams and Fogel & Beman, all of Los Angeles, for appellants.

Chas. H. Adkins and E. C. Bowen, both of Los Angeles, for respondents.

WORKS, J. These two actions, practically identical in character, were tried on the same evidence. The appeals in both cases are before us under a single number; the record in each is printed in one and the same transcript; and both are briefed together. A single opinion will therefore serve for a treatment of both appeals.

The actions were commenced for the purpose of recovering damages for fraud. Plaintiffs, as vendees, entered into certain contracts with defendants, as vendors, for the purchase and sale of certain lands. The alleged fraud consisted of false representations concerning the property. Plaintiffs had judgment, and defendants appeal.

[1] The first point made is that the complaints do not state causes of action. The contention is advanced that an action like these two—that is to say, an action for damages—may not be maintained except upon either a rescission or an affirmance of the particular contract claimed to have been fraudulently obtained. It is further insisted that if such an action be based upon an affirmance of the contract the complaint must allege the readiness, ability, and willingness of the plaintiff to perform his engagements under the agreement. There is no rescission alleged in the complaints which now lie before us. Upon the score of affirmance the two pleadings contain allegations which are practically alike. This is one of them:

"That plaintiff has performed each and every covenant and condition required of him to be performed under said contract, except the payment of the balance of the purchase price; that the defendants * * * have no property within the jurisdiction of this court subject to execution; that the property, the subject of this litigation, is included within a tract of land subject to a blanket mortgage of \$20,000; that if plaintiff should pay the balance due under said contract his claims herein set out could not be satisfied."

Appellants, basing their view on *Hines v. Brode*, 168 Cal. 507, 143 Pac. 729, insist that this allegation is insufficient. In that case the complaint alleged, after averring a certain offer to pay a sum due under the contract there in question:

"That plaintiff 'at the time of said offer to pay, ever since and now was and is ready, able and willing to pay said purchase price upon the conditions in said contract until discovery of said fraud.'"

The Supreme Court determined that the allegation, burdened with the last five words contained in it, amounted to a repudiation instead of an affirmance of the contract. The allegation of the complaints now before us is not subject to that condemnation. Rather, although inartificially conceived, it attempts by positive allegation to meet the effect of *Hines v. Brode*, as estimated in *Pembroke v. Houston*, 41 Cal. App. 54, 181 Pac. 828. In the opinion there rendered this court said:

"The first objection to the sufficiency of the complaint is that it appears therefrom that although the plaintiff had elected to affirm the contract and sue for damages, and is seeking to recover five thousand dollars, she is indebted

to the defendant, under the terms of the contract, in the sum of three thousand eight hundred dollars, the unpaid balance of the contract purchase price, with accrued interest thereon, which she has not paid or offered to pay, a portion of which was due before she discovered the facts on which she bases fraud, and that a still larger sum was due before the commencement of this action. We doubt if the failure to allege payment or tender of the amount for which she was in default at the time of discovering the alleged fraud is fatal to plaintiff's right of action. If the defendant is shown to have been actually guilty of fraud he was not in a position to declare a forfeiture; and we are of the opinion that the fraud, if it existed, justified the plaintiff in withholding the payments to recoup the damages she would be entitled to recover. We so construe the rule laid down by the Supreme Court in the case of *Hines v. Brode*, 168 Cal. 507."

This view of *Hines v. Brode*, is based upon a portion of the opinion in that case in which the Supreme Court said:

"Where, under an executory contract, a plaintiff seeks recoupment in damages for deceit while affirming the contract (and it must necessarily be an affirmance if the action be not after rescission) it must be conclusively taken as to such plaintiff that he stands ready and willing to pay the full consideration called for by the contract, and that the damages which he is entitled to recover are no other and no greater than those which would be awarded to a plaintiff who had fully executed his contract. Therefore, in case of an executory contract, from the award which the jury may make because of the fraud, must be deducted the unpaid part of the purchase price or the value of any other consideration."

However, the cases of *Hickman v. Johnson*, 36 Cal. App. 342, 178 Pac. 145, and *Hulinger v. Big Sespe Oil Co.*, 50 Cal. App. 6, 194 Pac. 742, seem to place upon *Hines v. Brode* a construction somewhat different from that expressed in *Pembroke v. Houston*, although it is possible that, upon a close comparison of the language employed in each, the three opinions of the District Court of Appeal may be harmonized. It is not necessary, however, to perform that labor here. We have already said that the allegation now under inspection is inartificially couched. Granting that the averment was necessary, it were better if the pleader had alleged in terms that the plaintiffs were ready, able, and willing to make payment of the amounts yet due, but that payment had been withheld for the reasons stated in the allegation as it now stands. Still, we think any defect in the allegation is immaterial under all present circumstances, even if the trial court might properly have sustained the general demurrers which were interposed to the complaints. The averment is not one in which an element is entirely missing in the legal sense. The reader of it may perceive an attempt to plead that the last payment was withheld only because of the insistence

of the plaintiffs that they had the right thus to recoup any damages for which they might obtain judgment. Moreover, in each case a cross-complaint was filed, and these pleadings showed the amount due under the respective contracts. One of the cross-complainants prayed judgment for the amount due, and the other demanded a foreclosure of the plaintiffs' rights under the contract involved in the action in which it was interposed, because of nonpayment. Further, the fact that the final payments due under both contracts had not been made was not lost sight of at the trial, for the court, in rendering its judgment for damages, gave credit to defendants for the amounts unpaid. It was ascertained by the judgment in each case, after giving these credits, that an amount was still due the plaintiff as damages, and judgment was rendered in each instance for the balance thus ascertained. These circumstances render nugatory appellants' contention that the complaints are insufficient. Under the doctrine of *Noakes v. City of Los Angeles*, 179 Cal. 38, 175 Pac. 409, the technical defect in the complaints, if any there may be said to be, was cured. Surely, any error of the trial court in overruling the general demurrers which were presented against the two complaints was without prejudice to the substantial rights of appellants, for the actions were fully tried upon the merits. The result finally attained by the judgment is the one plainly contemplated by *Hines v. Brode*, *supra*, whatever may be the form of the pleadings, considered from the standpoint of perfection, technically designed to lay a foundation for that result.

[2] It is contended that certain findings of the trial court are without support in the evidence. It was found, as finding 5, that—

Appellants "represented to said plaintiff that they owned and controlled a supply of water in a sufficient quantity and volume to irrigate properly, in a good and sufficient manner, all of the said tract of land and lots therein; that they had made a careful investigation of water available and accessible to irrigate said tract of land and the lots therein, and that they had discovered, and owned and controlled, a supply of water, to wit, a flow of water of 20 miner's inches, in a place known as Spanish Canyon, situated in the mountains in the vicinity of said tract of land, and that said supply of water of about 20 miner's inches in said Spanish Canyon was available and accessible to irrigate said tract of land and all of the lots therein. The court finds that the supply of water so owned and controlled by the defendants in said Spanish Canyon, and available for use on said tract was, in fact, at the time the said representations were made, and at the time the contract hereinafter mentioned was made and entered into, not in excess of 2 miner's inches of water, and that the statement that there was 20 miner's inches of water owned and controlled by the defendants, and available to irrigate said tract of land and the lots therein, was made as a positive statement of a fact, but that the

said statement and representation was not true, and that the said defendants knew at the time they made the same that such statement was not true."

This finding, along with others, is assailed by appellants in the following language:

"There is no evidence to sustain the findings of the court that appellants did not believe all of the statements that they made or that they made them without sufficient ground for their belief, and our specifications of the insufficiency of the evidence to justify the findings Nos. 2, 3, 4, 5, 6, and 7 [here are inserted references to parts of the transcript in which the various specifications may be found] in so far as they refer to the findings of the court that the appellants did not believe the representations which they made or that they made them recklessly and without sufficient investigation, or failed to attempt to carry out their promises should be sustained."

This method of presenting appellants' objections to the findings is both general and unsatisfactory, but we shall endeavor to make answer to the points so made as far as we are able to grasp their import and as far as we are able to make application of them. We understand appellants' view to be that the findings named by them are unsupported in so far as it is found: First, that appellants did not believe all the statements or representations that they made; second, that they made them without sufficient ground for a belief in their truth; third, that they made them recklessly and without sufficient investigation; fourth, that they failed to attempt to carry out promises which they had made. Thus reduced, the presentation of appellants' assault upon the findings is not a model of clarity, but we have made the best epitome we can formulate from the language which counsel have employed. The points thus listed are, however, to be depleted, perforce, by the process of elimination, both as to their number and as to their application to particular findings. In the first place, findings 2, 3, 6, and 7 contain nothing to which either of the four points may be applied. Also, we reject finding 4 from consideration, as it relates only to representations which appellants contend were mere statements of opinion. Without deciding whether or not they are so, we limit our inquiry to finding 5, above set forth, for the reason that it, if supported by the evidence, is sufficient to sustain the judgment. We next eliminate all of the points themselves save one, as having no application to finding 5. The sole survivor of this process is point first, and even that one does not in exact terms meet the situation, for the court found that appellants knew when they made the statement referred to in the finding that it was not true, whereas the point contests a finding that appellants did not believe the statement. We shall, however, consider the point as sufficiently made. Therefore, we

have remaining as the sole question concerning the findings: Is the evidence sufficient to support the finding that appellants knew that the following statement was untrue when they made it: That "they owned and controlled a supply of water in a sufficient quantity and volume to irrigate properly, in a good and sufficient manner, all of the said tract of land and lots therein; that they had made a careful investigation of water available and accessible to irrigate said tract of land and the lots therein, and that they had discovered, and owned and controlled, a supply of water, to wit, a flow of water of 20 miner's inches, in a place known as Spanish Canyon, situated in the mountains in the vicinity of said tract of land, and that said supply of water of about 20 miner's inches in said Spanish Canyon was available and accessible to irrigate said tract of land and all of the lots therein"?

[3] Respondents quote to us no evidence supporting this finding, but appellants say in their brief, concerning their activities after the contracts between the parties were consummated, omitting references to the transcript:

"After the sale to the respondents, the appellants constructed a 300-foot tunnel. They built a large cement reservoir and a distributing system to the property. They built roads and spent large sums in the upkeep of the water system they had installed, and at the very time that the trial was in progress they had entered into an expensive contract with Messrs. Patten & Monroe, acknowledged water experts in Monrovia district, to extend and develop one of the wells upon the premises. They did not spend the moneys above mentioned blindly, or in an attempt to get water where reasonable men would not have so attempted, but on the contrary made thorough investigation of the situation before buying the tract or beginning development. They consulted the best water experts available. They took advice from Thomas W. Patton and F. M. Monroe, who for many years had been connected with water development in the city of Monrovia. They went over the land with Mr. Pierce, water expert for R. C. Gillis of the city waterworks at Santa Monica. They had the opinion of Mr. Gerlich, city engineer of Monrovia, and from the opinions of all of these men, they were led to believe that they could reasonably expect to develop 5 to 20 inches of water in Spanish Canyon and from 25 to 30 inches from the well. That these ideas were not unreasonable is shown by the fact that in the first tunnel constructed they obtained a flow of from 6 to 8 miner's inches. Just why this flow did not continue, none of the experts were able to explain, excepting upon the ground that the whole country had for several years been suffering from a drought and water levels were falling."

This statement, to our minds, sufficiently shows that the finding of the trial court is sustained by the evidence in the respect in which it is assailed by appellants. Their efforts to develop water after the making of the contracts must have been preceded by a

knowledge of the untruth of the representations attributed to them by the finding. This remark plainly applies to their assertion, in particular, concerning "a flow of water of 20 miner's inches." If they had known that the statement was true, the efforts made by them after the deal was concluded would have been as unnecessary as they were apparently unavailing. Not knowing that it was true, they must have known that it was untrue. Considering the nature of the misrepresentation, there is no middle ground.

Appellants make the point that respondents' causes of action are barred by the statute of limitations, their claim being that the fraud practiced by them was discovered more than three years before the commencement of the actions, that being the period of limitation prescribed in such cases by Code of Civil Procedure, § 338, subd. 4. We have examined the evidence pointed out by appellants upon this question, and conclude, without repeating it, that it utterly fails to support the contention made.

Other points are made by appellants, but, considering the conclusion expressed above, it is not necessary that they be examined.

Both judgments are affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

63 Cal. App. 657

Ex parte VON GERZABEK. (Cr. 1153.)

(District Court of Appeal, First District, Division 1. California. Sept. 11, 1923.)

1. Habeas corpus ⚡92(3)—**Finding of the court as to the ability of contemner to comply with the terms of an order directing payment of alimony is conclusive.**

The finding of the court as to the ability of contemner to comply with an order directing payment of alimony is conclusive on habeas corpus, and contemner cannot be discharged, if the facts showing jurisdiction appear upon the record.

2. Habeas corpus ⚡4—**Cannot be used as a basis for review as on appeal.**

A writ of habeas corpus cannot be used as a basis for review as upon appeal.

3. Divorce ⚡269(12)—**Whether contemner can comply with an order directing payment of alimony is a question of fact for the court making the order.**

Whether contemner can comply with the terms of an order directing payment of alimony is a question of fact, which the court making the order has a right to determine.

4. Divorce ⚡269(5)—**Contemner may be imprisoned until he complies with order directing payment of alimony.**

Where the court finds in its order of commitment that contemner was able to comply with an order directing payment of alimony, he

may be imprisoned under Code Civ. Proc. § 1219, until such time as he complies with its conditions, notwithstanding the term of imprisonment may exceed five days.

5. Contempt ⚡54(4)—**Affidavit must show on its face a contempt of court.**

In a proceeding to punish a constructive contempt, the affidavit of facts forming the basis of judicial action must show upon its face a contempt; if it does not, the court has no jurisdiction, and the order of contempt is void, regardless of what may be proved or found.

6. Contempt ⚡40—**Proceedings in contempt are criminal in character, and court exercises but a limited jurisdiction.**

Proceedings in contempt are criminal in character, and the court exercises a limited jurisdiction.

7. Divorce ⚡269(10)—**Ability to comply with order need not be stated in contempt proceeding when the court finds such ability.**

Where the court finds on a complaint for contempt that the contemner has the ability to comply with an order directing the payment of alimony, it is not essential that the affidavit should so allege, and the only jurisdictional facts required to be stated in the affidavit are the making of the order, and the disobedience of it.

Original ex parte application by Oscar Von Gerzabek for writ of habeas corpus. Writ discharged, and prisoner remanded.

See, also, 58 Cal. App. 230, 208 Pac. 318.

Mervyn R. Dowd, of San Francisco, for petitioner.

Walker Peddicord, of San Francisco, for respondent.

R. M. J. Armstrong, of San Francisco, for sheriff of city and county of San Francisco.

TYLER, P. J. Application for writ of habeas corpus prayed to be directed to the sheriff of the city and county of San Francisco to secure release of petitioner from custody on an order adjudging him guilty of contempt of court. Petitioner remanded.

Petitioner seeks to be discharged from the custody of the sheriff of the city and county of San Francisco, by whom he is held under an order of the superior court adjudging him guilty of contempt in failing and refusing to pay certain sums as alimony in a divorce proceeding.

The record shows that on the 3d day of April, 1922, the court below in the divorce action entered an order requiring petitioner to pay the sum of \$50 on or before the 14th day of April, 1922, and a like sum on or before the 7th day of each and every month thereafter until the further order of the court as and for alimony and maintenance pending the divorce action, and the sum of \$25 on account of counsel fees, together with certain costs, and that such order is still in full force and effect. It also appears that,

after making certain payments, petitioner became in arrears, whereupon his wife obtained an order to show cause why petitioner should not be punished for contempt of court in failing to make payments. Upon the hearing petitioner was committed to jail for failure to comply with the order. He applied for a writ of habeas corpus before this court, and upon the hearing he was discharged from custody, this court holding that, as the affidavit of petitioner's wife on the order to show cause, which was the basis of the hearing on which petitioner was committed, was made on information and belief as to petitioner's ability to comply with the order, it was insufficient, and that the court below, in the absence of positive averments upon the subject, was without jurisdiction to hear or determine the matter. The order of commitment was accordingly declared void.

The petition further shows that since his discharge, and upon the 13th day of July, 1923, the wife again obtained an order to show cause why petitioner should not be punished for contempt for failure to comply with the terms of the original order. The matter came on regularly for hearing on the 13th day of July, 1923. The affidavit upon which this hearing was based was also made by the wife, and it failed to allege either upon information and belief or otherwise any facts tending to show that petitioner was able to comply with the court's order. It also appeared on the hearing that petitioner had paid under the order the sum of \$335.50, but that there was still owing and unpaid from petitioner to his wife the sum of \$499.50.

On August 31, 1923, when the matter was again brought on for hearing, petitioner testified that he had paid the sum of \$24 under the order, and he claimed that this sum was all he had earned since July 13, 1923. The court thereupon ordered him imprisoned indefinitely, and until he complied with the order in full.

It is claimed that such order is void, for the reason that the court exceeded its jurisdiction in ordering that petitioner be imprisoned beyond a period of five days, and for the further reason that it was made upon insufficient testimony upon the question of petitioner's ability to comply therewith. It is also urged as an additional reason for a reversal that the commitment is based upon an insufficient affidavit, and is therefore void.

[1-4] It is an established doctrine that, in a proceeding to punish for an alleged contempt, the finding of the court as to the ability of the contemner to comply with the terms of the order is conclusive on habeas corpus, and the prisoner cannot be discharged from custody, if the facts showing jurisdiction appear upon the record. *Ex parte Spencer*, 83 Cal. 461, 23 Pac. 395, 17 Am. St. Rep. 266. The writ of habeas cor-

pus cannot be used as a basis for review as upon appeal. *Ex parte Cottrell*, 59 Cal. 417; *Ex parte Clark*, 110 Cal. 405, 42 Pac. 905; *Ex parte Levin* (Cal. Sup.) 215 Pac. 908. The question is one of fact which the court making the order has the right to determine. Here the court found in its order of commitment that petitioner was able to comply with the order, and this adjudication is conclusive upon this hearing. And the ability of the contemner in this respect being established, he may be imprisoned until such time as he complies with its conditions, notwithstanding the term of imprisonment may exceed five days. Code Civ. Proc. § 1219; *Ex parte Karlson*, 160 Cal. 378, 117 Pac. 447, Ann. Cas. 1912D, 1334.

This brings us to the question as to the sufficiency of the initiatory affidavit.

[5-7] In a proceeding for the punishment of a constructive contempt, that is, one committed out of the presence of the court, the affidavit of facts forming the basis of judicial action constitutes the complaint, and it must show upon its face a contempt of court; if it does not, then the court is wanting in jurisdiction, and the order of contempt is void, as the absence of a recital of jurisdictional facts is the equivalent of the utter absence of an affidavit. *Overend v. Superior Court*, 131 Cal. 280, 284, 63 Pac. 372; *Hutton v. Superior Court*, 147 Cal. 156, 159, 81 Pac. 409; *Berger v. Superior Court*, 175 Cal. 719, 167 Pac. 143, 15 A. L. R. 373; *Strain v. Superior Court*, 168 Cal. 216, 142 Pac. 62, Ann. Cas. 1915D, 702. In such case it is immaterial what may be shown to the court upon the hearing, or specified and found by the court in its decree adjudging the accused guilty of contempt. The proceedings are void ab initio. *Hutton v. Superior Court*, supra. Proceedings in contempt are in their nature criminal in character, and the court exercises but a special and limited jurisdiction therein; and, if the affidavit upon which they are founded is jurisdictionally defective, it necessarily follows that the judgment founded thereon is equally defective, and cannot stand. *Frowley v. Superior Court*, 158 Cal. 220, 110 Pac. 817. Although there is some authority to the contrary (*Hawthorne v. State*, 45 Neb. 871, 64 N. W. 359), it has been generally held that it is not essential as a condition precedent to the exercise of the power to punish for contempt for nonpayment of alimony that the initiatory affidavit or complaint allege the ability of the contemner to comply therewith where the court, as here, has found that he has such ability, and that the only jurisdictional facts required to be stated in the affidavit are the making of the order and the disobedience of it (13 C. J. p. 66; *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817; *Curtis v. Gordon*, 62 Vt. 340, 20 Atl. 820; *Mackenzie v. Mackenzie*, 238 Ill. 616, 87 N. E. 848; *Galley v.*

Galley, 33 Ohio Cir. Ct. R. 161; In re Meggett, 105 Wis. 291, 81 N. W. 419). This rule has been adopted by our Supreme Court. In re McCarty, 154 Cal. 534, 98 Pac. 540. The precise contention here made was there presented and passed upon. It was held in that case that, where, in an action for divorce, a valid order has been made directing a husband to pay a monthly sum to his wife as alimony, and that such order finds that he has the ability to make the payments, it is unnecessary, in order to confer jurisdiction upon the court of a subsequent proceeding to punish him for contempt for failure to comply with the order, that the affidavit of the wife upon which the proceeding is based should state that he had the ability to make the payments. On the hearing of the contempt proceeding the wife establishes a prima facie case by producing the original order for alimony and proof of the refusal of the husband to make payment according to its terms. It was there further held that the husband may purge himself of contempt by presenting upon the hearing any legitimate excuse he might have, including the fact that since the making of the original order he has become unable to pay the alimony.

This precise situation existed at the time of the hearing of the former application upon habeas corpus when defendant was discharged, but the case last cited was not then brought to the attention of the court. Both the present and the former order of commitment recite that petitioner has at all times since April 3, 1922, the date of the original order, been and now is amply able to comply with its terms. This being so, for the reason stated we will not adhere to the rule adopted by this court upon the former hearing.

The writ is discharged, and the prisoner remanded.

I concur: ST. SURE, J.

63 Cal. App. 677

PEOPLE v. FONG WOT. (Cr. 724.)

(District Court of Appeal, Third District, California. September 13, 1923.)

1. Criminal law ☞517(4)—Corpus delicti need not be proved beyond reasonable doubt by evidence independent of extrajudicial confession of accused.

It is not necessary that the corpus delicti be proved beyond a reasonable doubt by evidence independent of the extrajudicial confession of accused.

2. Criminal law ☞517(4)—Proof of corpus delicti held sufficient to justify admission of extrajudicial confession.

In a prosecution for possessing and offering morphine for sale, proof of the corpus de-

licti held sufficient to admit accused's extrajudicial confession.

3. Poisons ☞9—Evidence held to support conviction for possessing and offering to sell morphine.

Evidence held to support conviction for possessing and offering to sell morphine.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Fong Wot was convicted of possessing and offering to sell morphine, and he appeals. Affirmed.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the offense of unlawfully having in his possession and selling and furnishing and offering to sell and furnish morphine. This appeal is from the judgment and the order denying defendant's motion for a new trial.

[1-3] Appellant contends that there was not sufficient proof of the corpus delicti. Two witnesses testified that one of them gave a certain drug addict three marked silver dollars, and instructed him to go to a point on I street, opposite "Duck Alley," and purchase three packages of morphine; that morphine was selling at one dollar a package; that they watched the addict until he met the defendant, and, after a conversation with him, which they could not understand, gave him the three marked dollars; that they saw defendant point towards the alley, and then leave; that the witnesses thereupon stationed themselves near the alley, and about 10 or 12 minutes later arrested the defendant as he was about to enter it; that when arrested he had three packages of morphine in his possession, but did not have the three marked dollars. In addition to the foregoing evidence, the defendant, at the time of his arrest, with reference to the addict and the packages of morphine, said: "He was sick, and I take them to him"; and when asked about the three dollars, he said: "I give money to another man. He go across the street." It is not necessary that the corpus delicti be proved beyond a reasonable doubt by evidence independent of the extrajudicial confession of the defendant. People v. Jones, 123 Cal. 65, 55 Pac. 698. The facts that the defendant was given the price of the morphine; that he thereupon pointed out Duck Alley to the addict, and then left, and, after a few minutes, returned to the place designated with the exact quantity of the drug which the three dollars given him would purchase, and without the marked money, are certainly sufficient proof of the corpus delicti to justify the admission of the defendant's

confession. Such facts and the defendant's confession together make out a clear case of selling and offering to sell and furnish the drug.

The judgment and order are affirmed.

I concur: HART, J.

(63 Cal. App. 578)

TOBIN v. NATIONAL CASUALTY CO.
(Civ. 4558.)

(District Court of Appeal, First District, Division 2. California. Aug. 31, 1923. Hearing Denied by Supreme Court, Oct. 29, 1923.)

1. Insurance ⚡531—**Proviso reducing amount recoverable, if insured changed his occupation to a class designated as more hazardous, is valid.**

Under a policy insuring against death by accident, a proviso that the amount recoverable shall be reduced, if the injury is received after insured has changed his occupation to a class designated by the company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, is valid.

2. Evidence ⚡272, 313—**Facts stated in proof of death held admissible against the beneficiary as declarations against interest and sufficient evidence thereof, in absence of any attempt to modify them.**

In an action on a policy insuring against death by accident, where proof of death showed that insured met death while engaged in an occupation classified as more hazardous than the one under which the policy was issued, the facts therein stated were admissible against the beneficiary as declarations against her interest, and were sufficient to establish such facts in absence of any attempt to contradict or modify them by explanation.

3. Insurance ⚡670—**Where the evidence as to occupation of the insured was uncontradicted, the finding should have been in accordance.**

In an action on a policy against death by accident, where the evidence as to occupation of the insured at the time of his death stood uncontradicted, and was all that was presented on that issue, the finding should have been in accordance therewith.

4. Insurance ⚡531—**Unnecessary to prove changed occupation more hazardous, where it was so classified.**

Under an accident insurance policy, providing that the amount recoverable should be reduced, if insured was injured while doing any act or thing pertaining to an occupation classified as more hazardous than that specified, it was unnecessary to prove that the occupation in which insured was injured was more hazardous, where it was so classified by the insurer.

5. Insurance ⚡531—**Competent for the parties to be bound by the classification of occupation by the insurer.**

It was competent for the parties to accident policy to contract to be bound by the classification of an occupation by the insurer as more hazardous than that specified; its classification being filed with the state officials having supervision of insurance.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Action by Jane R. Tobin against the National Casualty Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. F. Riley, of San Francisco, for appellant.

Egan & Morris and Hugh F. Keon, Jr., all of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment of \$5,000 upon a policy of insurance issued by defendant upon the life of Johannes W. K. Kooy. The plaintiff is the beneficiary under said policy.

Plaintiff alleged the issuance and delivery of the policy on April 10, 1918, the payment of the premium thereon; that on June 20, 1918, said Kooy died as the result of bodily injuries, effected through accidental means; that said death was not the result of suicide; that pursuant to the terms and conditions of said policy of insurance, plaintiff gave to said defendant immediate notice of the aforesaid injury and death of the said Kooy, and furnished to defendant affirmative proofs of said injury and death within 90 days after the date of the injury and death; that plaintiff complied with all the terms and conditions of said policy, and demanded payment thereof; that the sum called for by said policy has not been paid. A copy of the policy was attached to the complaint as an exhibit. It provides that the defendant—

"does hereby insure Johannes W. K. Kooy, of San Francisco, California, the person described in said application, who states his occupation to be that of hotel keeper—office and supervising duties only, duties managing hotel, subject to the provisions and conditions herein contained and indorsed hereon."

There was attached to said policy a copy of the application therefor. It is in the form of questions and answers, among which appear the following:

"(4) I am (member of firm) employed by Union Oil Co. of Cal. Nature of business: Hotel managing."

"(6) My occupation is hotel keeper—office and supervising duties only.

"(7) The duties of my occupation are fully described as follows: Managing hotel."

At the bottom of said application appears the following:

"The age, occupation, and duties as stated above, call for the following classification, indemnities, and premiums: Monthly Acc'd.: Class A. Ind. \$100. Monthly Sickness: Ind. \$——. Accidental Death. Ind. \$5,000."

As one of its defenses to the action defendant pleaded the following clause in the policy sued upon:

"Standard provisions. This policy includes the indorsements and attached papers, if any, and contains the entire contract of insurance, except as it may be modified by the company's classification of risks and premium rates, in the event that the insured is injured after having changed his occupation to one classified by the company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence, or while engaged in recreation, in which event the company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate, but within the limits so fixed by the company for such more hazardous occupation."

A reference to the copy of the policy shows that it contains the further provision:

"If the law of the state in which the insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the company in accordance with such law, but if such filing is not required by such law, then they shall mean the company's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the company is liable."

The answer also set out that Kooy had stated and represented in his application for said policy that his occupation was "hotel keeper—office and supervising duties only"; that defendant is informed and believes "that said insured was injured and died as a result of said injuries, after having changed his occupation to one classified by the company as more hazardous than that stated in the said policy, namely to hotel keeper, general duties, and that the said injuries resulting in the death of the insured were received while engaged in the duties of said latter occupation, and in work and duties not included in the said occupation stated in said application and said policy; that the premium paid by said insured would have purchased at the rate and within the limits fixed by the company for such more hazardous occupation an indemnity, in event of death, of \$3,000."

There are allegations in the answer that insured was intoxicated at the time he sustained his injuries, and was driving at an illegal rate of speed in an automobile upon

the public highway, but, as the findings upon these matters are against the defendant upon conflicting evidence, we are not concerned with these issues upon appeal. The only issues for our consideration are whether or not the record shows the insured to have been engaged in any act or thing pertaining to an occupation other than the one covered by his policy, and classified by the insurance company as a more hazardous occupation than the one mentioned in the policy, and if the record does so show, what is the effect of this showing upon the liability of the defendant under the policy?

We think the position of the appellant upon these matters is well taken. The policy of insurance and the application therefor were pleaded by the plaintiff, and found by the court as pleaded. They contain the statement that the insured was classified as a hotel keeper, office and supervising duties only, and that he applied for insurance under such classification. The plaintiff and beneficiary under the policy stated in the proof of death submitted to the defendant that insured was a hotel keeper, office and supervising duties only. A witness for the defendant testified that the amount of premium paid by insured would pay for insurance to the amount called for by the policy, only in the event insured was classified as hotel keeper, with office and supervising duties only; that under the classification of hotel keeper, general duties, the premium paid by insured would purchase only about \$2,500 worth of insurance.

These matters are not controverted in the record, and it is clear as a starting point that the contract between the insured and the defendant called for insurance as a hotel keeper, office and supervising duties only, and that the occupation of hotel keeper with general duties was classified by the defendant as a more hazardous occupation, requiring the payment of a larger premium.

[1] As to the validity and effect of the clause in the policy relative to the reduction of indemnity under the circumstances set forth, it is unnecessary for us to enter into a lengthy discussion, because the matter has been settled recently in this state, after a most comprehensive review of the authorities, by the case of *Ogilvie v. Aetna Ins. Co.* (Cal.) 209 Pac. 26. In that case, in discussing the effect of a provision substantially the same as the one involved in the instant case, our Supreme Court said:

"We are of the opinion that the better reason, as well as the weight of authority, is in support of that rule which gives effect to the plain intent of the language used by the parties in their contract."

We therefore pass to the question of the sufficiency of the evidence to sustain the allegation of the answer that the insured, at the time of his injuries, was engaged in an act pertaining to an employment classified

by the company as more hazardous than the one mentioned in the policy. The contention of defendant in this connection is that the evidence shows that the insured at the time of his injuries was engaged in the general duties of a hotel manager—a broader field than "office and supervising duties only." Respondent maintains that the evidence relied upon by appellant to establish the nature of insured's activities at the time of his injuries is not admissible against her, and that it does not establish the contention, even though admissible.

The proof of death sworn to by the plaintiff and beneficiary and furnished to the defendant pursuant to the terms of the policy was introduced in evidence. In it plaintiff stated, in answer to the question, "Who were present when the injury was received? Only the two passengers who were going to the hotel to work. Tony Ackerman, the other, a William Lennox." Attached to the proof of death was a statement of the employer of Insured which contained the following:

"What was his occupation at time of injury? Manager of hotel for Union Oil Company of California at Oleum Refinery. What were the duties of that occupation? Supervision of hotel for employees. On what work was he engaged at the time of accident? Bringing back supplies and labor for hotel in his automobile."

Respondent contends that these proofs of death are not evidence against the plaintiff upon the question of the nature of the insured's work at the time of his injury. It appears from the record that the plaintiff made no attempt to contradict the statements submitted by her to the insurer in the proof of death. Had she introduced any evidence to contradict these statements, there is no question under the later authorities that they might have been disputed. But she allowed them to remain uncontradicted in the record. Indeed, they were corroborated by other testimony, and by certain facts and circumstances appearing from the evidence introduced on behalf of the defendant, to which we shall advert later.

In *Travelers' Ins. Co. v. Melick*, 65 Fed. 178, 12 C. C. A. 544, 27 L. R. A. 629, the proof of death stated that the insured cut his throat. The defendant contended that this was conclusive upon the claimant, and the court said:

"The better rule upon this subject is that statements of this nature in proofs of loss are binding and conclusive upon the party who makes them until, by pleading or otherwise, he gives the insurance company reasonable notice that he was mistaken in his statement, and that he will endeavor to show that the death was the result of a different cause from that stated in his proofs. After the insurance company has received due notice of this fact, the proofs have the probative force of solemn admissions under oath against interest, but they are not conclusive."

In *Hanna v. Conn. Mut. Life Ins. Co.*, 150 N. Y. 526, 44 N. E. 1099, the defense was intemperance. The proof of death showed insured had died of alcoholism. No proof to the contrary was offered by the plaintiff, and defendant company moved for a nonsuit, which was granted. Upon appeal it was said:

"But the difficulty with the plaintiff's case is that there was no evidence with respect to the cause of the death of the insured, other than that it was the result of intemperance. That evidence was furnished through the plaintiff to the defendant in the certificates which she delivered to the defendant's agent when making her demand of payment of the policy. Upon those proofs as so furnished the insurance company had the right to rely as her representations, unless and until explained. They operated as admissions by her of a material fact, and were competent evidence against her, under the rule, as to admissions against interest."

The court then quoted from *Spencer v. Ins. Ass'n*, 142 N. Y. 509, 37 N. E. 618, as follows:

"The only proof upon which the defendant relied was the admission in the original proofs of loss that the illness of the deceased commenced February 6, 1890. This was competent evidence in support of the issue, because it was an admission by a party to the record against her interest. * * * The burden of proof was not changed by the admission. Unexplained it would have been conclusive, and the defense would have been made out."

In *Stephens v. Metropolitan Life Ins. Co.*, 190 Mo. App. 673, 176 S. W. 253, the court said:

"Proofs of death, furnished by a beneficiary to the insurer under the policy, are admissible in evidence against such beneficiary as proof by him of the truth of the statement therein contained, and, when not contradicted or explained, may become conclusive against the right to recover on the policy."

In *Castens v. Supreme Lodge, etc.*, 190 Mo. App. 57, 175 S. W. 264, it was said:

"No one can doubt that the proof of death so furnished by the beneficiary in the policy constitutes prima facie evidence of the facts therein stated. Such proof is conclusive, too, on the party furnishing it, touching the fact of suicide unless contradicted or properly explained, as by showing some mistake or misapprehension * * * to relieve against it."

In *Hill v. Aetna Life Ins. Co.*, 150 N. C. 1, 63 S. E. 124, where the proof furnished showed that insured had stepped from a train while in motion, the court said:

"The proofs of loss, though not conclusive and irrebuttable by plaintiff, are prima facie true as against him [citing cases]. The burden was upon the plaintiff to show that a statement made in the proofs of loss was erroneous in fact. The plaintiff, having filed them, has vouched for their truth. He must show mistake. * * * He must show that there was

error as to the fact, not merely that he relied upon hearsay statements."

Other cases pertinent upon the question of the admissibility of proofs of death as evidence against the beneficiary are *Zimmerman v. Fraternal, etc., Ass'n*, 166 Wis. 446, 166 N. W. 5; *Prudential Ins. Co. v. Breustle's Adm'r* (Ky.) 41 S. W. 9; *Mutual Benefit Life Ins. Co. v. Newton*, 22 Wall. (U. S.) 52, 22 L. Ed. 793; *Dennis v. Union Mut. Life Ins. Co.*, 84 Cal. 570, 24 Pac. 120.

[2] Our conclusion in the instant case is that the facts stated in the proof of death furnished to the defendant by the plaintiff were admissible against her as solemn declarations against interest, and were sufficient to establish such facts in the absence of any attempt upon the part of the plaintiff to contradict or modify them by explanation.

Respondent urges that the affidavit of the employer, attached to the proof of death, was not admissible against plaintiff under the rule in the case of *Mar Shee v. Maryland Assur. Corp.* (Cal.) 210 Pac. 269, because she had no discretion about furnishing the same, but was required to do so under the terms of the policy, and because she had no control over the contents of such affidavit. Conceding that the employer's affidavit was not admissible for any purpose against the plaintiff, there is yet sufficient admissible evidence to support appellant's position with reference to the activities of the insured at the time of the accident in the affidavit of the plaintiff in the proof of death to the effect that, at the time of the accident, there were present in the automobile with the insured two passengers, who were going to the hotel to work, and in the testimony of the witness Falk, who testified that he had been with the insured at about 12:30 or 1 o'clock on the day of the accident, and that, upon leaving him, insured stated that he was going to get men to go to work for him; also the testimony of the witness Adams, testifying for plaintiff, that he came upon the overturned automobile upon the public highway, and found the insured and one of his passengers lying in the road unconscious, and that he noticed fruit and vegetables strewn over the highway in such abundance as to suggest to his mind the overturning of a fruit peddler's wagon; also the testimony of the witness Gale to the effect that insured had purchased some fruit and vegetables from him, and had stated that he would call and take them away in his automobile; also the testimony of a dealer in butter and eggs to the effect that insured would sometimes carry away in his automobile his purchases of butter and eggs.

[3] While it is undoubtedly true that, taken all together, this evidence is scanty, it stands uncontradicted, and is all that was presented upon the issue, and the finding

should have been in accordance therewith. Had such a finding been made, it is clear under the authorities that the plaintiff would have been entitled to recover but \$2,500 instead of \$5,000. This is because the record contains uncontradicted testimony of the Pacific coast manager of the defendant company to the effect that, under the policy and schedules of classification and rates issued by the defendant company and filed with the state insurance commissioner, a person engaged in the general duties of hotel keeper—not office and supervising duties only—would be entitled, under the policy involved here, to an indemnity of \$2,500, and this amount of indemnity would also be payable under the policy if the insured met his death while engaged in the duties of taking help and supplies to his place of business.

In *Metropolitan Acc. Ass'n v. Hilton*, 61 Ill. App. 100, insured was classed as "proprietor of livery—office duties," class A. He was injured while driving one of his own cabs. Defendant contended that, while so engaged, he should be classed as a cabman, class C. The policy provided that, in case of injury sustained while engaged in any act more hazardous than that given, the insurance should not be void, but insured should receive within the limits of the more hazardous class that indemnity which his payments would have purchased therein. The defendant sought to show what indemnity the premium paid would have purchased in the more hazardous class, but the lower court would not permit it. On appeal this was held to be error, and the judgment was reversed. It was said:

"It is quite clear that the act of the plaintiff in driving the cab was not merely incidental to his general occupation, but was in fact a part of it. Apparently he was doing so for hire and profit, and that in the line of his business as a livery proprietor. It was not, however, such an act as would be included within the range of office duties, specified in class A, and no doubt was more hazardous."

In *Montgomery v. Continental Casualty Co.*, 131 La. 475, 59 South. 907, plaintiff was insured as a draftsman "with office and traveling duties only." He was injured while operating a press drill during the noon hour for recreation. The policy provided that if the insured was injured after having changed his occupation to one classified by the company as more hazardous than that stated in the policy, or was injured while doing any act or thing pertaining to any occupation so classified, the company's liability should be only for such proportion of the principal sum or weekly indemnity provided in the policy as the premium paid by insured would purchase at the rate and within the limits fixed by the company for such more hazardous occupation. In the trial court it was held that the insured was entitled to indem-

nity on the basis of the less hazardous occupation, but, upon appeal, the judgment was modified so as to award to insured only the amount of indemnity which the premium paid would have purchased in the more hazardous occupation, an act of which the insured was doing when injured.

Other cases in point are *Lane v. Gen. Acc. Ins. Co.* (Tex. Civ. App.) 113 S. W. 324; *Green v. National Cas. Co.*, 87 Wash. 237, 151 Pac. 509; *Loesch v. Union Cas. Co.*, 176 Mo. 654, 75 S. W. 621; *Ebeling v. Bankers' Cas. Co.*, 61 Mont. 58, 201 Pac. 284, 22 A. L. R. 777; *Aldrich v. Mer. Mut. Acc. Ass'n*, 149 Mass. 457, 21 N. E. 873.

[4, 5] Some question has suggested itself as to the sufficiency of the record made by defendant in the matter of proving that the occupation of "hotel keeper, general duties" was a more hazardous one than that of "hotel keeper, office and supervising duties only," in view of certain language contained in the recent case of *Ogilvie v. Aetna, etc., Co.* (Cal.) 209 Pac. 26. We think, however, that there is a vital distinction between the policies of insurance involved in the two cases. In the *Ogilvie* Case the decision rests upon the following clause in the policy: "Or is injured while doing any act or thing pertaining to any more hazardous occupation." It does not say any occupation classified by the company as more hazardous, but any occupation actually more hazardous. The Supreme Court said:

"It should be pointed out, however, that the burden rests upon the defendant * * * to make good its claim in this behalf, to allege and prove that the occupation of 'farmer,' or 'farm laborer,' or 'common laborer,' as the case may be, was in fact more dangerous than that of 'real estate and investments,' not merely that it was so classified. Such is the plain intent of the language used, construing it strictly, as we must, against the insurer."

In the instant case the language used was "while he is doing any act or thing pertaining to any occupation so classified." The plain intent of this language is that the occupation should be classified by the company as more hazardous, regardless of the actual facts. The *Ogilvie* Case rests upon the fundamental principle of the sanctity of contract, and upon the same principle, and, by the same reasoning, it was competent for the insured in the instant case to contract to be bound by the classification of the company on file with the state official having supervision of insurance in this state. It was alleged and proved by the defendant that such classification was on file, and that by such classification, "hotel keeper, general duties" was a more hazardous occupation than that of "hotel keeper, office and supervising duties only," and that, under the former classification, a higher premium was required

to be paid than under the latter. Therefore the statement in the *Ogilvie* Case regarding the necessity of proving actually increased hazard is inapplicable to the facts of the instant case.

In view of the foregoing conclusions, it is unnecessary for us to discuss the various alleged errors in rulings upon the evidence. The judgment must be reversed upon the merits. It is so ordered.

We concur: NOURSE, J.; STURTEVANT, J.

(63 Cal. App. 627)

PEOPLE v. GORDAN. (Cr. 1117.)

(District Court of Appeal, First District, Division 1, California. Sept. 5, 1923. Hearing Denied by Supreme Court Nov. 1, 1923.)

1. Libel and slander — Evidence held to show publication of oath of secret society was malicious.

In a prosecution for criminal libel, under Pen. Code, § 249, brought against defendant for publishing in his magazine a purported oath of a secret society and comparing it with the oath of another secret society, evidence showing that defendant published the article knowing it to be untrue and without justifiable ends, and to injure the members of the society by discrediting them and exposing them to public hatred, contempt, and ridicule, sufficiently showed malice.

2. Libel and slander — Publication of purported oath of secret society held not privileged as being based on legislative publication.

Publication of a purported oath of a secret society was not privileged under Pen. Code, § 254, because it purported to be an excerpt from proceedings in an election contest as appearing in the congressional record, where the statement was willfully and maliciously distorted, no mention being made of the fact that the congressional committee found that the oath was false.

3. Libel and slander — Information for criminal libel held sufficient.

Where an information for criminal libel under Pen. Code, § 249, expressly alleged that defendant did willfully and maliciously print and publish the libel and defamation of and concerning the members of the fourth degree of a secret society and of and concerning a named person, it sufficiently alleged that defendant intended to have it understood that the members of such degree administered or took the oath.

4. Libel and slander — No innuendo required when words are actionable per se.

When words published are actionable per se in their plain natural meaning, no innuendo is required in information for criminal libel.

5. Libel and slander — Matter may be libelous as against a class, although individuals thereof not named.

To render one amenable to prosecution for publishing or circulating libelous matter, it is

not necessary that such matter name the individuals or any of them composing the class against whom the matter complained of is published, and it is sufficient that the members of a certain degree of a secret order have been libeled.

Appeal from Superior Court, City and County of San Francisco; J. E. Woolley, Judge.

David J. Gordan was convicted of criminal libel, and he appeals. Affirmed.

Sawyer & Sawyer, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen. (Robert L. McWilliams, of San Francisco, of counsel), for the People.

TYLER, P. J. Defendant was charged by information with violating the provisions of section 249 of the Penal Code. That section defines and prohibits the offense commonly known as criminal libel. He was tried by a jury, found guilty, and sentenced to imprisonment in the county jail for the term of six months. This is an appeal from the judgment of conviction and the order denying defendant's motion for a new trial.

Defendant is the owner and publisher of a magazine styled "The Crusader," and it has a circulation of some 60,000 to 80,000 copies. The information alleges in substance that defendant, as such owner, published in his magazine a certain false and malicious libel concerning the members of the fourth degree of the Knights of Columbus, and of and concerning one David Supple, a member of that organization. The article was published under the heading "The K. K. K. Oath Versus the K. C. Oath," and is in the following terms:

"As Klansmen we have no fight with any one that has this country's interest at heart. We prefer to live in harmony with all men and would work with them to keep this country the greatest, grandest and the most wonderful country in the world, where every man can work his way up the ladder of success and live a life of complete happiness and harmony, always remembering those sublime words, 'Peace on earth, good will to all men.'

"Perhaps you will be interested in the Ku Klux Klan oath, or the first part thereof:

"Oath of Allegiance.

"('You will say) I —— (pronounce your full name and repeat after me) most solemnly pledge, promise and swear that I will never slander, defraud or in any manner wrong the Knights of the Ku Klux Klan, a Klansman or a Klansman's family, nor will I suffer the same to be done if I can prevent it.

"I swear that I will be faithful in defending and protecting the home, reputation and physical and business interests of a Klansman and that of a Klansman's family.

"I swear that I will at any time without hesitating go to the assistance or rescue of a

Klansman in any way, at his call I will answer, I will be truly Klannish towards Klansmen in all things honorable.

"I swear to keep secure to myself a secret of a Klansman when same is committed to me in the sacred bond of Klansmanship, the crime of violating this solemn oath, treason against the United States of America, rape and malicious murder excepted.

"I most solemnly assert and affirm that to the Government of the United States of America and any state thereof of which I may become a resident I sacredly swear an unqualified allegiance above every and any kind of government in the world. I here and now pledge my life, my property, my vote and my sacred honor to uphold its flag, its constitution and constitutional laws, and will protect, defend and will enforce same until death.

"I swear that I will most zealously and valiantly shield and preserve by any and all justifiable means and methods the sacred constitutional rights and privileges of free public schools, free speech, free press, separation of church and state, liberty, white supremacy, just laws, and a pursuit of happiness, against any encroachment of any nature by any person or persons, political party or parties, religious sect or people, native, naturalized or foreign, of any race, color, creed, lineage or tongue whatsoever.

"All to which I have sworn by this oath, I will seal with my blood, be Thou my witness, Almighty God. Amen."

"Knights of Columbus Oath, Fourth Degree.

"I, ——, now in the presence of Almighty God, the blessed Apostle St. Peter and St. Paul, and all the saints, sacred host of heaven, and to you, my Ghostly Father, the Superior general of the Society of Jesus, founded by St. Ignatius Loyola, in the pontification of Paul the III, and continued to the present, do by the womb of the Virgin, the matrix of God and the rod of Jesus Christ, declare and swear that his Holiness the Pope is Christ's vice-regent and is the true and only head of the Catholic or Universal Church throughout the earth; and that by virtue of the keys of binding and loosing given His Holiness by my Saviour, Jesus Christ, he hath power to depose heretical kings, princes, States, Commonwealths and Government, and they may be safely destroyed. Therefore to the utmost of my power I will defend this doctrine and his Holiness' right and custom against all usurpers of the heretical or Protestant authority whatever, especially the Lutheran Church of Germany, Holland, Denmark, Sweden and Norway, and the now pretended authority and Churches of England and Scotland and the branches of same now established in Ireland and on the continent of America and elsewhere, and all adherents in regard that they may be usurped and heretical opposing the Sacred Mother Church of Rome.

"I do now denounce and disown any allegiance as due to any heretical king, prince or state, named Protestant or Liberals, or obedience to any of their laws, magistrates, or officers.

"I do further declare that the doctrine of the Churches of England and Scotland, of the Calvinists, Huguenots, and others of the name of protestants or Masons to be damnable, and

they themselves to be damned who will not forsake the same.

"I do further declare that I will help, assist and advise all or any of His Holiness' agents in any place where I should be, in Switzerland, Germany, Holland, Ireland or America, or in any other kingdom or territory I shall come to, and do my utmost to extirpate the heretical Protestant or Masonic doctrines and to destroy all their pretended powers, legal or otherwise.

"I do further promise and declare that, notwithstanding that I am dispensed with to assume any religion heretical for the propagation of the Mother Church's interest, to keep secret and private all her agents' counsels from time to time as they interest me, and not divulge, directly or indirectly, by word, writing or circumstances whatever, but to execute all that should be proposed, given in charge, or discovered unto me by you, my Ghostly Father, or any of this sacred order.

"I do further promise and declare that I will have no opinion or will of my own, or any mental reservation whatsoever, even as a corpse or cadaver (*perine Ac cadaver*), but will unhesitatingly obey each and every command that I may receive from my superiors in the militia of the Pope and of Jesus Christ.

"That I will go to any part of the world whithersoever I may be sent, to the frozen regions north, jungles of India, to the centers of civilization of Europe, or to the wild haunts of the barbarous savages of America without murmuring or repining, and will be submissive in all things whatsoever is communicated to me.

"I do further promise and declare that I will when opportunity presents make and wage relentless war, secretly and openly, against all heretics, Protestants and Masons, as I am directed to do, to extirpate them from the face of the whole earth; and that I will spare neither age, sex or condition, and that I will hang, burn, waste, boil, flay, strangle, and bury alive these infamous heretics; rip up the stomachs and wombs of their women, and crush their infants' heads against the walls in order to annihilate their execrable race. That when the same cannot be done openly I will secretly use the poisonous cup, the strangulation cord, the steel of the poniard or the leaden bullet, regardless of the honor, rank, dignity or authority of the persons, whatever may be their condition in life, either public or private, as I at any time may be directed so to do by any agents of the Pope or superior of the Brotherhood of the Holy Father of the Society of Jesus.

"In confirmation of which I hereby dedicate my life, soul and all corporal powers, and with the dagger which I now receive I will subscribe my name in my blood in testimony thereof; and should I prove false or weaken in my determination, may my brethren and fellow soldiers of the militia of the Pope cut off my hands and feet and my throat from ear to ear, my belly be opened and sulphur burned therein with all the punishment that can be inflicted upon me on earth and my soul shall be tortured by demons in eternal hell forever.

"That I will in voting always vote for a K of C in preference to a Protestant, especially a Mason, and that I will leave my party so to do; that if two Catholics are on the ticket I will satisfy myself which is the better supporter of Mother Church and vote accordingly.

"That I will not deal with or employ a Protestant if in my power to deal with or employ a Catholic. That I will place Catholic g.r.l.s in Protestant families that a weekly report may be made of the inner movements of the heretics.

"That I will provide myself with arms and ammunition that I may be in readiness when the word is passed or I am commanded to defend the church either as an individual or with the militia of the Pope.

"All of which I, ———, do swear by the blessed Trinity and blessed sacrament, which I am now to receive, to perform and in part to keep this my oath.

"In testimony hereof I take this most holy and blessed sacrament of the Eucharist, and witness the same further with my name written with the point of this dagger dipped in my own blood and seal in the face of this holy sacrament."

"(Excerpts from 'Contested election case of Eugene C. Bonniwell against Thomas S. Butler,' as appears in the Congressional Record—House, Feb. 15, 1913, at pages 3215 et seq. and ordered printed therein by unanimous consent. Attached hereto and printed (one page 3216) as a part of said report as above.)"

In passing it may be stated that the true obligation taken by the members of the fourth degree of the Knights of Columbus was brought out through the testimony of one of the officers of that order. It is as follows:

"I, upon my honor as a Catholic Gentleman and Knight of Columbus (sic) never to reveal directly or indirectly by word or deed any, even the slightest details, of the doings of this order as they occur in this or any other council not absolutely known to be an equalized brother in good standing. This promise shall not conflict with my religious or civil duties. I promise not to comment upon the degree favorably or otherwise in the presence of strangers thereto in order to make comparisons of one degree with another. I further promise not to use or imitate any of the degree work of this order in any way outside of the same. These promises I regard as binding and constant upon me until death.

"I pledge myself as a Catholic citizen and Knight of Columbus to enlighten myself fully upon the duties as a citizen and to conscientiously perform such duties entirely in the interest of my country and regardless of all personal consequences. I pledge myself to do all in my power to preserve the integrity and purity of the ballot and to promote reverence and respect for law and order. I promise to practice my religion consistently and faithfully but without ostentation, and to so conduct myself in public affairs and in the exercise of public duties as to reflect nothing but credit upon our holy church to the end that she may flourish and our country prosper to the greater honor and glory of God."

It further appeared in evidence that the key-note of the fourth degree of the order was patriotism to the principles of our government.

Defendant admitted that there was no oversight or mistake in connection with the

publication, and that his act was intentional; but claimed that the article was published without malice, and that his motive in publishing the same was honorable and done with a desire to be fair to the members of both organizations. He testified that his act was the outcome of a more or less political and religious controversy which had taken place at Washington at the end of the previous year in connection with the alleged un-American and intolerant and bigoted teachings of a certain organization, and that he had noticed that the principal people who were parties to the institution of a congressional investigation of the order known as the Ku Klux Klan, were largely members of the Knights of Columbus or Roman Catholics. He claimed that in view of the investigation in 1921 it was within his privilege as a publisher and editor to copy from the Congressional Record the pretended oaths of the different orders, especially as he had made particular reference to the proceedings published in the governmental publication. The issue of the publication referred to in the published article was introduced in evidence. It appeared therefrom that in a contested election case heard before the House of Representatives charges were made by a defeated candidate that his successful opponent had promoted the circulation of this same so-called oath to the detriment of contestant, who was a member of the Knights of Columbus. The congressional committee appointed to investigate the charges found that the so-called oath had been circulated, but that the successful candidate had disavowed his belief in it and had done whatever he could to prevent its circulation. It also branded it as false and libelous.

Defendant herein offered no proof whatever of the truth of his charge that the so-called oath was taken by the members of the Knights of Columbus, contenting himself merely with the defense that he had published it in good faith and without any desire to impeach the honesty or integrity of any member of that organization. To refute this asserted honest intention the prosecution proved that defendant knew at the time of the publication that the congressional committee had condemned the so-called oath as being false and libelous. It also proved that he knew that men high in Masonic circles had upon investigation found that it was false, and that they had published an open statement in which it was declared that the Knights of Columbus as an organization was dedicated to charity and patriotism, and that it stood for law and order. In addition thereto it was in evidence that in subsequent numbers of his magazine and after his arrest defendant republished the oath, and also published the statement that he was being tried for a crime that he did not and could not commit, namely, libeling the K.

C.'s, and which he explained at the trial as meaning that the organization was depraved and its members were beneath contempt, and therefore incapable of being libeled. Other testimony was introduced to negative the honesty and good faith of defendant in publishing the article in question.

[1] The evidence upon the subject conclusively shows that defendant published the article knowing it to be untrue and without justifiable ends, and for the sole purpose of injuring the members of that society by discrediting their honesty, integrity, and reputation, and with a desire to expose them, and David Supple as a member thereof, to public hatred, contempt, or ridicule, and that the so-called oath was false, and that neither David Supple or any other member of the fourth or any other degree of the order ever took such an oath, and defendant made no attempt to refute this evidence or to prove that such an oath was taken. There is therefore, no merit in the contention that the evidence is insufficient to establish malice.

[2] Equally without merit is the plea of privilege. The Penal Code, § 254, provides in substance that no reporter, editor, or proprietor of any newspaper is liable to prosecution for a fair and true report of any judicial, legislative, or other public official proceedings except upon proof of malice in making such report, and that malice is not to be implied from the mere fact of publication. This section, however, does not afford immunity to one who has willfully and maliciously distorted a statement found in a legislative publication by intentionally publishing fragmentary and incomplete parts thereof which do not indicate a fair summary of the whole proceedings. Here there was a clear intimation that the publication was stamped with the approval of the congressional committee at Washington, no mention being made of the circumstances under which it was printed or that the committee found that the oath was false.

[3] The further point is urged that no public offense is alleged against defendant. In this connection it is claimed that the information does not by direct allegation or by innuendo charge that defendant intended to have it understood that the members of the fourth degree ever administered or took the oath. There is no merit in this contention. The information expressly alleges that the defendant did willfully and maliciously print and publish a certain false and malicious libel and defamation of and concerning the members of the fourth degree of the Knights of Columbus and of and concerning David Supple.

[4] When the words in their plain natural meaning are actionable per se no innuendo is required. The office of the innuendo is to point out and to refer to matters already expressed; to explain the meaning of the pub-

lication when it is obscure, and to designate the persons alleged to have been libeled when they are alluded to in covert and ambiguous terms. 25 Cyc. 449, 575.

[5] In order to render one amenable to prosecution for publishing or circulating libelous matter it is not necessary that such matter name the individuals or any of them composing the class against whom the matter complained of is published. The members of the fourth degree as a class are expressly stated to have been libeled. In *People v. Turner*, 28 Cal. App. 766, 154 Pac. 34, where this question was raised, it is expressly held that the law is elementary that a libel need not be of a particular person, but may be upon a class of persons, if the tendency of the publication is to stir up riot and disorder and incite to a breach of the peace. See, also, *People v. Crespi*, 115 Cal. 50, 46 Pac. 863; *Crane v. State*, 14 Okl. Cr. 30, 166 Pac. 1110, 19 A. L. R. 1455. The information sufficiently charges the crime of libel.

Other points refer to alleged misconduct of the prosecutor. We have examined them and find them to be without merit.

In conclusion it may be stated that it is to be regretted that sectarian bitterness with reference to religion should still exist in this enlightened age. As was said in *Crane v. State*, supra, where this identical so-called oath was involved:

"It is remarkable that in this country, where freedom of conscience in religious matters was one of the chief basic doctrines upon which the government was founded, people who hold themselves forth as possessing even ordinary intelligence would indulge in this character of criminal conduct. * * * The fundamental law of both the state and the nation guarantees to each individual the right to associate himself with any religious creed of his own selection, and no person of any other faith has the right to interfere with or publish false statements against the individual or the organization nor its lawful mode or method of religious worship."

The judgment is affirmed.

We concur: ST. SURE, J.; RICHARDS, J.

192 Cal. 282

MASSACHUSETTS BONDING & INS. CO. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR KERN COUNTY et al. (S. F. 10808.)

(Supreme Court of California. Oct. 19, 1923.)

1. Exceptions, bill of $\S$ 41(5)—Bills presented within 10 days after appeal from default judgment of which no notice had been given held timely.

Under Code Civ. Proc. $\S$ 650, as amended by St. 1911, p. 400, and St. 1915, p. 207, requiring bills of exceptions to be filed within 10 days after notice of entry of judgment and providing that certain notices and papers need not be served upon any party in default, where notice of entry of a default judgment is not served, the period for filing bills of exceptions begins to run only upon the taking of an appeal; such appeal being conclusive evidence of notice of the judgment.

2. Exceptions, bill of $\S$ 53(7)—Writ denied without prejudice where judge against whom sought was disqualified to act.

In proceedings for a writ of mandate to require a judge of the superior court to settle a bill of exceptions, where it appears that he acted as attorney for petitioner in presenting the bill of exceptions to his predecessor and is therefore disqualified, the writ will be denied without prejudice to another action in which a different judge is substituted.

In Bank.

Original application by the Massachusetts Bonding & Insurance Company for a writ of mandate to be directed to the Superior Court of California in and for the County of Kern and Hon. Erwin W. Owen, Judge thereof. Writ denied.

John Ralph Wilson, of San Francisco, for petitioner.

WILBUR, C. J. The petitioner seeks a writ of mandamus to compel the respondent to settle a proposed bill of exceptions on an appeal from a judgment rendered against the petitioner by reason of its default in failing to answer a cross-complaint filed by L. P. St. Clair and H. A. Jastro wherein said cross-complainants sought to recover against petitioner upon an insurance policy in the sum of \$5,000, indemnifying them for damages on account of bodily injury suffered by the employees of the cross-complainants.

The cross-complaint was filed in an action brought by J. L. Haggard against the St. Clair & Jastro Oil Company, but in the amended complaint judgment was sought against the members of the M. & S. Oil Company, a copartnership; said cross-complainants, L. P. St. Clair and H. A. Jastro, being members of said copartnership. The petitioner filed the necessary papers and moved the court to transfer the case to the federal court on the ground of diverse citizenship.

That motion being denied, the petitioner suffered default on the cross-complaint, and within 30 days after the entry of default judgment served proper notice of an appeal from such judgment. Within 10 days thereafter, petitioner served his proposed bill of exceptions, containing the pleadings in the case, the papers upon the motion for the removal of the case to the federal court, and the default judgment, and sought to have the bill of exceptions certified and allowed by the trial judge. The trial judge refused to settle the proposed bill of exceptions and the day thereafter resigned, and this application is made to compel his successor to settle the proposed bill.

[1] The respondent claims that the proposed bill of exceptions was served too late, and for that reason that the refusal of the respondent to allow the same was proper. This proposition is based upon the last paragraph of section 650 of the Code of Civil Procedure as amended in 1911 (Stats. 1911, p. 400), and as subsequently amended in 1915 [Stats. 1915, p. 207]. This paragraph is as follows:

"No bill of exceptions, notice of appeal, or notice or paper, other than amendments to the pleadings or an amended pleading, need be served upon any party whose default has been duly entered, or who has not appeared in the action or proceeding."

The respondent's contention is, in effect, that inasmuch as the petitioner was in default and the statute expressly provides that no notice of the entry of the judgment need be served upon the petitioner that, therefore, the time for the filing of a proposed bill of exceptions must run from the date of the judgment and not from the date of notice of the entry of the judgment which otherwise would set in motion the time for the preparation of the bill of exceptions.

The petitioner, undoubtedly, had a right to appeal within 60 days of the entry of the judgment, and it is conceded that this time would not be extended by a failure to give notice of the entry of the judgment; but the petitioner insists that as long as his right of appeal continues the right to file a bill of exceptions for use upon the appeal continues provided the bill of exceptions is proposed within 10 days after the taking of the appeal which, of course, is conclusive evidence that the appellant knows of the entry of the judgment.

We think the position of the petitioner must be sustained whether or not the last paragraph of section 650 applies to bills of exception prepared under section 649 of the Code of Civil Procedure, because, assuming that it does apply to bills of exceptions under both sections 649 and 650, it still remains true under both sections that the time for filing a bill of exceptions runs from notice

of the entry of judgment, and if a party in default has received no notice of the entry of the judgment the time for the preparation of the bill of exceptions does not expire, except by the expiration of the time for the taking an appeal which begins to run immediately upon the entry of the judgment and continues for sixty days thereafter.

[2] It appears from the statement made by the respondent judge that he acted as attorney for the petitioner in presenting the bill of exceptions to Judge T. N. Harvey, who has since resigned, and it is suggested that under these circumstances he is disqualified from acting in settling the proposed bill of exceptions. For that reason the application for the writ of mandate will be denied without prejudice to a further action in which another judge of the superior court of the county of Kern is substituted as the respondent in the event that there is a further refusal to settle the proposed bill of exceptions. The petition is denied.

We concur: WASTE, J.; LAWLOR, J.; SEAWELL, J.; KERRIGAN, J.; CONREY, Justice pro tem.

192 Cal. 258

MASH v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10631.)

(Supreme Court of California. Oct. 19, 1923.
Rehearing Denied Nov. 15, 1923.)

1. Justices of the peace § 159(12)—Dismissal of appeal proper, when new sureties did not justify and notice of filing and approval of bond not given in time.

Where the time for justification of defendants' sureties on appeal from a justice court expired under Code Civ. Proc. § 978a, without the sureties on new bond having justified, and, though new and sufficient bond was timely filed and approved, notice of such filing and approval was given after the expiration of the time fixed for such justification and more than five days after the taking of the appeal, the appeal was properly dismissed unless justification was waived.

2. Justices of the peace § 159(13)—Party not appearing at time fixed for justification of sureties on appeal bond waived justification.

If plaintiff failed to appear at the time fixed for the justification of sureties on bond on appeal from justice court and the sureties appeared, he waived their further justification, and the fact that they were nevertheless examined by the justice of the peace and found unqualified did not deprive the superior court of jurisdiction over the appeal.

3. Certiorari § 66—Court will assume truth of affidavit where issue is not raised and no request made for reference of question.

On certiorari to review an order dismissing an appeal from justice court, where the

judge denied for lack of information and belief that plaintiff's attorney failed to appear at the time fixed for justification of sureties, the appellate court will assume the truth of petitioner's affidavit so alleging, in the absence of a request for a reference of the question, where the issue was neither raised nor discussed during the argument.

In Bank.

Petition by S. L. Mash for writ of certiorari to review an order of the Superior Court in and for the City and County of San Francisco and John J. Van Nostrand, as Judge thereof. Application treated as one for mandamus, and peremptory writ granted, with directions.

S. L. Mash and Walter J. Thompson, both of San Francisco, for petitioner.

Jacob S. Meyer and Meyer & Mitchell, all of San Francisco, for respondents.

WILBUR, C. J. This is an application for a writ of certiorari to review an order of the respondent dismissing an appeal from the justice court. In view of the fact that the case of the petitioner depends in part upon a question of fact, as to what he did in perfecting his appeal, and as this fact is not shown in the return to the writ, we announced to the parties that we would treat the application as one for mandamus to compel the respondent to proceed with the trial, and we referred the disputed question of fact to the Hon. Daniel C. Deasy, judge of the superior court of the city and county, to hear the evidence offered on that subject and to report his findings. This report having been filed, we will state the facts, as admitted and as thus shown.

[1] A judgment of a justice court was rendered and entered against the petitioner for the sum of \$182.65, December 14, 1922. On January 10, 1923, within the 30 days allowed for an appeal the petitioner gave notice of appeal and filed an appeal bond for \$100 costs and for \$370; the latter sum being more than twice the amount of the judgment. On January 13, 1923, the plaintiff in that action served and filed a notice requiring the sureties to justify. On the same day the defendant served and filed a notice that the sureties would justify before the justice of the peace January 16, 1923, at 2 p. m. At that time the sureties presented themselves for justification and the plaintiff failed to appear. The justice of the peace, however, at the time and place fixed for the sureties to justify before him, indorsed an order upon the bond excepted to as follows:

"It is hereby ordered that a cash bond in the sum of \$182.65 be substituted for the bond on file herein and that the sureties on said bond be released on deposit of said cash bond."

The petitioner avers that he made a tender of such deposit of cash and that it was

refused, and this allegation being denied for lack of information and belief, the reference hereinbefore referred to was made, and Judge Deasy reports his finding as follows:

"I find it is a fact that on the 16th day of January, 1923, petitioner, S. L. Mash, tendered to the clerk of the justice's court of the city and county of San Francisco the sum of \$182.65. It is not true that said clerk of said justice's court refused to accept said money, but it is the fact that said clerk said that he would accept the same, but that unless a cost bond in the sum of \$100 were filed with him in addition to the deposit of said sum of \$182.65 he would issue execution if demanded by the plaintiff in the action of Rauer's Law and Collection Co. v. Mash. It is also true that after some discussion between said petitioner and said clerk about the question, said petitioner left the office of said justice's court and took with him said sum of money which he had tendered to said clerk, and that he did not on said 16th day of January, 1923, make any tender to said clerk other than the one herein referred to."

Thereafter, on January 17, 1923, the petitioner filed a bond executed by the United States Fidelity & Guaranty Company as surety, for \$100 costs and \$375 to pay the judgment. This bond was indorsed: "This bond approved Jan. 17, 1922. Thomas F. Prendergast J. P."

Notice of the filing of this undertaking was served on the plaintiff January 18, 1923, and filed with the justice January 19, 1923.

The new bond, it will be observed, was filed, approved, and notice thereof given to plaintiff, within five days after the notice requiring the justification, and thus within the time allowed by law for such justification, but was not filed until the day after the time fixed for such justification by the defendant, and more than five days after the taking of the appeal.

Section 978a of the Code of Civil Procedure provides that the undertaking on appeal must be filed within five days after the filing of the notice of appeal and that notice of the filing of the undertaking must be given to the respondent. "The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, *upon notice to the adverse party*, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given." It appears that at the time fixed for the justification the justice made an order requiring the cash bond. This order was not complied with, although it may be conceded that if the cash had been paid in, this would be equivalent to a justification. Unless the justification was waived, the time for justification having expired without new sureties having justified, the appeal was properly dismissed, notwithstanding the fact that within five days after

the filing of the notice a new and sufficient bond was filed and approved, but notice of such filing and approval having been given after the expiration of the five days from the notice to justify, the appellant could not substitute a new bond except in the manner required by law. *Wood v. Superior Court*, 67 Cal. 115, 7 Pac. 200. In *O'Donnell v. Superior Court*, 34 Cal. App. 208, 167 Pac. 187, it was held that the acceptance by the justice of a money deposit in lieu of a bond was not sufficient to give the superior court jurisdiction, where the deposit was made the day after the failure of the sureties to justify, and after the five-day period for justification had expired, although the justice had continued the matter of justification of the sureties to that date. The court in that case also expressed a doubt as to the power of the justice to continue the matter of such justification even within the five-day period. An application for a transfer to this court was denied.

It is clear, then, that unless the plaintiff waived a justification of the sureties by his failure to appear at the time fixed, the petitioner failed to perfect his appeal. The tender of the \$182.65 to the clerk was withdrawn and, therefore, cannot be considered. The surety bond was filed too late. It has been held, however, that where a party fails to except to the sureties on an appeal bond or, having excepted thereto, fails to appear at the time and place fixed for justification, he waives such justification. *Jeffries v. Superior Court*, 13 Cal. App. 193, 194, 109 Pac. 147; *Bank of Escondido v. Superior Court*, 106 Cal. 43, 39 Pac. 211.

[2] If the plaintiff failed to appear at the time fixed for the justification of sureties and the sureties appeared, he waived their further justification. The fact that they were examined by the justice of the peace notwithstanding such waiver, and were found to be unqualified upon such an examination, if such was the fact, as we may infer, did not deprive the superior court of jurisdiction over the appeal, and we may dismiss from consideration the futile attempt of the petitioner to comply with the order of the justice.

[3] It is true that the respondent judge denies for lack of information and belief that the plaintiff's attorney failed to appear before the justice at the time fixed for justification of the sureties; but in view of the fact that the issue was neither raised nor discussed during the argument by the attorney who acted for the plaintiff in the justices' court and now appears for the respondent we will assume the truth of the petitioner's affidavit, in the absence of a request for a reference of this question.

A peremptory writ of mandate will be issued requiring the respondent court to assume jurisdiction of the cause appealed and set this cause for trial, and try the cause

and render judgment therein. No costs are allowed against the respondent judge.

We concur: KERRIGAN, J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.

192 Cal. 256

SHEELEY et ux. v. JONES et ux.
(L. A. 7729.)

(Supreme Court of California. Oct. 19, 1923.)

1. Venue $\S$ 72—On motion for change of venue, trial court may inspect complaint to determine character of action and probable judgment.

For the purpose of considering the motion for a change of place of trial, the trial court may inspect the complaint to determine the character of the action and the judgment which might be rendered thereon.

2. Pleading $\S$ 45—Complaint must clearly show right to retain trial in county in which action is commenced, and ambiguities are resolved against pleader.

A pleader is required to frame his complaint in such a way as to make it clear that he is entitled to retain a trial of his cause in the county in which the action was commenced, and, if there are any ambiguities, they must be resolved against him and in favor of defendant's right to have the case tried in the county of his residence.

3. Venue $\S$ 16½—Defendant in suit for specific performance held entitled to change of venue to county of residence.

Where a suit to compel specific performance of that part of an oral agreement to exchange real and personal property which related to shares of stock was brought in the county in which the land transferred to plaintiffs was located, but the complaint did not allege the stock was appurtenant to the land and it appeared to be personal property, defendant was entitled to have the venue changed to the county of his residence.

4. Venue $\S$ 16½—If real and personal actions are joined in same complaint, cause must be tried in county of defendant's residence.

If real and personal actions are joined in the same complaint, then, under Code Civ. Proc. § 395, the action must be tried in the county of defendant's residence.

In Bank.

Appeal from Superior Court, Riverside County; William E. Ellis, Judge.

Action by C. M. Sheeley and wife against W. F. Jones and wife. From an order denying motion for change of venue, defendants appeals. Reversed.

Gates & Randles, of Los Angeles, for appellants.

A. P. Morewood, of Redondo Beach, for respondents.

SEAWELL, J. This is an appeal from an order denying a motion for a change of place of trial. The action was commenced in the county of Riverside, and defendants (appellants) were, at the time of the commencement of the action and ever since have been, residents of the county of Los Angeles. A demurrer, both general and special, was interposed, and the moving papers are sufficient in every respect to justify the granting of the motion if, as a matter of law, appellants are entitled to the transfer. Respondents and appellants agreed orally to an exchange of real properties. Appellants were the owners of a lot of land situated in the town of Corona, county of Riverside, upon which were five acres of orange trees, together with buildings. Respondents were the owners of a building and lot situated in the city of Redondo Beach, county of Los Angeles. By the oral agreements of the parties the appellants promised in addition to the conveyance of said realty, to include 10 shares of water stock of the Temescal Water Company of Corona. The respondents agreed orally in addition to the conveyance of said realty on their part, to include in the exchange certain household furniture on the premises. The complaint alleges that the plaintiffs and defendants thereafter made a written agreement to said exchange of properties, but in said written agreement nothing is said as to an exchange of the furniture and of the water stock. No reason is assigned for not including either. Deeds of exchange passed. Respondents, as they claim, delivered the furniture to appellants in accordance with said oral agreement, but the appellants have failed and refused to deliver said water stock as in said oral agreement agreed upon. Each went into possession of the properties exchanged. This action was brought to compel the specific performance of said oral agreement in respect to the delivery of said ten shares of the said Temescal water stock. An order was issued restraining appellants from disposing of said water stock pending the termination of the action.

[1] For the purpose of considering the motion for a change of place of trial the court is permitted to inspect the complaint for the purpose of determining the character of the action, and the judgment which might be rendered thereon. *McFarland v. Martin*, 144 Cal. 771, 78 Pac. 239.

[2, 3] The complaint contains no allegation that the water stock is appurtenant to the land transferred by appellants to respondents. It appears to be personal property in the ordinary sense that commercial water stocks or bank stocks are personal property. A pleader is required to frame his complaint in such a way as to make it clear that he is entitled to retain the trial of his cause in the county in which the action is com-

menced. If there be any ambiguities, they must be resolved against the pleader and in favor of the defendant's right to have the case tried in the county of his residence. *Ah Fong v. Sternes*, 79 Cal. 30, 21 Pac. 381.

[4] So, too, it has been held that if real and personal actions are joined in the same complaint, the case falls within section 395 of the Code of Civil Procedure and must be tried in the county of the defendant's residence. *Warner v. Warner*, 100 Cal. 11, 34 Pac. 523.

The order denying the motion for a transfer of the case to the residence of the defendant is reversed.

We concur: WILBUR, C. J.; WASTE, J.; KERRIGAN, J.; LAWLOR, J.; CONREY, Justice pro tem.; RICHARDS, Justice pro tem.

192 Cal. 236

PEOPLE v. TAMBARA. (Cr. 2577.)

(Supreme Court of California. Oct. 15, 1923.
Rehearing Denied Nov. 13, 1923.)

1. Criminal law — 1159(3)—Verdict based on conflicting evidence conclusive.

Jury's determination of fact on conflicting evidence is conclusive on appeal.

2. Embezzlement — 44(4)—Evidence held to show that bonds embezzled were indorsed to accused as pledgee.

Evidence held sufficient to warrant a finding that the bonds alleged to have been embezzled were the property of prosecuting witness, and were indorsed by him to accused as pledgee in connection with a note, and that acts of accused relating to the disposition of the bonds all occurred while they were in his possession solely by reason of their delivery to him as such pledgee.

3. Pledges — 42 — Pledgee may not pledge bonds to another as collateral for larger personal obligation.

Where bonds have been pledged as collateral it is not legal for the pledgee to separate the bonds from the note secured and use them as collateral to his own larger obligation to a third party, notwithstanding he has a power of attorney to furnish him with complete evidence of right to transfer the bonds.

4. Embezzlement — 11(1)—Pledgee repledged property guilty of embezzlement.

One who received bonds in pledge as collateral for a note and separated the bonds from the note and pledged them as collateral to his own larger obligation to a third party was guilty of embezzlement, the note for which they were originally pledged as collateral being paid.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Mitsushige Tambara was convicted of embezzlement and appeals. Affirmed.

A. A. Montagne, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

CONREY, Justice pro tem. The defendant was charged with the crime of embezzlement, by an information filed in the superior court of the city and county of San Francisco, in the charging part of which it was alleged that the defendant, on or about the 9th day of October, 1920, was intrusted by one F. Hachiyama with certain bonds issued by the Japanese imperial government, the property of said Hachiyama, and of the aggregate value of \$1,350, and that the said defendant having then and there received said personal property as bailee, and while he was so intrusted and in the possession of said personal property, he did unlawfully, feloniously and fraudulently embezzle and appropriate the same to his own use. To this information the defendant pleaded not guilty, and was thereupon put upon trial before a jury, which returned a verdict of "guilty of the crime of felony, to wit, embezzlement by bailee as charged in the information." The defendant's motion for a new trial was denied, and from the judgment which followed he prosecutes this appeal.

The contentions of appellant are that the evidence is not sufficient to prove that he was intrusted by Hachiyama with the bonds, or that Hachiyama was owner of the bonds, or that appellant disposed of the bonds while they were in his possession or without authority.

During the year 1920 appellant was engaged in the business of a merchandise broker in San Francisco. He had business relations with one Inouye, a retail provision dealer in Watsonville. Inouye had among his customers F. Hachiyama and one Mitsui, who were mutually interested in the business of raising and selling strawberries. In April, 1920, Mitsui applied to Inouye for a loan of \$1,000. Thereupon Inouye negotiated by telephone with Tambara and secured the latter's consent to make the loan. Thereupon Tambara sent down to Inouye a promissory note for \$1,000 payable 80 days after date to himself, or assigns, with interest at 12 per cent. per annum. Accompanying this note was another document in the form of a general power of attorney to be also signed by Mitsui, constituting Tambara his attorney in fact "with full authority to make all contracts and do all other acts of a business nature except a conveyance of lands." These two documents were duly executed by Mitsui, and were returned to Tambara together with the bonds, which were negotiable in form and transferable by bearer. These bonds

had been delivered by Hachiyama to Mitsui with the understanding that they would be pledged for this loan. Tambara, upon receipt of the note and bonds and on April 24, 1920, applied to the Anglo California Trust Company for a loan of \$1,100, offering his own note, payable in 60 days with interest at 6 per cent. per annum. The loan was made, Tambara depositing as security therefor the said bonds received from Mitsui together with certain Liberty bonds of his own. Thereupon Tambara forwarded \$1,000 to Inouye, who delivered the same to Mitsui.

[1] At this point we will consider appellant's contention that the evidence is insufficient to prove that Mitsui's note to him was paid in full on the 4th day of October, 1920, or at any time. From the evidence there is no doubt that Mitsui, through Inouye, sent checks which were paid and which were sufficient in amount to satisfy the Mitsui note. The amounts of these checks were paid to appellant or to Tambara Gumi, the name of the business house through which Tambara conducted his merchandising and brokerage affairs. An attempt was made by appellant to show that at least in part these payments were properly applied to indebtedness of Inouye to Tambara, and not toward satisfaction of the Mitsui note. The evidence, as a whole, is conflicting upon this issue, and under that condition, of course, the jury's determination of the fact is conclusive here.

The subsequent conduct of appellant tends to support the contention that the Mitsui note had been paid in full. According to the testimony of Inouye he instructed Tambara that those checks were for payment of the Mitsui note. Inouye further testified that after the last payment was made, and early in November, 1920, he called on appellant in San Francisco, and, after first stating that the loan had been paid in full, asked for a return of the bonds which had been deposited as collateral; that in reply Tambara said that it was the proper thing for him to deliver the bonds, but that they were placed in a certain safe deposit vault; that if Inouye would return on the following morning he would be ready to deliver them; on Inouye's return next day to Tambara's office, Tambara was absent; in fact the bonds never were returned. In this contention it may be noted that in making his \$1,100 loan at the bank, Tambara used the Hachiyama bonds, together with some other bonds, independently as collateral to his own note without including the Mitsui note as a part of such collateral.

Appellant having failed to pay his note to the Anglo California Trust Company, that company pressed for payment. Thereupon, and on the 6th day of December, 1920, appellant arranged with another broker named Koshland to advance \$1,100 for the taking up of the trust company's loan, with the understanding that the bonds would be trans-

ferred to Koshland as security for the indebtedness of appellant to Koshland as created by that transaction. Koshland and appellant went together to the trust company, where Koshland paid over \$1,100 to the trust company, and at the same time appellant separately paid to the company the accrued interest due from him on the note. The bank then passed the bonds over to Koshland, but first took appellant's receipt therefor.

[2] The evidence of these transactions, which, in substance, is hereinabove stated, was sufficient to warrant the jury in determining that the bonds were the property of Hachiyama and were intrusted by him to appellant as pledgee thereof in connection with the Mitsui note, and that the acts of the appellant relating to the disposition of the bonds all occurred while they were in his possession solely by reason of their delivery to him as such pledgee. When he took the bonds to the Anglo California Trust Company, they were in his actual possession. When he caused them to be delivered over by the trust company to Koshland, they were practically in his possession.

[3] The only remaining question relates to the authority of appellant to pledge these bonds as security for his own debts after they had been received by him as pledgee in connection with the Mitsui note. "One who has a lien upon property may pledge it to the extent of his lien." Civ. Code, § 2990. If appellant in giving security for his note to the trust company had pledged the Mitsui note and together therewith had pledged the Hachiyama bonds as collateral annexed to that note, he would have been acting strictly within his rights under this section of the Code. But in separating the bonds from the note for which they had been pledged and in thus using those bonds as collateral to his own larger obligation, he exceeded his legal rights in the use of the bonds. We are not concerned here with the proposition, which may be conceded, that as to the trust company the pledge of the bonds to it was beyond successful attack. Appellant had been given possession of the bonds with all the indicia of ownership. Nevertheless as between him and his pledgor or pledgors his application of the bonds to his own separate use in excess of his rights as pledgee was an illegal conversion of the property. The fact that he had procured from Mitsui a power of attorney in the general terms which we have quoted did not extend his rights beyond the purposes for which the power of attorney was given, namely, to furnish him with complete evidence of his right to transfer the bonds, but only under those circumstances and by those methods which pertain to the relation of pledgor and pledgee. For there is no evidence that any other relations or rights were contemplated by the appel-

lant or by Mitsui or by Hachiyama except those incident to said \$1,000 loan and note.

[4] If it be at all material, it might be conceded that on April 24th, when appellant used the bonds as collateral to his note to the trust company, he thought he was authorized so to do and expected that the bonds would again be in his possession through the payment of his note to the trust company at its maturity 20 days before maturity of the note of Mitsui to appellant. But when the Mitsui note was paid, and the appellant failed to comply with the demands made upon him for a return of the bonds, there can be no doubt that from that moment there existed a wrongful conversion amounting to embezzlement. When we add to this situation the fact that subsequently he caused the same bonds to be repledged to Koshland for an indebtedness of his own, created under the circumstances to which we have referred, that act was in and of itself an embezzlement of the property of Hachiyama, in which property appellant had no remaining right or interest whatsoever, although he held it in possession as trustee for the owner, to whom it was his bounden duty to restore the same.

Judgment is affirmed.

We concur: WILBUR, C. J.; KERRIGAN, J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.

192 Cal. 254

WILLIAMS v. EDGE et al. (L. A. 7754.)

(Supreme Court of California. Oct. 17, 1923.
Rehearing Denied Nov. 15, 1923.)

1. Landlord and tenant — §329 — Insecurity clause held to give right of possession, where landlord dissatisfied.

Where a farm lease gave lessor a lien for a stated amount upon crops and livestock, and reserved to lessor the right to re-enter, and if he deemed it necessary for the protection of his interests to take possession and harvest the crops for both parties, the landlord's right to possession accrued to him at his pleasure on his becoming dissatisfied, certainly where there was reasonable basis for dissatisfaction.

2. Landlord and tenant — §329 — Lessor's failure to make demand or give notice of intent to re-enter held waived.

Where a farm lease gave lessor a lien for a stated amount upon crops and livestock, and reserved to lessor the right to re-enter, and if he deemed it necessary for the protection of his interests to take possession and harvest the crops for both parties, upon lessor becoming dissatisfied, he should give notice and demand possession to mature his cause of action for possession, but where he does not rely upon the statute permitting an action for unlawful detainer with its accompanying penalties, and lessee contests his right of possession, failure to make such a demand or give notice is waived.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action to recover possession of real property by De Witt B. Williams against Virgle E. Edge and another. Judgment for defendants, and plaintiff appeals. Reversed.

Harry W. Horton, of El Centro, for appellant.

Joseph F. Seymour, Frank Erzinger, and E. R. Simon, all of El Centro, for respondents.

WILBUR, C. J. The plaintiff, as landlord, executed a lease to the defendant by which the defendant was to pay as rental one-fourth of the crops and proceeds derived from farming the land. It was agreed that the landlord should maintain certain supervisory powers over the farming operations conducted by the tenant, and that the tenant should observe certain requirements in the lease concerning the irrigation of the alfalfa, etc.

The lease provided that—

"The party of the first part shall have a lien and charge upon all crops sown, growing or harvested, and all live stock raised on the premises, to the amount of (\$4,000) four thousand dollars, and party of the first part reserves the right for himself or his agent to enter upon said premises at any time to make examination of the premises and crops, and should he deem it necessary for the protection of his interest in the land or the crops or the rent, to take immediate possession of the leased premises and to mature and harvest the crops for the benefit of both parties, as provided by law in such cases."

The landlord being dissatisfied with the tenant's methods, brought this action to recover possession.

(The trial court found all the facts alleged by the plaintiff to be true; that the terms of the lease had not been complied with by the tenant, but denied the plaintiff's prayer to be let into possession.

[1] It is clear that the landlord's right to possession accrued to him at his pleasure upon his becoming dissatisfied, and this was certainly true where there was a reasonable basis for such dissatisfaction. By the terms of the lease both parties were interested in the crops and proceeds of the land, regardless of where the title thereto lay. Although he it said the lease provided that the landlord had a lien thereon for \$4,000.

[2] No doubt the landlord should have given notice and demanded possession in order to mature his cause of action for possession (Tiffany on Landlord and Tenant, p. 81, § 12, subd. 4), but the plaintiff does not rely upon the statute permitting an action for unlawful detainer with its accompanying penalties and, inasmuch as the

defendant contested and now contests plaintiff's right of possession, the failure to make a demand or give notice was waived.

The plaintiff was entitled to the possession of the premises under the terms of the lease and upon the facts found by the court, and the judgment should have given him such possession subject to the rights of the parties to the crops under the terms of the lease.

Judgment reversed, and the trial court is directed to enter a judgment for plaintiff in accordance herewith.

We concur: KERRIGAN, J.; WASTE, J.; SEAWELL, J.; LAWLOR, J.; RICHARDS, Justice pro tem.; CONREY, Justice pro tem.

192 Cal. 250

ANDERSON v. UNITED STAGES, Inc.
(L. A. 7161.)

(Supreme Court of California. Oct. 17, 1923.)

1. Damages — 132(7) — \$3,238.84, for injuries to hip and back, held not excessive.

Verdict for \$3,238.84 for plaintiff, 47 years old, in good health at time of accident, for injury to back and hip, from which he had not recovered at time of trial, four months after the accident, *held* not excessive.

2. Damages — 206(1) — Refusal to appoint physician to examine plaintiff and report concerning his condition, without plaintiff's consent, held not error.

In a personal injury action court's refusal during trial to appoint a physician to examine the plaintiff and report concerning his condition, without plaintiff's consent thereto, *held* not error.

3. Appeal and error — 207 — Misconduct of counsel to which adverse party did not object not considered.

Misconduct of counsel to which the adverse party made no objection will not be considered on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Carl Anderson against the United Stages, Inc. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Thomas and B. P. Gibbs, both of Los Angeles, for appellant.

John H. Wellman, of Alhambra, and Walter M. Campbell and Bertrand J. Wellman, both of Los Angeles, for respondent.

CONREY, Justice pro tem. The defendant appeals from a judgment rendered against it in an action to recover damages for personal injuries received in an automobile collision while the plaintiff was riding as a passenger of the defendant in one of its automobile stages. Since appellant in its reply brief

concedes that it is liable to the plaintiff in some amount, we shall omit from further consideration all of the points relied upon in the opening brief, except those connected with the contention that the amount of the verdict is excessive.

The plaintiff, in addition to his demand for damages on account of the injuries received, claimed certain items of special damage amounting in the aggregate to the sum of \$738.84. Because the verdict and judgment are for the sum of \$3,238.84, appellant argues that the general damages allowed were \$2,500 and that the special items were allowed in full. It then contends that not only is the \$2,500 an excessive allowance, but also that some of the special items, in whole or in part, are not supported by the evidence. But the verdict was for a lump sum without any segregation of items of which the verdict may have been composed. Assuming, as claimed by appellant, that more than \$300 of the special items are not supported by the evidence, it only results that the general damages were allowed in the sum of a little over \$2,800 instead of \$2,500.

[1] There is evidence tending to prove that the plaintiff at the time of the accident was 47 years old and in the enjoyment of very good health; that when the collision occurred he immediately lost consciousness and did not regain consciousness until after he was in a hospital; that he received bruises on the head and other injuries to the back and hip; that his right ear was mangled and torn; that there were contusions on his right leg, right hip and in the scrotal region; that he was kept in the hospital about 6 weeks and during that time lost about 24 pounds in weight; that at a time 4 months subsequent to the accident his back was extremely tender, with marked pain in the groin, which the physician who examined him at that time considered to be the cause of the fact that plaintiff limped in walking. It is not necessary to state the evidence in further detail. Unquestionably it is sufficient to show that the injuries received were of a very serious character, not only with regard to their severity at the time of the accident and during the period of recovery, but also that in some respects the resulting injuries are of a permanent character. Under these circumstances we would not be justified in concluding that the jury was influenced by passion or prejudice or abused its discretionary power in determining the amount of its verdict.

[2] Prior to the close of the testimony on behalf of the plaintiff, counsel for defendant suggested to the court that the court appoint some surgeon to examine the plaintiff and report and testify concerning the condition of the plaintiff at that time. In response the judge expressed an opinion that

the court did not have the power to take such action except with the consent of both parties. Such consent was not given. Prior to that time the defendant had caused the plaintiff to be examined by a physician selected by it, and his testimony was introduced in evidence. It does not appear that the defendant was prevented from having made further examinations of the plaintiff such as it desired. Moreover, counsel for defendant expressly stated that he did not believe that the court had power to order such examination, and did not further insist upon the making of such order.

It is now contended by appellant that the trial court did have power to make and enforce the suggested order, irrespective of the consent of the other party, and that "the court erred in denying the motion." It relies on the case of *Johnston v. Southern Pacific Co.*, 150 Cal. 535, 540, 89 Pac. 348, 11 Ann. Cas. 841, as the controlling authority on this point. But an examination of that decision shows that the question presented here was not decided at all and was not before the court. In that case the defendant was seeking to obtain an order requiring the plaintiff to submit to a physical examination by reputable physicians selected by the defendant. The court refused to make the order, solely because the court believed that it was powerless so to do. On appeal it was held that the court did have that power. It may well be that a court is authorized to make such an order in order to enable the defendant to obtain evidence necessary to his defense. But we do not think the law imposes upon the court any duty to obtain and produce evidence at the instance of one party without the consent of the adverse party.

[3] Appellant suggests that counsel for plaintiff was guilty of misconduct in several instances during the trial. It is a sufficient answer that counsel for defendant made no objection which can be construed as amounting to an assignment of error at the time when those incidents occurred or at any time during the trial. Moreover, it is extremely doubtful whether the defendant suffered prejudice by reason of any of said statements of counsel of which he complains.

The judgment is affirmed.

We concur: WILBUR, C. J.; LAWLOR, J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.; RICHARDS, Justice pro tem.

192 Cal. 242

KELLY v. TOWN OF HAYWARD et al.
(S. F. 10805.)

(Supreme Court of California. Oct. 16, 1923.)

Dedication §57—City could not construct town hall on land dedicated as "plaza."

A city of the sixth class incorporated under St. 1875-76, p. 215, had no right to con-

struct a town hall containing a jail on land dedicated as a "plaza," by which term the dedicator intended that the land should be used as a public square.

[Ed. Note.—For other definitions, see Words and Phrases, Plaza.]

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by T. L. Kelly against the Town of Hayward, and Arthur E. Manter and others as trustees thereof. Judgment for defendants, and plaintiff appeals. Reversed.

F. H. Arb, of Hayward, for appellant.

C. W. White, of Alameda, for respondents.

PER CURIAM. The plaintiff and appellant herein, a citizen and taxpayer of the town, brought this action to secure an injunction against the erection by the trustees of the town of Hayward of a town hall including rooms and offices for town officers, and a jail, for the sole use and benefit of said town of Hayward, upon the "plaza" in said town. The defendants answered, admitting practically all the allegations of the complaint, and the parties thereafter entered into a stipulation of facts and submitted the cause to the superior court upon that stipulation and briefs. Judgment was entered for the defendants, findings being waived, and plaintiff appeals.

The stipulated facts in substance are as follows: Hayward is a municipal corporation of the sixth class, incorporated under the act of March 11, 1876 (Stats. 1875-76, p. 215). The town was formerly known as San Lorenzo and grew up on lands granted by the Mexican government to Guillermo Castro. By two maps, or town plats, filed by Castro in the years 1854 and 1856, respectively, and recorded in Book 17 of Maps of Alameda County, at pages 34 and 22 [a copy of the latter being kept in Castro's office, exhibited to prospective purchasers, and its block and lot numbers used in deeds of parcels sold], one block of land 400 feet by 300 feet in dimensions, and now bounded by Castro, Watkins, C, and D streets, was designated by the word "plaza" and was thereby "dedicated to the public as a plaza and the same has been ever since and now is dedicated to the use and convenience of the public as a plaza."

It is also stipulated that the block comprises 2.75 acres of land which the town has heretofore planted to various ornamental trees, lawns and flowers; that in the center of said lands there is an unoccupied piece which is about 22,500 square feet in area, whereon it is proposed by the defendants to erect and construct a town hall, the town never having had a town hall, which said building, when completed, will contain such

necessary rooms and offices as may be required for town officers, and a jail; and that by so erecting said town hall in the center of said lands, the beauty of said lands as now ornamented by trees, shrubbery, flowers, and lawns will in no wise be interfered with and the same will at all times have constant care and attention, and the same will at all times be kept open to the public for the pleasure and recreation of said public.

The only issue raised by the pleadings arises from plaintiff's allegation that the construction and erection of the proposed town hall would deprive the public and the plaintiff of the use of said lands as a plaza, and is therefore contrary to the use for which said lands were dedicated, and that irreparable injury would be done to the public and the plaintiff thereby; and the defendants' denial thereof, and their affirmative allegations that Castro, in using the word "plaza" for the purpose of making said dedication, intended that the said block of land designated on said map should be used as a "public square and not as a park, and that as a public square the same would be used for a town hall and the remainder thereof to be used for growing of trees, shrubbery, flowers, and lawns for the pleasure and recreation of the residents of the town of Hayward, * * * and that the use of the center portion of said land as a site for a town hall is not inconsistent with or contrary to the purposes for which said lands were dedicated and will not interfere with or in any way prevent plaintiff or the public of the right and convenience of using said lands and premises for any and all other purposes intended by Guillermo Castro at the time of the dedication of the same." As to this issue of consistency of proposed use with the purposes of dedication we are without aid from the stipulation of facts, which recites that Castro, in using the word "plaza," intended that the block should be used as a plaza.

It might be suggested at this point that it would seem that the intention of the dedicant and the terms of the dedication as interpreted by the predecessors of the present town authorities, by leaving this land unoccupied by any edifice for a period of 45 years, would be an almost conclusive argument upon the question of such intention; also that if the present board of trustees has discretion to utilize a portion of this block for town buildings, some future board might claim that under their discretion a corporation yard and rock pile for the employment of prisoners, and other very useful adjuncts to the administration of the economic affairs of the town, might be located thereupon, until the entire space was fully so occupied.

It is stated in respondents' brief that it has been established by a decision of the United States federal court that the town of

Hayward "owns" the plaza, to be used by said town for the purposes intended by Castro when making the dedication.

The decision in the case referred to, *Grogan v. Town of Hayward*, 4 Fed. 161, written by Circuit Justice Field in 1880, contains a most interesting history of the organization of the town and the dedication of this plaza, which might well be added to the foregoing statement were we not constrained by a desire to be concise. It shows the action to have been instituted by a grantee of the purchaser at foreclosure sale under mortgages executed by Castro subsequent to the dedication of this plaza and covering a tract which embraced the entire townsite. This grantee maintained warehouses on a portion of the plaza from 1864 to 1877, when they burned down, whereupon the town took possession of the ground and Grogan brought suit to regain the same. Judge Field's conclusion was that the purchaser at the mortgage sale and his grantee took whatever rights they acquired in subordination to the interests of the public, represented, since the incorporation of the town, by its authorities.

Counsel agree that the purpose of the appeal is solely to secure a final determination of the questions of law involved and that these questions depend on the meaning of the word "plaza," which has never been judicially defined in this state. For our assistance, as set forth in their briefs, the definition of the word "plaza" found in the dictionaries is as follows: Webster's New International Dictionary: "Plaza." Spanish. A public square in a city or town; a market place; an open square; a fortified place or town. 30 Cyc. 1643: "Plaza." A word of Spanish derivation which in Spain, Cuba, Mexico and parts of the United States settled by the early Spaniards, is used to designate a plat of ground in a city or village dedicated to the use of the general public for a market place, a common or a park. (Plaintiff's Brief, p. 20.)

Appellant contends that it means a "park," and it is conceded that under that definition it may not be used as now intended, while respondents urge that it means a "public square" and as such may be utilized for governmental purposes, and counsel quotes cases from Illinois and Pennsylvania to support that view. The principal of these is *Commonwealth ex rel. v. Connellsville Borough*, 201 Pa. 154, 50 Atl. 825, wherein it is stated:

"The ordinary and most frequent uses [of public squares], as enumerated by Justice Rodgers in *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95, are as 'sites for the erection of buildings for the use of the public such as court houses, market houses, school houses and churches; sometimes they are designed as ornaments and at others for the promotion of the health of the inhabitants by admitting free circulation of air.' To these might be

added, especially in the earlier dedications, commons for pasture, public pounds for stray animals, even, under some conditions, common dumping grounds, or, as in the present case, common landing places for those using the river."

On examination of that case and the other Pennsylvania cases cited in connection with it, they are shown to have been based either upon the language of the particular dedication or upon legislation or local customs, and a line of decisions starting with the early case of *Commonwealth v. Bowman*, 3 Pa. 202, where it is said:

"To allow the county reasonable accommodation for its courthouse and offices in the great square of the county town, is one of the usages of our state, which has acquired the consistency of law."

In the Colorado case cited by respondents of *McIntyre v. Board of County Com'rs, El Paso County*, 15 Colo. App. 78, 61 Pac. 237, the square upon which the county courthouse was sought to be erected, with another of the same dimensions, was recited in an ordinance transferring control from the city of Colorado Springs to the county of El Paso to have been reserved by the Colorado Springs Company in planning the town for public buildings, company buildings, and parks, without which, it is inferentially held, the erection of even city buildings could not have been permitted. The judgment for defendant on demurrer was reversed and the cause remanded because the buildings contemplated were county and not city buildings. The case, therefore, does not support the respondents' position.

In view of the reasoning set out in decisions to be hereafter cited, it does not seem to us important to distinguish between the definitions of "plaza" and "public square." It seems fair to assume that had Castro realized that English-speaking lawyers and courts would be probing his intention in future times, he would have used "public square" as a term less troublesome to them. Undoubtedly, what he sought to do was to present such a plat as would appeal to purchasers as meeting the current conception of proper subdivision. With changing conceptions and advancing years the uses would doubtless be changed. But we must examine the question in the light of what was expressed, and done, and our knowledge that in the nature of things, property was being purchased in the expectation that those expressions and acts showed the complete purpose of donor and donee. Let us then examine the cases which we think controlling.

The first is that of *Village of Princeville v. Auten et al.*, reported in 77 Ill. at page 325 et seq. That was an action very similar to this. A bill in equity was brought to enjoin the village trustees from placing the

town hall on a "square" or "public square," which was found to have been dedicated by its then proprietors by the filing of a map of the town wherein the center block was left blank, only the dimensions being indicated, and the proprietors signed the appended certificate that the plat was correct and "that the streets and alleys are of the size set forth in the plat," while the deputy surveyor certified, among other things, to the dimension in feet of the "public square." The proof showed that the board of directors of the town had recognized the blank square as public grounds and sold lots fronting on it for an enhanced price. Neither the plat nor any of the certificates accompanying it expressed any limitation or condition as to the future use of the block designated as a public square nor indicated in what manner the public might enjoy it, although there was testimony introduced to the effect that it was the intention of the board of directors that it should forever remain an open square as a "beauty, convenience and charm to a country village."

The Illinois Supreme Court stated:

"In the absence of any custom or usage having the force of law, our conclusion is, the mere fact this block of ground was dedicated, by the original proprietors of the town, for a 'public square,' does not, of itself, confer upon the village trustees authority to appropriate it, in whole or in part, as a site for buildings for corporate purposes, against the wishes of any citizen interested. The privilege could only exist by grant, or by some act of the donors equivalent to a grant."

It therefore affirmed the decree granting the injunction.

In *Sachs v. Trustees of Towanda*, 79 Ill. App. 439, cited by appellant, a careful definition of the word "plaza" is attempted as follows:

"In some places the 'plaza' is an uninclosed market place and common, over which the public may drive and ride and vend the products of the farm; in other places it consists of an inclosed park, filled with trees, flowers, walks, etc., around which is a driveway, and into which the public have free access; while in other places it consists of an open square, in the center of which is a small inclosed park with a fountain, flowers, seats and walks."

From this the court concluded that—

"Where the owner of a plat of ground situated in a city or village dedicates it to the use of the public and calls it a 'plaza' but does not in any manner designate how it shall be enjoyed, that the city or village authorities may assume control of it and maintain it either as an open market place and common, an inclosed park for the pleasure and recreation of the public, or partly inclosed and partly uninclosed. In such a case they would be allowed a discretion in determining the manner of its enjoyment by the public."

In the recent case of *Dunne v. County of Rock Island*, 273 Ill. 53, 112 N. E. 342, the Supreme Court of Illinois cited *Village of Princeville v. Auten*, supra, as authority for the doctrine that the words "public square" do not indicate a certain or definite use of the square, and certainly not the definite use of maintaining thereon a county jail.

The trend of judicial interpretation is further indicated in the case of *Church v. City of Portland*, 18 Or. 73, 22 Pac. 528, 6 L. R. A. 259, involving two blocks designated upon the city plat by the words "public square," which were recognized by the city as having been set apart and dedicated by the proprietors of the "Portland Claim" to the use of the public as a public square for the use of the inhabitants thereof and the public generally, as an open plaza, and the city had planted trees thereon and otherwise improved the same as and for a public park or open plaza; later, the city prepared plans and specifications for a building on a portion of one of the blocks to be used as a city hall with a basement so furnished and completed as to be used as a public jail. One of the citizens of the city sought an injunction, and on denial of relief, appealed. Chief Justice Thayer of the Supreme Court of Oregon, in his decision, states:

"The questions to be determined herein are: For what use were the blocks intended to be dedicated? And will the construction of the building which the common council of the city proposes to erect thereon be consistent with the purpose of the dedication? That the blocks were intended to remain open plazas, and be beautified and adorned by the hand of art, I do not think there can be any doubt. Spots of that character, especially in large cities, are highly important. They afford healthful and pleasant resorts in the heated season, and are in fact the only places where a large class of the community are able to go and enjoy the blessings and comfort of shade and pure air; and any attempt on the part of public officials to appropriate them as a site for public buildings, in which to conduct the economic affairs of a city, under any pretext whatever, would, as I view it, be a cruel effort to subvert a humane scheme. The building of a city hall, with a jail in the basement thereof, upon the said block, as the common council proposes to do in this case, would, in my judgment, be a use of it foreign to the purpose for which it was dedicated, and should not be permitted. * * * The blocks were indicated on the map as public squares; which implied, of course, that they were to be enjoyed as such by the public at large, and not be appropriated and used by the city in the management and conduct of its affairs. The use of them in the way proposed would necessarily exclude the public from the use of them, except for the transaction of city business; but that privilege can be enjoyed wherever the buildings may be located. The act of building

the city hall in question would virtually be a purpresture. The city would be making that several to itself which ought to be common to many."

For the purpose of the appended illustrative notes, we would also cite *Codman v. Crocker*, 25 L. R. A. (N. S.) 930 (203 Mass. 146, 89 N. E. 177).

Our own cases which most nearly conform to the proper interpretation to be placed upon such a dedication as is involved here are *McCullough v. Board*, 51 Cal. 418, denying the right of the board of supervisors of San Francisco to devote a portion of a public square to the purpose of erecting a school house thereon, and the case of *Spires v. City of Los Angeles*, 150 Cal. 64, 87 Pac. 1026, 11 Ann. Cas. 465, which involved the use of a portion of one of the public parks of Los Angeles, which park it was conceded had been dedicated as "a public place forever for the enjoyment of the community in general," as the site of a public library. In a decision upholding the right to erect a library, this court drew the distinction very clearly between structures which would not interfere with the enjoyment of the public and those which were of a business character for the advancement of the interests of the municipal government and would interfere with such right, and held that the library, if erected, might not be used for meetings of the board of education of the city.

In the case under consideration it cannot be said that the erection of the town hall with a jail will not interfere with the complete and common use and enjoyment of this space by the public, particularly that larger public not inhabitants of that particular community who are beneficiaries nevertheless of the trust resting upon the town authorities. Respondents state that if this plaza may not be utilized for the town hall the taxpayers will be burdened with the expense of acquiring other land as a site for a town hall; but should the town of Hayward become a city, as it no doubt will, its need of parks and open spaces will become more and more apparent with increasing population, and the expense of then acquiring the same from private owners will be very much greater than the amount today involved in the purchase of a site, so that even utilitarian considerations would be in favor of granting the relief which plaintiff, on his own behalf and that of the public generally, is seeking.

For these reasons we conclude that the judgment should be reversed and the trial court directed to enter judgment for plaintiff as prayed in the complaint, and it is so ordered.

All concur.

63 Cal. App. 674

PEOPLE v. KING. (Cr. 717.)

(District Court of Appeal, Third District, California. Sept. 12, 1923.)

4. False pretenses — 5 — That accused had money coming which he intended to deposit to cover fictitious check not a defense.

On trial for passing a fictitious check, held the only issue is whether at the time defendant drew the check, he had funds on deposit to meet it or credit or agreement with the bank to take care of it, and the fact that he had money coming which he intended to deposit to cover the check is not a defense and is immaterial.

2. Criminal law — 1159(4) — Verdict of guilty is irrefragable evidence that jury repudiated defendant's story.

On trial for passing a fictitious check, the truth of defendant's assertion that his failure to deposit funds to cover the check was due to a mental breakdown was for the jury, and the verdict is irrefragable evidence that the jury disbelieved his story.

Appeal from Superior Court, Sacramento County; Stanley Murray, Judge.

F. J. King was convicted of passing a fictitious check. He appeals. Affirmed.

F. J. King, in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was, by information filed in the superior court of Sacramento county, charged with the crime of drawing, uttering, and delivering to the Zemansky Bros., a partnership, doing business in the city of Sacramento a check for the sum of \$1,450 on the First National Bank of Yuba City in Sutter county, knowing that he (said defendant) did not at that time have sufficient funds on deposit or credit with said bank to meet or satisfy said check; the information alleging that said check was issued and so delivered by said defendant with the intent to defraud said Zemansky Bros. Section 476a, Pen. Code.

The defendant was convicted of the crime as charged and prosecutes this appeal from the judgment of conviction and the order denying his motion for a new trial.

[1, 2] The appeal was regularly placed upon the calendar of the September term of this court for hearing, and the defendant regularly notified by the clerk of this court of that fact. No brief has been filed for or on behalf of the defendant, and he was not present or represented at the time the case was called for oral argument. On motion of the Attorney General the case was submitted upon the record. We have examined the record with care and have discovered no reason why the judgment and the order appealed from should not be sustained. The

evidence shows that the check referred to was delivered by the defendant to the Zemansky Bros. as in payment for a diamond ring; that the defendant, neither at the time the check was issued and so delivered (the 12th day of February, 1923), nor within the period of six months prior or within a period of two months subsequent thereto, had money on deposit in said bank with which said check could have been paid or any credit therewith or any agreement whereby the bank was to protect and take care of any checks he might thereupon draw. Indeed, the defendant himself admitted that he drew and delivered the check to Zemansky Bros., and that neither then nor at any other time did he have any money in the bank or any arrangement or understanding with the officers thereof that they would cash any check that he might draw on said bank. He stated, however, that he had sufficient money due him from other people which he intended to deposit in the bank on the day following that upon which he issued the check. He testified that on the evening of the day upon which he delivered the check to the Zemansky Bros. he suffered a nervous breakdown, and that as a result thereof he became mentally so aberrated that he did not realize any acts that he did or movements that he made until several days thereafter, when, upon the restoration of his normal mental condition, he found himself in the town of Calexico, in Imperial county, near the Mexican line.

Manifestly, the only issue in the case was whether, at the time he drew the check upon a bank, in which he did not have sufficient funds out of which the check might be cashed, or credit or agreement with the bank which would stand for the same purpose, with the intention of defrauding the Zemansky Bros., and therefore the fact, if it was a fact, that he had money coming to him in a sufficient amount to satisfy the check and that he intended to deposit the same in the bank upon which he drew the check would be no defense to the crime charged, and his testimony as to that matter was wholly irrelevant and immaterial to the issue. And even if it were true that his failure to deposit sufficient money in the bank to satisfy the check after the same had been issued and delivered by him was due to his mental derangement by reason of his asserted nervous collapse, and that that fact would constitute a defense to the charge preferred against him (and we do not say that it would be a defense), it would still be for the jury to determine whether his story regarding his asserted nervous breakdown and its effect upon his mentality was true or untrue, and the verdict of the jury, of course, stands as irrefragable evidence that the jury disbelieved and repudiated said story.

No exceptions are recorded against any of the court's rulings as to the admissibility of the evidence. In fact, if the court made any error at all in this particular, it was in the interest of the defendant, much greater latitude having been given him by the court and the district attorney in the presentation of his defense than he was entitled to, and this for the reason that, although not a lawyer, he conducted and insisted on conducting his own case. The charge of the court covered every principle of law applicable to the case, and is free from error.

The judgment and the order are affirmed.

I concur: FINCH, P. J.

63 Cal. App. 637

DILLON et ux. v. QUALLS. (Civ. 4535.)

(District Court of Appeal, First District, Division 1. California. Sept. 6, 1923. Hearing Denied by Supreme Court Nov. 5, 1923.)

1. Municipal corporations ⇐706(7)—Whether automobile driver exercised proper vigilance in approaching intersection held for jury.

Whether automobile driver exercised proper diligence in looking ahead when he approached an intersection, and in applying the brakes to his car as soon as he saw defendant's car come towards him on the wrong side of the road, from behind a truck as it turned into the intersection, *held* for the jury.

2. Municipal corporations ⇐706(7)—Whether automobile driver exceeded speed limit in approaching intersection held for jury.

Whether automobile driver, as he approached an intersection, was driving at a greater speed than 15 miles per hour, in violation of Motor Vehicle Act, § 22, as amended by St. 1917, p. 404, *held* a question for the jury, notwithstanding mathematical calculations based on casual observations of witness as to distances traveled.

3. Municipal corporations ⇐706(5)—Finding defendant's negligence was proximate cause of collision held supported by evidence.

Where defendant was driving north on a highway, behind a truck, and, despite his view of plaintiff and his wife coming from the north, drove to the left side of the highway, in passing a truck as it turned into an intersecting avenue, and after passing it collided with plaintiff, who was on the proper side of the road and did not see defendant until in close proximity, when he applied the brakes, the jury could infer that the injury to plaintiff's wife was proximately caused by defendant's violation of the rules of the road.

Appeal from Superior Court, Alameda County; J. G. Quinn, Judge.

Action by J. Plunkett Dillon and wife against John A. Qualls. Judgment for plaintiffs, and defendant appeals. Affirmed.

Strother P. Walton, of Fresno, for appellant.

Will S. Robenson, of Richmond, for respondents.

ST. SURE, J. This is an action by J. Plunkett Dillon and Rita Dillon, husband and wife, to recover damages for injuries sustained by the wife, occasioned by the collision of an automobile with that of defendant.

Plaintiffs' complaint alleged a cause of action against defendant for negligence. Defendant, in his answer, denied that he was negligent, and specially pleaded as a defense contributory negligence on the part of Mr. Dillon. Upon these issues the case was tried before and submitted to a jury. The jury found in favor of the plaintiffs, and fixed damages in the sum of \$25,000. Upon motion for a new trial the superior court ordered that \$10,000 of the judgment entered upon the verdict be remitted or a new trial would be granted. Plaintiffs remitted all damages in excess of \$15,000, whereupon the court denied the motion for a new trial, and judgment for the sum of \$15,000 was entered in favor of plaintiffs and against defendant. From this judgment defendant appeals, upon the sole ground that the evidence shows that the contributory negligence of plaintiff J. Plunkett Dillon bars both himself and his wife from a recovery.

The accident occurred at or near the intersection of San Pablo with Park avenue, in the city of Emeryville. San Pablo avenue is the main highway running in a northerly direction from Oakland to Richmond, passing through Emeryville. Park avenue runs from the water front in Emeryville in an easterly direction to its point of intersection with San Pablo avenue, but does not extend beyond San Pablo avenue. Mr. Dillon was driving his automobile, in which his wife and three children were passengers, southerly along San Pablo avenue. Defendant was driving his automobile northerly on San Pablo avenue, immediately behind a truck.

Counsel for defendant says that—

"On the question of the course that defendant took and where the accident occurred, there was a sharp conflict in the testimony. The jury has resolved this in favor of plaintiffs. * * * We must conclude that the finding of the jury that defendant left his own side of the street and the wreck occurred on the westerly side of the avenue finds support in the evidence."

[1] Notwithstanding the finding of the jury that the defendant was guilty of negligence, it is claimed that the evidence, and particularly the testimony of plaintiff and his wife, shows that the plaintiff husband was, as a matter of law, guilty of contributory negligence, which is imputable to the plaintiff wife and bars recovery.

We turn to the transcript of the testimony. George Gilmore, a disinterested witness, who was standing at the northwest corner of the intersection, had a clear view of the accident, and he described it as follows:

"There was a truck, a big truck coming up San Pablo avenue towards Richmond, and there was another machine a little to the outside coming in the same direction. The truck started to make this turn down Park avenue, and the man driving the machine behind him, instead of his turning to his right towards the curb—he had plenty of room to keep on his way—but instead of that he turns to the left over on the wrong side of the street, and he cut in front of the truck just the other side of the truck as the machine coming from Richmond toward Oakland came, and they collided right there."

S. Garbutt, another disinterested witness, testified:

"Well, I saw the truck make the turn, and I saw this other car cut in front of it."

He also testified that at the time the truck made the turn and the defendant's car started to swing around there was ample fairway to have continued on along the right-hand side of San Pablo avenue.

Defendant himself testified:

"I saw Dillon's car before I started around the truck."

Mr. Dillon testified in part as follows:

"When my wife called out 'Look at that big car!' Well, I looked over to the left (of course, a man driving a car would) and I saw there was nothing there coming for me; the truck was pretty well getting in front now, and when I just about entered my—I guess—I think my wheel just about entered the safety zone near the intersection of Park avenue, I saw the defendant's car loom away over on my right in front of the truck that was going down Park avenue, and I put my brakes—he was coming across trying to regain his side, right-driving side, on San Pablo, cutting in on this southern, south-bound traffic, and I tried to put my—I put my brakes on, and brought my foot brake on, but it was too late. He was coming, and so great was the peril, the peril was so great and the situation was so swift, so fast, that he came in front of the truck and cut into the south-bound traffic, of which, where I was going, the peril was so great that—I am not going to use any levity, but it would seem to me that three things could be done to avoid that accident: One would be to go up into the air, the other would be to go down into the floor, and the other would be to dissolve into the air. That is just how the situation appeared to me—I, with my little cargo of human lives—and I put my brake on. Had I veered over to the left, he would have struck me, and the speed at which he was going he would have struck me in the middle of my car, and we would have all been cut to pieces; and had I gone to the right—now, then, it seemed to me that the only thing I could do was just to throw on my brake, which I did. * * *

Defendant contends that Mr. Dillon was not watching the road, and that he did not see the defendant's car until his wife called his attention to it. Mrs. Dillon explains this by stating that she was sitting on the right her husband on the left-hand of the car in which she was a passenger, and that the defendant's car came into her view sooner than it did her husband's. Dillon testified that while driving he was looking ahead; that he saw the truck to the right of him; that as soon as he saw defendant's car he applied the brakes.

Automobile accidents usually happen in the twinkling of an eye. Generally the situation is "swift" and "fast," as described by Mr. Dillon. Mr. Dillon was not expecting a car to "cut in front" from behind the truck, and he had a right to assume that any one driving at the rear of the truck would obey the law of the road and confine his driving to the right-hand side of the highway. It was therefore a question for the jury to determine, under all of the circumstances, whether Mr. Dillon's vigilance was what it should have been.

[2] Defendant comments upon the speed at which Mr. Dillon was driving. Mr. Dillon testified that he was going about 15 miles per hour. Defendant said he thought Mr. Dillon was "going 20 or 25 miles per hour." Mrs. Dillon was of the opinion that her husband was driving at less than 15 miles; it might have been 12 miles, an hour. She says she noticed the speedometer. Upon this evidence, and geometric calculations, it is contended that the Dillon car was exceeding the limit of 15 miles an hour in approaching or traversing an intersection. Section 22, Motor Vehicle Act; St. 1915, p. 409, as amended by St. 1917, p. 404. Counsel for defendant endeavors to demonstrate by mathematical calculations, based upon casual observation of witnesses as to the distance traveled by the Dillon car within a given period of time, that Mr. Dillon was driving at an excessive rate of speed. Such testimony, and the consequences, may serve as a matter for argument before a jury, but the idea that thereupon, in a given case, the rate of speed of an automobile may be established is fallacious. Testimony growing out of perception and memory shows an almost unaccountable variation. Rarely does a witness see clearly, and report accurately. Take any case where an automobile accident is the subject of inquiry. Two persons from the same vantage ground witness a collision. They are called to testify at the trial. Admittedly each is disinterested, and each is endeavoring to tell the truth. Upon the question as to how far each car traveled before the collision occurred, one witness will swear 10, the other 50, feet. Measurements show that both are mistaken. Upon the question as to how long after the cars were first seen the impact took place, one will say

one minute and the other will say five minutes, when as a matter of fact the cars crashed together in a second. It is the same with testimony as to speed; one witness saying one car was going very fast, the other slow, while witness No. 2 is positive that one car was going at less than 10 miles an hour and the other car was standing still. Clearly, then, the question of speed was one for the jury to determine.

[3] In support of his contention that Mr. Dillon was guilty of contributory negligence, counsel for defendant cites *Ogden v. Lee* (Cal. App.) 215 Pac. 122. In that case the plaintiff Ogden, a pedestrian, while crossing a thoroughfare at night, saw the lights of an approaching automobile and had ample time to avoid an accident by pausing a few seconds. But he chose to proceed across the highway until he was struck. In affirming a judgment of nonsuit, this court held that plaintiff Ogden, under the circumstances shown, failed to measure up to the standard of conduct which the law requires of a person voluntarily placing himself in a position of peril. In the instant case these facts stand out in bold relief: Plaintiff Dillon was driving his automobile southerly along the right side of San Pablo avenue. Defendant was driving his car northerly on the right side of the same highway. A truck preceded defendant. The three vehicles approached the intersection. The truck turned westerly onto Park avenue. As the truck turned defendant changed his course to the left, "speeded up," passed in front of the truck, and while on the left (for him wrong) side of the highway, met plaintiffs' car in collision. Mr. Dillon did not see defendant's car until it emerged from behind the truck and appeared directly in his path; and then he applied his brakes. Defendant saw Dillon's car before he changed his course, and he had opportunity to confine his travel to the right side of the highway with safety. It will thus be seen that the facts in *Ogden v. Lee* and the case before us are quite different.

It was within the province of the jury to make any logical, reasonable deduction which the facts permitted. It was the privilege of the jury to infer from all the facts and circumstances shown that the injury to Mrs. Dillon was caused through the negligence of defendant; that the proximate cause of the accident was defendant's act in violating the rules of the road by going upon the left of the highway and passing a turning truck at an intersection; that the plaintiff Dillon was driving his car in a prudent and careful manner and was not guilty of contributory negligence.

It therefore follows that the judgment should be affirmed.

It is so ordered.

We concur: TYLER, P. J.; RICHARDS, J.

63 Cal. App. 562

PEOPLE v. BARNARD et al. (Cr. 921.)

(District Court of Appeal, Second District, Division 2. California. Aug. 29, 1923.)

1. Conspiracy — 43(1)—Indictment charging conspiracy to commit offense indefinitely described is defective.

An indictment charging, in a single count, conspiracy to commit a felony which is so described that it might be treated as applying to any one or more of the offenses denounced by Pen. Code, §§ 532, 563, 564, section 182, subd. 4, as amended by St. 1919, p. 170, and section 532a(2), subd. 1, or Corporation Securities Act, § 8, is defective, in that defendants were not advised that they were accused of the commission of any particular offense.

2. Conspiracy — 43(1)—Indictment held defective in not alleging amount of money sought to be obtained by conspiracy.

Under Pen. Code, § 182, as amended by St. 1919, p. 170, providing for two different punishments depending on the amount of money sought to be obtained by conspiracy, and in view of sections 489, 490, indicating the punishment for larceny, an indictment failing to allege the amount of money "obtained" by false pretenses, is defective, in that it does not advise defendants whether their offense is punishable under the first or second scheme of section 182.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

W. L. Barnard and others were convicted of conspiracy, and they appeal. Reversed.

Daley & Byrne, of San Bernardino, and S. L. Carpenter, of Los Angeles, for appellant Dunn.

Ford & Bodkin, of Los Angeles, for appellant Barnard.

B. Rey Schauer, of Los Angeles, for appellant Dennison.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

WORKS, J. This cause was prosecuted under an indictment by the grand jury for conspiracy. The action was never tried as to defendant Cook, and was dismissed as to defendants Breikreutz and Cullen. The jury disagreed as to the guilt or innocence of defendant Tune, and defendants Currier and M. C. Barnard were acquitted. Defendants Dunn, Dennison, and W. L. Barnard were convicted, and each appeals from the judgment of conviction. There is also an appeal from each of the orders denying the respective motions of the convicted defendants for a new trial.

The portion of the indictment alleging the formation of the conspiracy, with immaterial matters indicated by ellipsis, is in the following language:

"The defendants * * * are accused by the grand jury * * * of the crime of conspiracy to commit a felony committed, * * * as follows, to wit:

"That * * * the said defendants did willfully, unlawfully, fraudulently, feloniously, and corruptly conspire, combine, confederate, and agree together and each with the other that they would procure the charter of a corporation known as the Los Angeles & Kern River Improvement Company and all of the stock of said corporation which said corporation was then and there wholly insolvent, and change the name of said corporation to the Huntington-Hawthorne Oil & Gas Company, and change the par value of the stock of the said Los Angeles & Kern River Improvement Company from \$1 per share to 10 cents per share, and change the number of shares of said corporation from 500,000 to 5,000,000 shares, and to represent and pretend to the public to whom they then and there and thereafter were intending to offer stock for sale that the said Los Angeles & Kern River Improvement Company was then and there possessed of and owned assets and bills receivable in the sum of \$150,000, and that by reason of the said Los Angeles & Kern River Improvement Company owning the said assets of \$150,000 the same would be used by its successor, the Huntington-Hawthorne Oil & Gas Company, for the drilling of oil wells, one of which was to be drilled upon certain oil leases near the town of Moneta, * * * and the other on an oil lease at and near the town of Hawthorne, * * * both of the said leases being the property of the Huntington-Hawthorne Consolidated Oil Company, an unincorporated association theretofore organized and controlled by the said defendants. The rights and interests in and to said leases and the properties of the said Huntington-Hawthorne Consolidated Oil Company was divided into 2,500,000 units, about 2,000,000 of which said units had theretofore been sold and issued; * * * that the said 2,000,000 units so theretofore issued were to be received from unit holders or owners presenting them, and were to be received, and the stock of the corporation issued therefor on the basis of 1 share of stock of the corporation known as the Huntington-Hawthorne Oil & Gas Company of the par value of 10 cents for each unit held by unit holders in the Huntington-Hawthorne Consolidated Oil Company so presented and offered to be converted into such corporation stock, and that the trustee for the benefit of the said unit holders, and then and there one William F. Welling, who was then and there under the domination and control of the defendants, W. L. Barnard and Joseph V. Cullen, would assign and set over to the said Huntington-Hawthorne Oil & Gas Company all of the leases, properties, and rights of the said Huntington-Hawthorne Consolidated Oil Company and the unit holders holding units of ownership in and to said Huntington-Hawthorne Consolidated Oil Company to the said Huntington-Hawthorne Oil & Gas Company, and that, as a consideration for the said assignment, the said defendants would, as a part of said agreement and plan to defraud the public and to defraud the unit holders theretofore purchasing units in the Huntington-Hawthorne Consolidated Oil Company, set aside and di-

rected [sic] that 1,000,000 shares of said stock would be set aside for delivery to such unit holders who presented their units in the Huntington-Hawthorne Consolidated Oil Company for conversion into the stock of the Huntington-Hawthorne Oil & Gas Company, and, further, that they, the said defendants, as a part of the said conspiracy, scheme, and plan so entered into and agreed upon by the said defendants as aforesaid, willfully and feloniously, corruptly and fraudulently then and there agreed as a part of the said scheme and plan to procure one L. H. Scott, who was then and there wholly insolvent, to execute and deliver to the said defendants 13 promissory notes of the aggregate face value of \$150,000, 3 of said notes being for the sum of \$25,000 each, being dated March 19, 1921, and 6 of said notes being dated March 26, 1921, 4 of which being for the apparent face value of \$10,000 each, 2 of the apparent face value of \$5,000 each, and 4 of said notes being dated March 29, 1921, 3 of which were for the face value of \$5,000 each, and 1 of the face value of \$10,000, all and each of said notes being signed by the said L. H. Scott, and upon the understanding and agreement with the said L. H. Scott that he would not be held responsible for the payment of said notes, nor would he be expected to pay them, and that the said defendants and agents employed by them would represent and pretend to the public and the unit holders of the Huntington-Hawthorne Consolidated Oil Company that the said Huntington-Hawthorne Oil & Gas Company then and there was financed and had money on hand sufficient to drill a well upon the property and leases heretofore mentioned at Moneta, * * * and to drill and complete an oil well upon the lease heretofore mentioned near the town of Hawthorne, * * * and with the intent upon their part to deceive the state corporation commissioner of the state of California having supervision of the sale of corporate securities in the state of California and brokers selling such securities, to deceive the said corporation commissioner into believing that the said Huntington-Hawthorne Oil & Gas Company was a solvent corporation, and were then and there able to carry out its contracts and representations made to the public, and, as a part of said common plan, scheme, and conspiracy aforesaid and to deceive those of the public inquiring as to the assets of the corporation, and said defendants agreed and entered it upon the minutes of the said corporation that the said payment of the notes aggregating \$150,000 was secured by certain collateral security, to wit, 3,000,000 shares of the capital stock of the Huntington-Hawthorne Oil & Gas Company; it was further agreed as a part of said common scheme and plan that 1,000,000 shares of the capital stock of said corporation should be divided up among the said defendants without payment upon their part, and that the said defendants should sell the stock of said Huntington-Hawthorne Oil & Gas Company, and that where the stock of said corporation which was represented to be attached as collateral security was sold for money that 5 cents only of the sums which said stock was sold for would go for the benefit of the corporation, and the balance would be taken by the said defendants for their own use and benefit, and it

was then and there a part of said common scheme and plan as aforesaid that only such stock for the benefit of such corporation would be sold as would be required by the said defendants to pay the expenses of advertising and sale of said stock, and such other sums as the said defendants might consider would be an appropriate charge against the corporation."

The enactment which in this state denounces the crime of conspiracy, section 182 of the Penal Code, as amended by St. 1919, p. 171, provides in part:

"If two or more persons conspire: 1. To commit any crime; * * * 4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises. * * * They are punishable as follows: When they conspire to commit any felony, * * * they shall be punishable in the same manner and to the same extent as in this Code provided for the punishment of the commission of the said felony. * * * When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars. * * *

[1] Appellants make the contention that the indictment does not state a public offense with that certainty which is requisite to the validity of a true bill found by the grand jury. More specifically, the point made is that the indictment attempts to state several offenses, with the result that the persons indicted are not by its language apprised of the fact that they are charged with any particular one. The indictment was demurred to, not only on the general ground, but on the ground of uncertainty as well. Appellants, or at least some one of them, see in the indictment an attempt to charge them with each of the following crimes: First, a conspiracy to obtain money and property by and through the commission of the crime of obtaining money or property by false pretenses, which latter crime is defined by Penal Code, § 532; second, a conspiracy to obtain money "by false promises with fraudulent intent not to perform such promises," an offense denounced by Penal Code, § 182, subd. 4; third, a conspiracy to commit a fraud by and through the keeping of false accounts in the books of a corporation, the commission of such a fraud being made a crime by Penal Code, § 563; fourth, a conspiracy to procure the payment of cash or the delivery of personal property by and through the making of a false statement respecting the financial condition of a corporation, a crime defined by Penal Code, § 532a(2), subd. 1; fifth, a conspiracy to make a false report or statement of the affairs or pecuniary condition of

a corporation, such report or statement having a tendency to affect the apparent value of its shares of stock, the making of such reports or statements being declared a crime by Penal Code, § 564; and sixth, a conspiracy to deceive the corporation commissioner by the filing, pursuant to the provisions of section 8 of the Corporate Securities Act (Stats. 1917, p. 673; Deering's Consol. Suppl. to Gen. Laws, 1917-1921, p. 1447), of a false statement of the securities sold by a corporation. To this list of apparent charges respondent adds a seventh. The Attorney General defends the indictment upon the theory that it charges a conspiracy to obtain money and property by false pretenses not amounting to a complete commission of the crime of obtaining money or property by false pretenses.

It is evident from a casual examination of the indictment that it contains allegations tending toward a charge of the commission of each of the seven crimes tabulated above, some of those allegations going but a little distance toward a complete charge, others proceeding to greater lengths. These circumstances place before us, as a question for our consideration: Is the indictment so uncertain that it did not apprise the persons charged that they were to be tried for the commission of any single and particular crime?

In making answer to this question it is interesting to note the view of the indictment entertained in the trial court, by both the district attorney and the trial judge, as contrasted with that advanced by the Attorney General on this appeal and already mentioned. At the request of the district attorney the jury was told, in an instruction which we shall designate as A, that the defendants were charged "with criminal conspiracy, a felony," and that—

"The particular offense charged against the defendants is a violation of section 182 of the Penal Code, as amended in 1919, * * * which provides in part as follows: * * * (1) If two or more persons conspire: (1) To commit any crime; * * * (4) to cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses, or by false promises with a fraudulent intent not to perform such promises, * * * they shall be punishable in the same manner and to the same extent as in this Code provided for the * * * commission of the said felony or act, respectively."

In an instruction which we shall term B, also given at the request of the district attorney, the jury was informed that the indictment—

"charges that the defendants * * * entered into a conspiracy to obtain money and property from the persons to whom they were then of-

fering stock of the Huntington-Hawthorne Oil & Gas Company, and from persons whom they were thereafter intending to offer stock of such corporation for sale, and as a part of said conspiracy to procure one L. H. Scott to sign certain papers in the form of notes and to use such papers as pretended assets of the Huntington-Hawthorne Oil & Gas Company, and to enter a record of said notes in the records of the company as an asset of said company, and to falsely represent to the public and the unit holders of the previously organized Huntington-Hawthorne Consolidated Oil & Gas Company that the said Huntington-Hawthorne Oil & Gas Company was financed and had money on hand sufficient to drill oil wells upon a lease at or near the town of Moneta, and a second well at or near the town of Hawthorne, * * * which was and would be false, and also by reason of the said financial condition of the said company to falsely pretend to brokers selling the stock of the Huntington-Hawthorne Oil & Gas Company and to the state corporation commissioner of California, that the said Huntington-Hawthorne Oil & Gas Company was solvent and able to carry out its contracts and representations made to the public; and as a part of said plan conspired to knowingly make and publish a certain false written report and statement of its financial affairs and pecuniary conditions that it owned and controlled a large amount of assets, having a tendency to give the shares of the stock of said corporation a greater value than they really possessed. * * *

In another instruction, which we shall call C, which was requested by the defendants, the jury was charged—

“that no evidence has been introduced showing that the Huntington-Hawthorne Oil & Gas Company was ever authorized by the corporation commissioner to sell securities; and you are further instructed that said corporation was not subject to any examination, audit, or investigation made by the corporation commissioner, or his authority, and you must acquit the defendants of any charge of conspiracy to file such false statement on behalf of said company.”

It will be observed that these instructions reflect the view that the indictment contained language tending toward a preferment of several of the charges already listed by us under seven numbers, that is to say, those designated by us as the first, second, fourth, fifth, and sixth seen in the indictment by the appellants, and possibly the third also. Of these, the first and second are touched by instruction A, the fourth and fifth by instruction B, the sixth by instruction C, and some language in instruction B appears to contemplate the third. It is especially to be observed as to the charges designated first and second that instruction A paraphrases subdivision 4 of section 182, Penal Code; as to fourth that the provisions of section 532a(2) are in effect given in instruction B; and as to fifth that certain provisions of section 564 are practically reproduced. The views

of the trial court as expressed in these instructions argue forcibly the contention of appellants that the indictment is uncertain in the respects pointed out by them.

[2] Appellants insist that there is a further uncertainty, and, in effect, an insufficiency in the indictment. Considering the pleading as a charge of conspiracy to obtain money by the commission of the crime of obtaining money by false pretenses—and it appears to us to bear that construction more readily than any other—appellants insist that it is defective in that there is present in it no allegation as to the amount of money which the defendants conspired so to obtain. The importance of this omission is apparent when it is remembered that two separate and distinct schemes of punishment are provided by section 182, Penal Code, and that either the one or the other of those scheme applies to the convictions under the indictment now before us, depending upon the question whether the amount of money sought to be “obtained” under the conspiracy was above or below a certain amount. Section 182 provides that when any persons “conspire to commit any felony, * * * they shall be punishable in the same manner and to the same extent as in this Code provided for the punishment of the commission of the said felony. * * *” Conspiracies to commit certain other offenses, not of moment in the present inquiry, are to be punished as provided in the language just quoted, along with conspiracies to commit felonies. Then occurs the provision that when persons conspire “to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both. * * *” Section 532 of the Penal Code lays the same punishment for the crime of obtaining money by false pretenses as is provided for larceny by sections 489 and 490. Under the former of these two sections grand larceny, the taking of property of the value of more than \$50, is punishable by imprisonment in the state prison for not less than one nor more than ten years. Section 490 prescribes the punishment for petit larceny as a fine not exceeding \$500, or by imprisonment in the county jail not exceeding six months, or both. Because of the provisions of sections 532 and 489, the crime of obtaining money by false pretenses is a felony if the amount “obtained” is more than \$50, for under the terms of section 17 of the Penal Code an offense punishable by imprisonment in the state prison is a crime of that grade. It is plain, then, as already indicated, that if the defendants in the present action conspired to obtain by false pretenses money of the value of more than \$50 they are punishable under the first scheme pro-

vided by section 182, while if they conspired to obtain that amount, or less, they are punishable under the second. There is thus shown a patent uncertainty or defect in the indictment if it be considered as a charge of conspiracy to obtain money by the commission of the crime of obtaining money by false pretenses. Where the punishment of a crime, as in the case of larceny or the obtaining of money or property by false pretenses, is made to depend upon the value of the money or property taken or obtained, the value must be stated in the indictment. *Woodring v. Territory*, 2 Ann. Cas. 857, note; 25 Cyc. 85; 25 C. J. 634.

We cannot avoid the conclusion that the indictment now before us is uncertain in two respects: First, in that it contains matter tending toward a charge of the commission of several offenses, and presents that matter in such manner as that the defendants were not advised that they were accused of the commission of any single and particular offense; second, that, if the charge be regarded as one denouncing a conspiracy to obtain money by the commission of the crime of obtaining money by false pretenses, the indictment is uncertain and defective, in that it cannot be ascertained from its language whether the defendants are sought to be charged with a conspiracy punishable under the first or under the second scheme of punishment provided by section 182, Penal Code.

In defending against the points made by appellants, the Attorney General advances a variety of arguments which do not apply under section 182 in its present form, granting that those arguments would be conclusive if the section now stood as it did prior to the amendment of 1919. The old section was so framed as to denounce the crime of criminal conspiracy in general. The present section, as a reading of it will indicate, is of an utterly different import. The enactment now denounces the crime of conspiracy to commit particular offenses, and indictments under it must be so framed as to point out the separate offense which persons are charged with conspiring to commit. We do not decide that, if parties conspire to commit several distinct crimes, they may not be charged under separate counts equal in number to the number of crimes contemplated by them, pursuant to the terms of section 954, Penal Code, allowing the inclusion of several counts in indictments and informations. That particular question is left open to future determination.

The judgment as to each of the appellants is reversed. Each order denying the motion of the respective appellants for a new trial is reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

192 Cal. 275

CITY OF PASADENA v. CHAMBERLAIN,
City Clerk. (L. A. 7796.)

(Supreme Court of California. Oct. 23, 1923.)

Municipal corporations §918(1)—Where several bond issues are voted on, two-thirds of all votes at election necessary for any issue.

Under St. 1901, p. 27, § 3, as amended by St. 1915, p. 1454, § 2, and section 12¾ as added by St. 1915, p. 1454, where several municipal bond issues separately set out are voted on at the same time and place, in connection with a general election, there being but one set of election officers, and one ballot, for any bond proposition to carry it must have an affirmative vote of two-thirds of the greatest number voting on any of the bond propositions, though the ordinances calling the election provided that each bond issue should be a separate election.

In Bank.

Original mandamus proceeding by the City of Pasadena against Bessie Chamberlain, as City Clerk of the City of Pasadena. Writ denied.

James H. Howard, City Atty., of Los Angeles, and Roscoe R. Hess, Asst. City Atty., of Pasadena, for petitioner.

O'Melveny, Millikin, Tuller & Macneil, and Paul E. Shwab, all of Los Angeles, for respondent.

WILBUR, C. J. Petitioner seeks a writ of mandamus to compel the respondent to sign certain bonds to be issued by the city of Pasadena in the sum of \$30,000 "for the purpose of the acquisition, construction and completion by the city of Pasadena of a certain municipal improvement, to wit, the acquisition of land and the construction and completion thereon of a building for branch library purposes." The real question involved is whether or not a sufficient number of voters voted for this bond proposition at a general municipal election and special bond and charter amendments election held in the city of Pasadena on the 5th day of April, 1923. The bond issue, in question was submitted as "Bond Proposition No. 4" at such election. There were 1,250 votes for the issuance of said bonds and 612 votes against the issuance of said bonds. The total number of voters voting at the election was 2,012, and the highest number of voters voting on any bond proposition was 1970. If it was required that two-thirds of the total number of voters voting at the election upon any subject or for any person was necessary to ratify the proposed bond issue, the number of voters voting affirmatively for the bond issue was insufficient. If it was necessary to secure two-thirds of the voters voting on any other bond proposi-

tion, then the number voting affirmatively upon this bond issue were insufficient.

The board of directors of the city of Pasadena provided for the holding of four separate special bond elections at the same time the general municipal election was held and at the same time four charter amendments, lettered A, B, C, and D, were to be voted upon. The ballot furnished the voters at the election contained the names of the board of directors to be voted for at such general municipal election, the four bond propositions, and the four charter amendments. The election was conducted by a single set of officers, but the ordinances calling the election provided that each bond issue should be a separate election and that these four separate elections should be held at the same time and place. It is therefore contended by the petitioner that the vote upon each separate bond issue should be considered as though it were the only proposition voted upon at the election and that where two-thirds of the voters voting upon the particular bond issue voted in favor thereof that such bond issue should be deemed carried.

This court has held that where a special bond election has been consolidated with a general election and two-thirds of the voters voting upon the question of the issuance of bonds have voted in favor thereof, that this is sufficient to carry the bond issue, although such number was less than two-thirds of those voting at the election. *Howland v. Board of Supervisors*, 109 Cal. 152, 41 Pac. 864; *Morgan v. City of Los Angeles*, 182 Cal. 301, 187 Pac. 1050. In the case of *Law v. San Francisco*, 144 Cal. 384, 77 Pac. 1014, it was held that where several bond issues were voted on at the same special election that it was not sufficient for each bond issue to have two-thirds of the vote upon such particular issue, but it was essential that it should have two-thirds of the vote cast at the special election upon the subject of bonded indebtedness. This decision was based upon the special charter provisions of the city and county of San Francisco upon the subject of such bonded indebtedness (article 12, § 4). This conclusion was arrived at partly because of a change in the language of that section, which as it originally stood provided for a majority of "two-thirds of the electors voting thereon at such election," whereas it had been amended to provide for two-thirds of the electors voting at a special election as necessary to carry the bond issue. The court there stated:

"Under the earlier charter provision it would have been quite permissible to hold that the law meant that each proposition severally was to receive a two-thirds vote of those voting upon it, but, *ex industria*, this language has been changed so as to require a two-thirds vote of those voting at the special election. Since these propositions were submitted separately,

as the charter contemplates, the failure of one to carry does not affect the validity of the others which have received the requisite number of votes."

The decision of the District Court of Appeal of the Second District in City of Long Beach v. Boynton, 17 Cal. App. 290, 119 Pac. 677, was based upon a similar provision in the statutes of 1901 (Stats. 1901, p. 27, § 3), and it was there held that under this statute where two bond issues were submitted at the same election, a separate proposed bond issue was defeated unless two-thirds of all of those voting at the special election voted for the particular bond issue in question.

The election in the case at bar was held under the terms of section 3 of the Statute of 1901, supra, as amended in 1915 (Stats. 1915, p. 1454), which provides now as the section did at the time of the bond election in Long Beach, passed on by the District Court of Appeal in City of Long Beach v. Boynton, supra, that—

"It shall require the votes of two-thirds of all the voters voting at such special election to authorize the issuance of the bonds herein provided. * * *

To this act authorizing elections concerning the issuance of bonds the Legislature of 1915 added a new section (Stats. 1915, p. 1454, § 12¾) permitting the consolidation of a special bond election "with any other election authorized by law at which the qualified voters of such city, town or municipal corporation are entitled to vote. * * *

The contention of petitioner that each item of proposed bonded indebtedness was submitted at a separate bond election, consolidated with several other special bond elections held for the purpose of passing upon other proposed bond issues, and that therefore a voter should not be considered as voting at one of these special bond elections unless he voted upon the particular bond issue, is not wholly without foundation in view of our decision to the effect that when a special bond election is consolidated with a general election, voters voting upon the propositions submitted at the general election are deemed not to have voted at the special election for the issuance of bonds consolidated therewith unless voting for the proposition submitted at special election. *Morgan v. City of Los Angeles*, supra. We must, however, look at the substance rather than the form, and the situation presented here is no different in substance from those considered in *Law v. San Francisco*, supra, and *City of Long Beach v. Boynton*, supra, where several items of proposed bonded indebtedness were submitted by one ordinance at one election.

Upon the authority of those decisions the

proposed bond issue under consideration failed to carry.

Writ denied.

We concur: WASTE, J.; SEAWELL, J.; KERRIGAN, J.; LAWLOR, J.; LENNON, J.; MYERS, J.

192 Cal. 293

WOOD, State Superintendent of Public Instruction, Etc., v. RILEY, State Controller. (Sac. 3538.)

(Supreme Court of California. Oct. 24, 1923.
Rehearing Denied Nov. 22, 1923.)

Statutes § 33—Proviso for transfer of appropriation held "item of appropriation" subject to Governor's veto.

A proviso to Budget Bill 1923, § 4, requiring the state controller, at the request of the state director of education, who is vested by St. 1921, p. 1033 (Pol. Code, §§ 362-362e), with the duties and powers of the boards of trustees of the state normal and special schools, to transfer 1 per cent. of the appropriation for salaries and support of such schools for payment of salaries and support of the general administrative office of the division of normal and special schools of the department of education, held an "item of appropriation" for such purpose in addition to the appropriation for support, including salaries, of the state board of education and the office of state superintendent of public instruction, who is ex officio director of education, and hence subject to veto by the Governor, under Const. art. 4, § 34, as amended November 7, 1922, authorizing him to reduce or eliminate items of appropriation while approving other portions of the bill, instead of being limited to objecting to one or more items, as under article 4, § 16.

In Bank.

Application by Will C. Wood, State Superintendent of Public Instruction and ex officio Director of Education, for a writ of mandate directed to Ray L. Riley, State Controller. Writ denied.

Devlin & Devlin, of Sacramento, for petitioner.

Dion R. Holm, of San Francisco, J. L. Atteridge, of Sacramento, and H. C. Lucas, of San Francisco, for respondent.

Garret W. McEnerney and Andrew F. Burke, both of San Francisco, for Board of Control.

WASTE, J. This is an application, on an order to show cause, for a writ of mandate involving the question whether or not certain language inserted by the Legislature in the general appropriations act or "budget bill" of 1923 (St. 1923, p. 242), and vetoed by the Governor, is, nevertheless, effective upon the theory that the veto was nugatory. The petitioner is the state superintendent of public

instruction and, as such, ex officio director of education of the state. The respondent is the controller of the state, who has refused the demand of petitioner that he set over and transfer from the appropriations for salaries and support of the several teachers' colleges and special schools in the state an amount not exceeding 1 per cent. of such appropriations, as an allotment for the payment of salaries and support of the general administrative office of the division of normal and special schools. The case was argued and has been briefed in connection with the so-called "budget cases" already decided, but the questions presented for consideration do not depend upon, and are not germane to, the discussion or the principles involved in the other decisions.

There are in this state a number of teachers' colleges and special schools, the administration of which, prior to 1921, was committed to a board of trustees for each institution. There was created in that year a department of the state government known as the department of education (Stats. 1921, p. 1033; Pol. Code, §§ 362-362e), which succeeded to, and was vested with, the duties, powers, purposes, responsibilities, and jurisdiction of the state board of education and of these various boards of trustees of the several normal schools or teachers' colleges and special schools. These last-named boards, together with positions of all deputies, officers, and employees thereunder, were abolished, and the management of the various institutions was placed under the control of an executive officer to be known as the director of education, but who is, in fact and ex officio, the state superintendent of public instruction. The work of the department was divided into two divisions. The "division of textbooks, certification and trust funds" was placed in charge of the state board of education, which was expressly continued in force with all previous powers and functions conferred on it by law, and with certain powers and functions in respect to the conduct of normal schools or teachers' colleges and special schools. The "division of normal and special schools," created to perform the functions theretofore conferred by law on the boards of trustees, was put "in charge of the director of education for the purposes of administration." The act further authorized (section 362e) the department of education to expend the moneys in any appropriation or in any special fund in the state treasury at the time remaining or made available by law for the administration of the provisions of any of the statutes enumerated, or for the use, support, or maintenance of any board, commission, office, or officer that was abolished, and whose duties, powers, and functions were transferred to and conferred upon the department of education. It was also provided that the funds of the state

board of education in respect to functions retained by it, including such funds as had been or might thereafter be intrusted to said board for administration, and the funds of the superintendent of public instruction, should be administered as theretofore. No distinct or separate appropriations for the support of the office of director of education were made by the Legislature in 1921, the administrative expenses of the department apparently being provided for in the general appropriations for the support, salaries, and expenses of the state board of education and superintendent of public instruction. Stats. 1921, p. 1711.

At the general election, held on November 7, 1922, section 34 of article 4 of the state Constitution was amended to provide for the establishment of an executive budget system in the handling of the state finances. The amendment fixes definitely upon the Governor the responsibility for preparing a budget showing in detail the items of expenditure recommended by him, and the anticipated revenues of the state. In conformity with the new procedure, the Governor submitted to the Legislature, within the first 30 days of its last regular session, and prior to its recess, with an explanatory message, a budget of all proposed expenditures of the state and its institutions, boards, officers, and agencies, provided by existing law, or recommended by him, and of all estimated revenues for each of the fiscal years of the present biennial period. The budget was accompanied by an appropriation bill covering the proposed expenditures, which was known as the "budget bill." As submitted by the Governor and passed by the Legislature, the bill contained, under the general heading "Educational," various separate items of appropriation for the state board of education under appropriate designations of "salaries," "support," "new equipment," and "free textbooks." It also carried separate items in different amounts for "salaries, superintendent of public instruction, deputies and employees," "support, superintendent of public instruction," and for "new equipment, superintendent of public instruction." There were no appropriations in the budget bill for the department of education, as such, or for the director of education by that designation. There were distinct and separate items of appropriation "for salaries of officers and employees" and "for support" of each of the state teachers' colleges and special schools, identical in form and substance; the only difference being in the name of the school and the amount appropriated. For instance, the first one read as follows:

"For salaries of officers and employees, Chico State Teachers College, one hundred eighty-nine thousand eight hundred eighty dollars. For support, Chico State Teachers College, forty-two thousand six hundred dollars."

Section 4 of the bill, as originally presented by the Governor, contained a provision that not more than $\frac{1}{24}$ of the amount appropriated under the act for each department or institution, for support and salaries for the biennial period, shall be expended during any one month without the consent of the state board of control, and not more than one-half of such appropriation shall be expended in one year, unless expressly authorized by the act itself. The Legislature added a "proviso" to this section reading as follows:

"Provided, that the state controller shall at the request of the state director of education set over and transfer from the appropriations for salaries and support for the several teachers colleges and special schools, an amount not exceeding one per cent. of such appropriations and the amount so transferred shall be designated as the administrative allotment of the state department of education and shall be available for use by the director of education for the payment of the salaries and support of the general administrative office of the division of normal and special schools during the seventy-fifth and seventy-sixth fiscal years."

This "proviso" forms the basis for the question here under consideration.

The Governor reduced, or entirely eliminated, many items of appropriation, while approving other portions of the measure. He refused to approve the proviso inserted by the Legislature in section 4 upon the ground that "such appropriation was unnecessary," giving as his reason that "the director of education has in ample allowance for running his department." The Legislature attempted to override the Governor's various vetoes, but failed (Assembly Journal, May 8, 1923, pp. 30, 31), and the measure became a law (Stats. 1923, c. 121). The aggregate of appropriations for the salaries of officers and employees of the various teachers' colleges and special schools carried in the budget bill approved by the Governor amounted to \$2,187,754. Claiming that the action of the Governor in not approving the proviso in the bill was nugatory, the director of education demanded of the state controller that he transfer and set over from such appropriations for the teachers' colleges and special schools 1 per cent. of the amount of each item, aggregating in all the sum of \$21,877.54, and designate the fund so transferred as "the administrative allotment of the state department of education for the seventy-fifth and seventy-sixth fiscal years." The controller refused to do so, and the director of education brought this proceeding in mandamus to enforce his demand. It is his contention that the language of the proviso above quoted remains an integral part of the budget bill, notwithstanding the Governor's disapproval and the failure of the Legislature to override the veto, and should be followed by the state controller on his de-

mand. This claim is based upon the theory that the executive action was nugatory for the reason that it was in effect but an attempted veto of a part of a sentence in the appropriation bill that does not appropriate money, but simply provides for a transfer, as a matter of bookkeeping, of a percentage of funds already appropriated. The respondent takes the counter position that the proviso amounted to and was an "item of appropriation" within the meaning of the Constitution, and, as such, was subject to elimination by the Governor. The petitioner concedes that if it be held that it did amount to an appropriation his application for a writ of mandate must fail.

The petitioner has cited a number of authorities to the effect that, except in the case of a bill containing several items of appropriation of money, the Governor is not empowered to modify or change the effect of a proposed law after its passage by the Legislature, or to do anything concerning it except to approve it as a whole, and that he may not partially approve and partially disapprove an item of appropriation carried in a general appropriation bill. He cites these cases and others in support of his contention that, as no appropriation resulted from the insertion of the proviso, the Governor's attempted veto was nugatory, and amounted only to a futile attempt to interfere with a legislative direction concerning part of an appropriation. Much reliance is placed by petitioner upon *State v. Holder*, 76 Miss. 158, 23 South. 643. The Constitution of Mississippi (section 73) provides that the Governor may veto any item of appropriation in an appropriation bill and approve other parts of the same, and the part approved shall become a law. A bill appropriated money to a college provided that the trustees thereof should give the president of the college certain powers. The Governor vetoed this part of the proviso and approved the balance of the bill. It was held that the bill failed in whole and in part to become a law, that the Governor had only a qualified and destructive legislative function and never any creative legislative power, and that the attempt to exercise such power destroyed the attempted approval of the balance of the bill. But in this case it is apparent that the Governor, by his veto of the proviso, sought to make an absolute appropriation out of that which the Legislature intended as only a conditional one. The court held, in effect, that the Governor's veto was a nullity for the reason that the condition was an essential element of the appropriation and could only be eliminated by vetoing the entire appropriation. He could not, it held, "transform a conditional or a contingent appropriation into an absolute one in disregard and defiance of the legislative will," for to do so "would be the enactment of law by executive authority

without the concurrence of the legislative will and in the face of it." Other cases relied on by petitioner may as readily be distinguished.

By reason of the power of veto lodged in the Governor, the chief executive has always had a most important relation to the legislative department, and, in so far as his control over the expenditures of the state is concerned, the recent amendment to the Constitution providing for an "executive budget" (article 4, § 34) has tremendously increased and widened his powers, which was undoubtedly the primal object of the people in voting for its adoption. That fact must not be lost sight of in the present proceeding. Under the old system, the Governor might eliminate, but might not reduce, an appropriation. He could only "object to one or more items" (Const. art. 4, § 16). He may now reduce or eliminate any one or more items of appropriation of money, while approving other portions of the bill. (Const. art. 4, § 34, as amended November 7, 1922). Under the new plan he is not forced to choose between vetoing an item of appropriation for a meritorious purpose, or approving it for an excessive amount. Without entirely rejecting it, he may reduce the amount provided for to a sum in accord with his own view as to the need for the expenditure. In view of the purpose and effect of the amended section of the Constitution much of the argument advanced and many of the authorities cited by the petitioner lose persuasive force. *Lukens v. Nye*, 156 Cal. 498, 105 Pac. 593, 36 L. R. A. (N. S.) 244, 20 Ann. Cas. 158, was decided long before the "budget amendment" was adopted. It dealt with the effort of the Governor to reduce the amount of a special appropriation by securing an agreement from the parties interested that they would accept less than the amount appropriated in full settlement and satisfaction of the claim against the state. They so agreed, and the Governor unqualifiedly approved the bill for the whole amount. The decision is not an authority in the present case, for it dealt with the effect of the agreement by which the Governor was induced to sign the bill, and which was interposed as a defense when suit was instituted to collect the whole amount of the appropriation from the state. *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120, and *People v. Brady*, 277 Ill. 124, 115 N. E. 204, are not authority in this matter. The Governor of that state attempted to veto certain items of appropriations. The Constitution of Illinois provides, as did the Constitution of this state before the present amendment, that if the Governor should not approve any one or more of the items or sections contained in any appropriation bill, but should approve the residue, the bill should become a law as to such residue. *Fullmore v. Lane*, 104 Tex. 499, 140 S. W. 405, 1082, was decided under a like provision of

the Constitution of Texas, the court holding that nowhere in the Constitution of that state was authority given the Governor to reduce or veto in part any distinct item. These cases, and others cited, are only in point. therefore, if no appropriation was in fact made by the proviso inserted in section 4.

Petitioner cites other cases in support of his contention that the Governor has no power to veto portions of appropriation bills that merely prescribe the conditions on which the money appropriated may be drawn. He contends that when an appropriation of money is made, directions given as to how it shall be spent, and other matters contained in the bill incident to the appropriation, are inseparable from the appropriation itself, and one cannot be disapproved without the other being vetoed. *State v. Holder*, supra; *Miller v. Walley*, 122 Miss. 521, 84 South. 466. If a veto be attempted in such cases, he contends, it is unavailing and of no effect, as both the appropriation and the provisions must stand or fall together. *Callaghan v. Boyce*, 17 Ariz. 433, 153 Pac. 773; *Regents v. Trapp*, 28 Okl. 83, 113 Pac. 910. These decisions, however, like those heretofore noted, were decided under constitutional provisions similar to those existing in the Constitution of California prior to its amendment. Respondent finds in some of them expressions which seem to strengthen his position. For instance, in the *Callaghan Case*, supra, the court said (at page 458 of 17 Ariz., at page 782 of 153 Pac.), referring to an item of appropriation:

"Item," therefore, is used synonymously with 'subject,' 'distinct or separate parts,' and an objection and disapproval by the Governor of an item or several items of appropriations of money has reference to the distinct subject or part for which the appropriation is made and all its incidents. In *Commonwealth v. Barnett*, 199 Pa. 161, 48 Atl. 976, 55 L. R. A. 882, the term 'item,' as used in article 4, § 16, Constitution of Pennsylvania, a similar provision, was held to mean 'the particulars, the details, the distinct and severable parts of the appropriation,' and is 'used interchangeably in the same sense' with the word 'part.' See 4 Words and Phrases, 3797."

In the case of *People v. Brady*, supra, also relied upon by petitioner, it was held that, under a constitutional provision similar to the one formerly in force in this state, the Governor had the power to veto any portion of an appropriation bill which was in effect an allocation or setting apart of a sum of money for a given purpose, even if such allocation or setting apart follows an appropriation of a gross sum of which the amount allocated is only a part. The appropriation bill under review in the *Brady Case* provided that certain sums, or so much thereof as might be necessary for the respective purposes thereafter named, should be appropriated to certain boards, societies, and associa-

tions enumerated. Following this provision was an appropriation of the sum of \$153,150 to the state board of agriculture for the biennial period. Then followed a specification of 44 separate purposes for which this gross amount was to be used, for each of which a definite amount was set down. The Governor vetoed a number of these 44 separate amounts. It was argued that the Governor had no power to veto the items in question because the only distinct "item" of appropriation was the whole amount of \$153,150, and that the enumeration which followed was only an apportionment of that item, or a direction as to how it should be used. Reliance was placed upon the case of *Regents v. Trapp*, supra. In disposing of the argument the Supreme Court of Illinois said:

"If the bill in that case [the *Trapp Case*] can be regarded as of the same character as the one under consideration we could not justify such a conclusion under our Constitution, which provides that bills making appropriations shall appropriate to the specified objects and purposes, respectively, their several amounts in distinct items and sections. * * * The word 'item' is in common use and well understood as a separate entry in an account or a schedule, or a separate particular in an enumeration of a total which is separate and distinct from the other particulars or entries, and the items vetoed by the Governor come within that meaning."

It was held that the Governor had power to veto the particular items in the bill in question, and, he having done so, the items vetoed did not become any part of the law.

In a recent decision cited by and relied on by both petitioner and respondent, *Fairfield v. Foster*, 214 Pac. 319, the Supreme Court of Arizona sets forth the divergent views which have resulted from cases involving the veto power of the Governor in situations like that we are considering here. The issue in the case was whether the Governor legally vetoed a part of a subdivision of a section of an appropriation bill passed by the Legislature. It appears from the decision itself and from the briefs of the parties in this action that the bill appropriated certain sums for the several purposes and objects specified, and the state auditor was authorized and directed to draw warrants upon the state treasurer to and not to exceed the amounts set forth in the bill, a list of which was made in detail. In subdivision 5 there was appropriated:

"For the Corporation Commission: For salaries and wages, \$53,880. For the following positions not to exceed the annual rates herein specified [24 in all, including the following]: 1 rate clerk, \$2,100.00 per annum. 1 stenographer, \$1,560.00 per annum. 1 investment stenographer, \$1,680.00 per annum. 1 mailing and reception clerk, \$1,560.00 per annum. For contingencies, \$2,500.00." Session Laws of Arizona 1922, Special Session, p. 273.

The Governor sent a message to the secretary of state, transmitting, with his signature of approval, the general appropriation bill, with the exception of certain items, among others those just noted in subdivision 5. In a proceeding in mandamus to compel the state auditor to draw a warrant on the state treasurer in payment of the salary provided in one of the vetoed items, the court examined and cited a number of the decisions relied on by the petitioner here, and discussed the divergent views taken by the particular courts as to the general nature of the veto power and the purpose to be accomplished by the special constitutional provisions considered in the decisions. The Constitution of Arizona authorizes the Governor to "object to one or more of the items" in an appropriation bill, "while approving other portions of the bill." The court said:

"But certainly, whenever the Legislature goes to the extent of saying in any bill appropriating money that a specified sum of money raised by taxation shall be spent for a specified purpose, and that alone, while other sums mentioned in the bill are to be used otherwise, no matter what language it may be disguised under, it is, nevertheless, within both the spirit and letter of the Constitution, an 'item' within the bill, and may be disapproved by the Governor without affecting any other items of appropriation contained therein."

In *Commonwealth v. Barnett*, 199 Pa. 161, 48 Atl. 976, 55 L. R. A. 882, it was held that, under the constitutional power to disapprove of any item or items of an appropriation bill, the Governor might disapprove one or more of the subdivisions of a clause making appropriations for schools by which the amount was distributed among separate, designated schools or educational interests, either as to the beneficiary, or as to the amount, and approve the residue.

In further support of his contention that the proviso inserted in the bill did not amount to an appropriation, petitioner argues that it took no money from the state treasury. On the surface, the argument seems plausible, but, correctly viewed, such allotment or direction was a specific setting aside of an amount, not exceeding a definite fixed sum, for the payment of certain particular claims or demands, to wit, those that might be occasioned by the "payment of the salaries and support of the general administrative office of the division of normal and special schools during the seventy-fifth and seventy-sixth fiscal years"—purposes not otherwise expressly provided for in the appropriation bill. It appears in no other light than as amounting to an item of appropriation in that it adds an additional amount to the funds already provided for the administration of the office of the director of education through the sums appropriated for the use of the state board of education and

the superintendent of public instruction. This court has held that "by a specific appropriation" was understood "an act by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand. * * * The fund upon which a warrant must be drawn must be one the amount of which is designated by law, and therefore capable of definitive exhaustion—a fund in which an ascertained sum of money was originally placed, and a portion of that sum being drawn an unexhausted balance remains, which balance cannot be thereafter increased except by further legislative appropriation." *Stratton v. Green*, 45 Cal. 149, 151. See, also, *State v. Steele*, Auditor, 37 La. Ann. 355; *State v. La Grave*, 23 Nev. 28, 41 Pac. 1075, 62 Am. St. Rep. 766; *State v. Lindsley*, 3 Wash. 128, 27 Pac. 1019; also, *State v. Moore*, 50 Neb. 96, 69 N. W. 373, 61 Am. St. Rep. 544. Where the exact amount of a disbursement required to be provided for cannot be ascertained in advance, the legislative act must itself fix the maximum authorized to be expended for a specific purpose. *Blaine Co. Inv. Co. v. Gallet*, 35 Idaho, 102, 204 Pac. 1066; *State v. Eggers*, 29 Nev. 469, 91 Pac. 819, 16 L. R. A. (N. S.) 630; *People v. Brady*, supra. In this instance the Legislature appropriated a definite maximum amount or "named sum," which it in effect directed should be set apart in the treasury and devoted to the payment of particular claims and demands arising by reason of the "payment of the salaries and support of the general administrative office of the division of normal and special schools during the seventy-fifth and seventy-sixth fiscal years." The proviso, therefore, appears to fill all the requirements of a distinct item of appropriation of so much of a definite sum of money as may be required for a designated purpose connected with the state government. It was said in *Fairfield v. Foster*, supra, quoting from *Commonwealth v. Barnett*, supra:

"In ordinary bills the single subject is a unit which admits of approval or disapproval as a whole, without serious inconvenience, even though some of the details may not be acceptable. But every appropriation, though it be for a single purpose, necessarily presents two considerations almost equally material, namely, the subject and the amount. The subject may be approved on its merits, and yet the amount disapproved. * * * If the Legislature, by putting purpose, subject, and amount inseparably together, and calling them an "item," can coerce the Governor to approve the whole or none, then the old evil is revived which this section was intended to destroy."

"It cannot be questioned that the preceding quotations state the evil which our Constitution makers wished to prevent. In plain English, they wished the Governor to have the right to object to the expenditure of money for

a specified purpose and amount, without being under the necessity of at the same time refusing to agree to another expenditure which met his entire approval."

We may judge, from the language of the Governor's veto message, that had an express appropriation been made for the payment of these salaries and support of the general administrative office of the division of normal and special schools during the seventy-fifth and seventy-sixth fiscal years, it would have met with executive disfavor. It is very clear that the situation presented is that no appropriation having been recommended by the Governor, or included in the proposed budget bill, for the payment of the "salaries and support of the general administrative office of the division of normal and special schools," other than the general provisions for the support of the state board of education and the state superintendent of schools, the Legislature attempted, by the inclusion of the proviso in the bill, to make such additional appropriation for such purpose under the guise of an administrative allotment. Therefore, looked at in the light of what it was intended to accomplish, and what it would have accomplished if allowed to stand, one cannot escape the conviction that it worked an appropriation. It added a specific amount to the allowance already made for the use of the state board of education and the state superintendent of schools.

To sustain the contention of the petitioner that the proviso in question did not amount to an item of appropriation, and was therefore removed from the effect of the executive veto, would be to hold that the Legislature might, by indirection, defeat the purpose of the constitutional amendment giving the Governor power to control the expenditures of the state, when it could not accomplish that purpose directly or by an express provision in appropriation bills. The present case may be used by way of illustrating this point, and we use it for that purpose only, and not to challenge or impugn the good faith of the Legislature or petitioner. If, after providing for the salaries and support of the various teachers' colleges and special schools of the state, a distinct and definite purpose, and then providing that 1 per cent. of this amount shall be set aside on demand as an administrative allotment for payment of the salaries and support of the general administrative office of the director of education, another and separable purpose, the Legislature may appropriate 1 per cent. of a definite and fixed amount for such purpose, and such appropriation cannot be controlled by the Governor, the Legislature need not stop at 1 per cent., but may carry the so-called "administrative allotment" to any extent.

It is contended by the petitioner that the

office of the director of education, created by the Legislature, is a separate and distinct office from that of superintendent of public instruction provided for by the Constitution. It follows, says the petitioner, that the appropriation for the support of the office of the superintendent of public instruction cannot be used for the support of the office of the director of education, although the same person may occupy both offices. He asserts that section 362e of the Political Code expressly prohibits the funds of the superintendent of public instruction from being used for the administrative expenses of the director of education, for the reason that it provides that "the office of the superintendent of public instruction shall be administered as heretofore." We do not need to pass upon this contention, for if it be assumed that petitioner's theory is correct, it at once becomes more than ever apparent that the legislative proviso inserted in the appropriation bill amounts to an express item of appropriation for the support of the office of the director of education.

Petitioner contends at some length in a supplemental memorandum, discussing *Fairfield v. Foster*, supra, that if the Governor vetoed the item in subdivision 4 on the theory that it was in fact an appropriation of 1 per cent. of the total amount provided for the state schools and special colleges, it would follow that such appropriation for the state schools would be decreased to 99 per cent. of the aggregate amount provided by the Legislature. It would require distinct action on the part of the Governor, he argues, to decrease the appropriation for the normal and special schools to 99 per cent. of the amount voted by the Legislature. What may or may not have been the effect of the Governor's veto of the appropriation made by the proviso on other portions of the act does not concern the court at this time. The point of this decision is that the Legislature attempted to make an appropriation for the payment of the salaries and support of the general administrative office of the division of normal and special schools, in addition to the appropriation made for support, including salaries, of the state board of education and of the office of the state superintendent of schools, in such way as to circumvent the veto power of the Governor. Under the Constitution of the state as now existing he had the power to eliminate the item, and has stricken it from the general appropriation bill.

The order to show cause is discharged, and the petition for a writ of mandate is denied.

We concur: WILBUR, C. J.; KERRIGAN, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; MYERS, J.

192 Cal. 278

PACIFIC MILL & TIMBER CO. v. MASSACHUSETTS BONDING & INS. CO.
(S. F. 9768.)

(Supreme Court of California. Oct. 24, 1923.)

1. Principal and surety ⇨20—Failure of principal to sign a bond held immaterial, where it assumed the same obligations by signing contract.

The failure of the principal to sign a joint and several surety bond, guaranteeing the faithful performance by the principal of the terms and conditions of a main contract, did not prevent the surety from being bound, where the principal had signed the main contract and thereby assumed the same obligations and liabilities as covered by the bond.

2. Principal and surety ⇨23(2)—A bond delivered without principal's signature held not constructive notice of condition attached to its execution.

Where a joint and several bond guaranteeing the faithful performance of a contract was delivered to the obligee without the principal's signature, but the principal signed the contract imposing the same obligations, the obligee was not charged with constructive notice of any condition attached to its execution by the surety, having a right to infer that the signature was omitted because unnecessary.

3. Principal and surety ⇨59—Bond securing the performance of a contract is a contract of "suretyship" and must be construed in accordance with statute.

A bond given to secure the performance of a contract is a contract of "suretyship" and must be construed in accordance with Civ. Code, § 2837, providing that in the interpretation of a contract of suretyship the same rules are observed as in the case of other contracts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suretyship.]

4. Principal and surety ⇨45—Evidence held insufficient to support finding that bond was not to be delivered to obligee until it had been executed by the principal.

In an action on the bond of a surety, evidence held insufficient to sustain the finding that the bond was executed by the surety upon condition that it was not to be delivered until it should have been executed by the principal.

5. Principal and surety ⇨23(2)—In absence of notice that bond was not to be valid until signed by the principal, violation of such condition did not prevent liability.

Where a surety delivered a bond to the principal to sign and deliver to the obligee, there being nothing on the face of the bond imposing a duty on the obligee to inquire whether any condition had been imposed on delivery, the fact that principal delivered the bond to the obligee unsigned does not discharge the surety, whose intention that the bond should not be valid until signed was not disclosed to the obligee.

6. Principal and surety ¶121—Transfer of a sum of money in four drafts instead of one, as agreed, not a material variance from a contract.

Where the obligee of a bond insuring performance of a contract transferred to the principal a sum of money in four drafts instead of one, as contemplated by the contract, and an officer of the principal appropriated one of the drafts, the failure to transmit according to the original contract, being a variance in form, did not increase the obligation so as to discharge the surety.

7. Principal and surety ¶112—Contract held not performed by mere placing of a draft to the credit of the plaintiff on the books of principal.

Plaintiff contracted for output of a mill, accepting a draft drawn by seller for \$6,500; the difference between the price of the material subsequently furnished and the draft drawn to be placed to his credit or debit as the case might be. *Held*, that the contract was not performed by the seller by the mere placing of the draft to the credit of the plaintiff on the books of defendant, so as to exonerate a surety from liability for seller's failure to deliver.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by the Pacific Mill & Timber Company against the Massachusetts Bonding & Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed.

Sterling Carr, of San Francisco, for appellant.

Thomas, Beedy & Lanagan and Hartley F. Peart, all of San Francisco, for respondent.

SEAWELL, J. A hearing was granted by this court after decision by the District Court of Appeal, First Appellate District, Division 2, for the purpose of construing the contract out of which the obligation of suretyship springs in its entirety and also for the purpose of making a more extended statement of the law and its application to the facts of the instant case. We adopt, however, as the law of the case the following portion of Mr. Justice Nourse's opinion:

"This is an action on a bond given to guarantee the faithful performance of a contract. The trial court gave judgment for defendant after finding that the bond was not signed by the principal or delivered to plaintiff and that there was a material change in the terms of the agreement to the detriment of the defendant.

"A brief statement of the facts will suffice. On January 25, 1917, plaintiff and the McKenzie Company (a corporation) executed a written contract whereby plaintiff agreed to take the total output of lumber from a certain mill leased and operated by the McKenzie Company. A second paragraph was incorporated

in the contract wherein, as part performance, plaintiff placed with the McKenzie Company an order for 25,000 redwood ties and not less than 15 carloads of other lumber according to specifications to be furnished later. Contemporaneously therewith plaintiff accepted a draft drawn upon it by the McKenzie Company in the sum of \$6,500 as payment on account for the ties and carloads of other lumber mentioned. It was stipulated that if this sum was insufficient to pay for all the lumber covered by the order, the plaintiff would immediately pay the balance; on the other hand, if this sum was in excess of the amount of lumber delivered, such excess should be placed to the credit of the plaintiff. The bond in suit was given to secure the faithful performance of the terms and conditions of paragraph 'second' of the contract. It was duly executed by the authorized agent of the bonding company and by him delivered to Mr. Cutten, with instructions to cause the corporation to sign as principal and to then deliver the bond to the plaintiff. Cutten delivered the bond to the plaintiff without the signature of the McKenzie Company, but the absence of the principal's signature was not discovered by the plaintiff until this case was set for trial. The McKenzie Company drew its draft on the plaintiff for \$6,500, as provided for in the contract, and this was accepted by the plaintiff. A few days later the McKenzie Company represented to the plaintiff that it was unable to negotiate the draft, and it thereupon secured from the plaintiff four smaller drafts covering the same sum. These four drafts were negotiated to innocent purchasers for value before maturity by the McKenzie Company and were all paid by the plaintiff at maturity, at which time the plaintiff knew that the McKenzie Company had failed in its contract and that it was insolvent.

"It was stipulated in the bill of exceptions that the McKenzie Company wholly failed to deliver to the plaintiff at any time any portion of the lumber ordered by and under the contract, and that, within the time fixed in the contract for delivery the plaintiff, relying on its contract, executed agreements for the reselling of the lumber, but, because of the default of the McKenzie Company, the plaintiff was compelled to purchase lumber and ties in the open market to fulfill its agreements, to the damage of plaintiff in the sum of \$1,172. The action is one to recover the two sums of \$6,500 and \$1,172.

"The appeal is based upon three grounds: (1) The insufficiency of the evidence to support the finding that the bond was not properly executed and delivered; (2) the insufficiency of the evidence to support the finding that in cutting up the \$6,500 draft the parties had materially changed the terms of the principal agreement; (3) errors of law in the admission of evidence of the instructions and intentions of the surety relative to the execution of the bond.

"Upon the first point appellant argues that the bond is binding upon the surety, regardless of the fact that it was not signed by the principal, because it is a joint and several obligation and the principal is bound by the terms of the main contract which the bond was given to secure, and because the surety constituted

Cutten its agent to deliver the bond to the appellant and is, therefore, bound by the acts of its agent. The respondent insists that its liability was conditional upon that of the principal; that it was not a completed bond because the principal failed to sign; and that it was the intention of the surety, evidenced by the instrument itself and by the testimony taken at the trial, that the bond should not be effective and should not be delivered until such signature had been affixed.

[1] "The contention of the appellant that the bond is binding without the signature of the principal must be sustained. It is a joint and several obligation guaranteeing the faithful performance, by the principal, of the terms and conditions of the main contract. This contract obligated the principal to perform certain specified acts and to comply with certain specified terms and conditions. The principal signed the main contract and thereby assumed the same obligations and liabilities as those covered by the bond. Its signature upon the bond would have added nothing to either its obligation or its liability. *Kurtz v. Forquer*, 94 Cal. 91, 93, 29 Pac. 413.

"Respondent directs our attention to *Sacramento v. Dunlap*, 14 Cal. 421, and *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758, holding that a surety is not bound unless the principal has executed the bond. But both of these cases related to bonds which were joint and not joint and several. Reference is also made to *Weir v. Mead*, 101 Cal. 125, 35 Pac. 567, 40 Am. St. Rep. 46. But the bond under consideration in that case was an executor's bond given under section 1383 of the Code of Civil Procedure, which required an executor to 'execute a bond to the state of California, with two or more sufficient sureties.' The court held that the meaning of this section was that 'the principal and sureties must sign the bond before letters can be issued, for obviously there can be no execution without signing.' 101 Cal. p. 128, 35 Pac. 567, 40 Am. St. Rep. 46. As the bond under consideration was the joint obligation of the principal and sureties and the several obligation only of the latter, it was held that it was ineffectual for any purpose without the principal's signature. Respondent cites many other cases from outside jurisdictions holding that where a principal has failed to sign the bond it is necessary to show that the sureties intended to be bound, notwithstanding the failure of the principal to sign. Many of the cases cited do not go as far as respondent contends, and none of those examined cover a case where the bond is given as security for the faithful performance of a contract which the principal has already executed.

"There is a wide divergence of opinion among the various jurisdictions upon the point under consideration, but this conflict of authority seems to arise mainly from the failure of some courts to emphasize the distinction between joint and several obligations, and those which are joint only. No California case is directly in point. *Kurtz v. Forquer*, supra, comes nearest to a case involving a similar state of facts. Though some elements arose in that case which are not present here, the rule stated in the syllabus (and this is supported by the decision) is in line with the weight of the authorities. This is that a joint and several bond, conditioned for the faithful performance

by the principal named therein of the contract which the principal has already signed, is binding upon the sureties though the principal has failed to sign the bond. The following statement found in 32 Cyc. p. 41, is a correct summary of the weight of authority on the point under discussion: 'The better rule seems to be that when the failure of the principal to sign the instrument affects the surety injuriously, the surety is not bound. But when the failure of the principal to sign the instrument in no way affects the rights or liability of the surety, the instrument is valid, and the surety is bound, unless the surety signed upon the express condition that the principal should also sign before delivery of the instrument to the obligee, or the statute absolutely requires the principal to sign. Thus, where the liability of the principal in a bond is fixed by contract, or by operation of law, his failure to sign the bond does not affect the liability of his sureties thereon.'

"Assuming for the moment the correctness of the rule of those cases which hold that, where a bond is not signed by the principal, the burden of proof is on the obligee to show that it was not executed by the sureties on the express condition that they would not be bound unless the principal signed, the better rule is, as stated in 32 Cyc. p. 45: 'So, where a bond is good without the signature of the principal, and the sureties' recourse against him is in no wise impaired by his failure to sign, the fact that the sureties signed the bond on the express condition that the principal should also sign is no defense to an action thereon.'

"As we have said, the principal was already bound by the execution of the main contract. Its signature upon the bond could not have affected either its rights or its liabilities concerning either the obligee or the surety. The bond was one, therefore, which was good without the signature of the principal.

[2] "Such being the case, when the bond was delivered to the obligee without the principal's signature, the obligee did not have constructive notice of any condition attached to its execution by the surety. The natural inference which the obligee would draw under the circumstances would be that the principal's signature was omitted because it was not necessary. Holding as we do on this point, it is unnecessary to consider the assignments of error to the admission of evidence of the intentions of the surety as it is conceded that none of these matters were communicated to the appellant. The same may be said as to the finding of nondelivery. This was not a finding of fact—actual delivery being conceded—it was the conclusion of the trial court based upon the finding that the surety's execution of the bond was conditional.

"On the second point the appellant insists that, assuming that there was a material alteration of the agreement when the \$6,500 was cut into four smaller drafts, the finding of the trial court does not sustain the judgment because the issue was not properly raised. The point is that, when a party claims exoneration under section 2819 or section 2840 of the Civil Code by reason of the suspension or impairment of his rights, he must allege the facts which are the basis of the claim. Here the answer, after setting forth the facts relating to the issuance and acceptance of the four

drafts, alleged: "That in making the payment of said drafts as herein alleged the rights of this defendant were prejudiced to the extent of the amount of the total sum of said drafts."

"In a similar case relating to a plea of exoneration the Supreme Court, in *Blackwood v. McCallum*, 187 Cal. 655, 659, 203 Pac. 758, 759, said: "The answer wholly failed to plead any facts showing that the original contract had been modified in a material or in any respect. * * * If appellants claimed that a different contract had been entered into * * * they should have stated its covenants and conditions. * * * In short, the appellants made no adequate attempt in their answer to bring themselves within the provisions of sections 2819 and 2840 of the Civil Code, or to show any exoneration by reason of the suspension or impairment of their remedies or rights against Hansbrough-Johnson Company, and their case cannot be "better proven than alleged."'"

[3] It should be borne in mind that the bond in the instant case is a contract of suretyship and is not a statutory or official bond. Further, it is a joint and several bond as distinguished from a joint obligation only. Being a contract of suretyship, it must be construed in accordance with the following provisions of section 2837, Civil Code:

"In interpreting * * * a contract of suretyship, the same rules are to be observed as in the case of other contracts."

The evidence conclusively shows that respondent's attorney in fact, and its manager, Mr. Hall, were wholly familiar with the terms and conditions of the contract for the performance of which respondent agreed to indemnify appellant in the event the principal should fail to comply with its covenants. Mr. Robertson, in a conference with C. R. Cutten, president of the McKenzie Company, and Hewitt Davenport, president of the Pacific Mill & Timber Company, discussed on the same day or on the day prior to its execution the terms of said bond. No intelligent discussion could have been had without a knowledge of the contents of the contract. As a matter of fact, said manager of respondent had asked for and had received from Mr. Davenport a copy of said contract before the delivery of the bond to appellant by Cutten. The contract plainly provided that the McKenzie Company, party of the first part, "in order to secure said party of the second part [Pacific Mill & Timber Company] in the faithful performance by the party of the first part, of all the terms, conditions and agreements herein to be kept and performed by said party of the first part, under and by virtue of this paragraph 'Second,' said party of the first part promises and agrees to cause to be made and delivered contemporaneously herewith to said party of the second part, the guaranty of two parties acceptable to said party of the second part, and in the sum of twelve thousand (\$12,000) dollars that said party of the

first part will keep and perform each and all of the agreements and covenants by it to be kept and performed, as set forth in this paragraph 'Second.'"

Paragraph "Second" contains in detail all of the material engagements of the parties. Respondent Massachusetts Bonding & Insurance Company was accepted by mutual consent of all parties in lieu of "the guaranty of two parties" as in said contract provided and no point is made as to the substitution.

It is important to notice that the binding effect of said contract is recognized by the bond, as it is expressly provided that a copy of the contract "is or may be attached to said bond and become a part thereof." It is held in *Kurtz v. Forquer*, supra, and by many courts of various jurisdictions, that when the principal is under an independent obligation, as in the instant case, to perform the various provisions of a bond, either by separate contract or by operation of law, his execution of the bond is unnecessary. So far as the McKenzie Company's liability to respondent was concerned, it mattered not whether it did or did not sign the bond. Its signature would have added nothing to any legal right which respondent already had, and it was, therefore, in no wise prejudiced or deprived of any remedy by a failure of its principal to sign the bond.

"Where several persons are named in the body of the instrument as parties thereto, it is not necessarily invalid, as against those who have signed it, because others have not signed. Such a result would follow where it appeared on the face of the instrument, or by proof, that the person sought to be charged signed upon the consideration that others named would also sign. *Cavanaugh v. Casselman*, 88 Cal. 549, 26 Pac. 515. Nothing of the kind, however, appears in the case at bar. The three sureties, who stood on the same footing, did sign the instrument; and it is evident that the signatures of the principals, who were already bound by the contract referred to in the bond, were not necessary as a consideration. Moreover, appellants delivered the bond, without the signatures of the principals, to the plaintiffs. We think, therefore, that the sureties were liable, so far as this point is concerned." (*Kurtz v. Forquer*, supra.) So here, respondent caused said bond to be issued after its terms had been agreed upon by respondent's officers, the president and attorney of appellant, and the president of the McKenzie Company. Respondent's agent expressly promised that the bond would be issued in compliance with the changes agreed upon and that it "would be ready in a little while." Following this meeting of the parties the bond was executed by respondent and delivered to its principal, who, in turn, delivered it to appellant,

[4, 5] The finding of the trial court that respondent signed said bond but did not deliver it is not supported by the evidence in the case and cannot be sustained as a matter of law. This finding was made on the theory that although the bond did physically pass from respondent through its principal, McKenzie Mill & Lumber Company, to appellant, there was no absolute delivery, but a conditional delivery only.

The testimony as to the execution and delivery of the bond comes chiefly from Mr. John H. Robertson, the attorney in fact of respondent. His testimony is that he executed the bond and handed it to Mr. Cutten, president of the McKenzie Company, at the office of respondent, no others being present but himself and Mr. Cutten. This occurred on the 24th day of January, 1917. The witness, over the objection of appellant, testified that he did not intend to bind the bonding company unless the instrument was also signed by the principal; that his intention was that, after it was signed by the president and secretary of the McKenzie Company under its corporate seal, it should then be delivered to appellant. He explained that it was the custom of the bonding company to prepare bonds in the office of the company and then sign, seal and deliver the same to the principal with the request that it also sign and seal the same in the principal's office by the proper officers. The court interposed this question:

"Q. But what is the custom as to delivery? A. I think that is up to the principal. I don't go around delivering these instruments. *I give them to people who apply for them.*" (Italics ours.)

Witness continuing:

"As a general rule, the principal either through himself or through some employee comes to the office and makes some arrangement for the bond. Then so far as we can in the office we prepare it, put on the seals and stamps, etc., and then instruct them what to do with it. Then it is *our understanding* that the instrument is not complete until signed by the principal. * * * My best recollection is that I told Mr. Cutten to have that bond signed by himself as president and have its secretary sign it, and have its corporation seal attached; I don't think I told him to bring it back to me. I do not know that I used the language of telling him to give it to the company; that is what I *supposed* he would do." (Italics ours.)

The witness also stated that almost invariably all the dealings in bond cases to the point of time at which the bond is actually delivered to the obligee are with the principal. Nothing was said to any of appellant's officers or its attorney that respondent as a condition precedent to the delivery of said bond required its execution by respondent's principal. It is not claimed by respondent that he specifically instructed

his principal *not* to deliver the bond until executed by said principal. The furthest that he is willing to go in this direction is to say that it was his intention that the bond should not be delivered by the principal to the obligee unless signed by said principal. He stated that such was his intention and understanding as to delivery. But his understanding or intention was not disclosed or made known to appellant if, indeed, it was to the McKenzie Company. It cannot be claimed that appellant had any knowledge of a secret arrangement or understanding between respondent with its principal, if any existed, as to any of the requirements of the former touching delivery. The bond was delivered by respondent to appellant and continued thereafter to remain in its custody without any objection being made thereto on the ground that the McKenzie Company had not signed the same or on any like ground until after the case was set for trial.

On April 25, 1917, the day on which all the drafts reached maturity, Mr. Robertson was advised by letter written to him by appellant that all drafts drawn by the McKenzie Company had been paid excepting one for the sum of \$500. This gave notice beyond question that the draft for \$6,500 had been split into lesser amounts. In the same letter a demand was made on the surety for damages suffered by reason of the McKenzie Company having failed to keep its engagements, the exact amount of which was not then ascertainable. A month or six weeks later Mr. Robertson, upon his own suggestion, accompanied Mr. L. D. MacDonald, a representative of appellant, on a visit to the property of the McKenzie Company, situate in Sonoma county, for the purpose of looking over the property and determining what was best to be done to straighten out the situation. The question of the bonding company advancing money to the McKenzie Company as a feasible method of working out of the situation and complying with the contract was considered by respondent. No definite plan was adopted and the matter rested.

No repudiation of the bond had been hinted at by respondent up to this time or for some time thereafter.

We have related the material facts touching the question of delivery so far as they are presented by the record. There is nothing upon the face of the bond, it being joint and several (*Kurtz v. Forquer*, supra), or in the transaction itself, which imposed upon the obligee the duty of inquiring of the surety company whether any conditions had been imposed upon the McKenzie Company before delivery made. The case of *Woodman v. Calkins*, 13 Mont. 363, 34 Pac. 187, 40 Am. St. Rep. 449, presents facts identical with those of the instant case. In that case,

as in the present, the principal had failed to sign the bond and the same defense was there made as is made in the instant case, to wit, that the bond was signed by the sureties on the condition and with the understanding that the principal should sign it before it should be delivered; that said sureties never intended nor consented that it should be delivered without the principal's signature, which did not appear on the bond. The court said the fact that the sureties never intended nor consented that the bond should be delivered without the signature of the principal involves no fact or condition, which, under the law, would have given the sureties any right or remedy for reimbursement which they did not already possess. The opinion concludes with the following language:

"If the sureties have lost any material legal right by reason of the omission of the principal to sign this undertaking (obligating himself to do as principal what the law obliges him to do without the undertaking) it has not been pointed out or in any manner suggested in this case. It is well known that there are bonds and obligations whereby the liability of both principal and sureties arise from, and is founded upon, the instrument alone, and where the principal could neither be held liable directly to the obligee, nor collaterally as between him and the sureties without his signature, but such is not the case at bar. And we do not perceive how general suggestions of doubts respecting those cases are applicable in deciding this, or will aid in correctly deciding such other cases when they arise."

See, also, *State v. Peck*, 53 Me. 284; *Trustees v. Sheik*, 119 Ill. 579, 8 N. E. 189, 59 Am. Rep. 830.

The rule of a surety's liability on failure of the principal to sign is thus stated in 32 Cyc. p. 45, as follows:

"Where a surety signs a note or bond on condition that the principal also signs it, which condition is known to the payee or obligee, the surety is not liable thereon in case the principal fails to sign. But if the obligee has no notice, actual or constructive, of the condition, the surety is bound, especially if, upon learning of the nonperformance of the condition, he does not raise any objection. So where a bond is good without the signature of the principal, and the sureties' recourse against him is in no wise impaired by his failure to sign, the fact that the sureties signed the bond on the express condition that the principal should also sign is no defense to an action thereon."

[6] Whether or not the answer be regarded as sufficient to raise the issue found on by the trial court to the effect that the draft drawn for the sum of \$6,500 in accordance with the contract and which was at the request and for the convenience of respondent's principal on the following day split into four drafts for the sums of \$2,000, \$3,500 and two for \$500, respectively, equalling the

said sum of \$6,500, payable at the same time as the original draft, we are satisfied that the evidence does not sustain the finding of the trial court that this change in form materially changed the terms of said agreement to the detriment of respondent. The change in form and urged as a defense produced no material change in the terms of the contract and in no wise could have resulted in detriment to respondent. The fact that an officer of the McKenzie Company, acting within the scope of his employment, but in violation of his duties, misapplied or appropriated to his own use one of the drafts forming an integral part of the whole, was no more the proximate result of the act complained of than would have been the appropriation of one of the rolls of coin containing a like sum had the original amount been payable in coin only. It would have been just as easy to have misappropriated the full amount represented by the \$6,500 draft or any part thereof as it was to misappropriate one of the divisible parts of said original draft. The obligation for which indemnity was given was not increased by the splitting of the original draft into four parts. It amounted to a mere variance of the form of the contract without changing its substance. To hold otherwise would, under the circumstances of the instant case, be sacrificing substance to form and thereby defeat the main object of the contracting parties, which was to transfer \$6,500 to respondent's principal to be used partly as a working capital so as to enable it to perform its obligations. No claim is made that any officer of the corporation for whose faithful performance of the contract respondent became surety was not the rightful custodian of the draft in its original form or in any form which it might thereafter have assumed.

[7] The point made by respondent that the only acts which the McKenzie Company were required to perform under the contract were to deliver the lumber when ordered and "to place to the credit" of the appellant the difference between the amount of the draft and the contract price of the lumber is wholly without merit. The contract discloses a practical working plan. To construe it in such a manner as to exonerate the surety from liability on the theory that the bare placing of the credit to the account of appellant on the books of the McKenzie Company for moneys advanced for material to be furnished by it would be doing violence to the object of the parties and render the contract meaningless and without purpose.

The judgment is reversed.

We concur: LAWLOR, J.; WASTE, J.; KERRIGAN, J.; LENNON, J.

MYERS, J. I concur in the judgment upon the ground that the evidence does not, in my opinion, sustain the finding of the trial court to the effect that the bond was executed by the surety upon the condition it was not to be delivered unless or until it should have been executed by the principal. I think it fairly appears from the evidence that the bond was executed by the surety company unconditionally and that the direction of its manager to have the bond signed by the president and secretary of the principal was a mere suggestion as to the method of procedure and was not intended to and did not have the effect of imposing a condition precedent upon its delivery.

I concur in the conclusion of Mr. Justice SEAWELL that the splitting up of the \$6,500 draft into four smaller drafts aggregating the same amount, payable at the same time and upon the same terms, did not amount to a material alteration of the original contract. I agree, also, with the conclusion that the contract was not performed by the mere placing of the amount of the draft to the credit of appellant upon the books of the McKenzie Company.

I concur: WILBUR, C. J.

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COSEY v. LOS ANGELES RY. CORPORATION. (L. A. 7084.)

(Supreme Court of California. Oct. 23, 1923.)

1. Appeal and error $\Leftrightarrow$ 1004(1)—**Damages for injuries not reduced or new trial granted unless award is result of passion or prejudice.**

Where, in actions for personal injuries, the amount of the damages is left to the sound discretion of the jury or to the trial court, the award may not be reduced on appeal, nor a new trial granted, unless the amount of the award is the result of passion and prejudice, within Code Civ. Proc. § 657, subd. 5.

2. Carriers $\Leftrightarrow$ 381(1)—**Mental suffering may be inferred from wrongful ejection of passenger.**

Mental suffering caused by the unlawful ejection of a passenger from a train or street car with unnecessary force may be inferred from the nature of the wrongful act.

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action by Lawrence C. Cosey, an infant, by Lawrence C. Cosey, his guardian ad litem, against the Los Angeles Railway Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles (J. Karl Lobdell, of Los Angeles, of counsel), for appellant.

Afue McDowell, of Los Angeles, for respondent.

LAWLOR, J. The plaintiff, Lawrence C. Cosey, by his guardian ad litem, Lawrence C. Cosey, father of plaintiff, brought this action against the defendant, the Los Angeles Railway Corporation, a street car company in the county of Los Angeles, for damages for personal injuries. Issue was joined on an amended complaint and amended answer and the case was tried by the court sitting without a jury. Findings of fact and conclusions of law were filed and judgment entered in favor of plaintiff. A motion for a new trial was interposed and denied. Defendant appeals.

Respondent at the time of the injury was 18 years of age. He is a negro boy, employed at the time by a contractor as a laborer. On July 19, 1920, he became a passenger on one of appellant's cars on South Vermont avenue at the intersection of West Sixth street. The car was so constructed that the front and rear sections were open, and the middle section inclosed; the three sections containing seats for passengers. A passageway extended along the middle section the entire length of the car. The only entrance to the car was by way of steps to an open doorway on the right-hand side near the rear end of the rear open section of the car. Respondent was bound for Jefferson street and he obtained a transfer for that point. He describes himself as standing behind the rear seat, the last seat on the left-hand side, when the conductor, who kept saying, "Move forward," told him to go to the front end of the car. Respondent moved along the rear platform and middle aisle, as far as he could, without pushing aside other passengers, who, by filling the aisle and obstructing the passageway, prevented him from moving farther forward. Because of this situation respondent stopped and remained standing at the forward end of the rear, open section of the car and next to the passengers who blocked the aisle. While the crowded condition of the car remained unrelieved, the conductor made several other requests of respondent to move still farther forward; but he only looked at the conductor and made no answer. The conductor then told him if he did not move farther forward he would remove him from the car. To this respondent replied he could not move forward because the other passengers were blocking his way. Thereupon the conductor signaled for the motorman to stop the car. He then squeezed his way through the crowd of passengers standing between him and respondent, and, holding respondent by the arm, led him a few steps through the crowd towards the rear exit. Up to this point respondent made no resistance, but at this point, after walking a few steps, he, without speaking, stopped walking and, with his feet and arms, fastened himself to the seats and upright bars, so that after considerable

tugging and pulling on respondent the conductor was unable to move him. The latter then signaled for the motorman to come to his assistance; the motorman squeezed through the crowd, rushed up to respondent, and the two men, "with great force, violence and roughness," seized his arms, body, and clothing, in various grips and holds, including the motorman seizing his coat from the rear, by the collar; the two men "severely jerking, knocking, bumping, pulling and tugging" respondent, forced him through the crowd of passengers onto the rear platform and down the steps, in such "rough, forceful and exciting manner" that he was rendered helpless, fell from the platform down the steps to the ground, "striking, bumping, lacerating, and bruising his leg and feet on the steps, and his arm and knuckles on the iron work of the car, as he fell to the ground." Still holding a bar at the side of the car, respondent attempted to board the car again, and in this attempt, and while he was standing on the ground with one foot on the lower step of the car (the motorman being on the platform), the motorman, without warning, suddenly and quickly, and with "great force and violence, and roughness," administered to respondent a severe kick in the chest, flesh, and muscles, and while he was still on the ground, tried to strike him with the controller bar. Other passengers reprimanded the conductor and motorman for their conduct. Respondent requested the conductor to either allow him to ride or refund the fare to him. He then boarded the car and the fare was refunded. He gave the refunded fare to the conductor, who accepted it and allowed him to continue on his journey. Respondent resumed the same position he first occupied on the car, the car being in the same crowded condition.

According to the evidence, respondent was unable to comply with the directions of the conductor to move farther forward, and hence there was no justification for ejecting him from the car and treating him in the manner described by the evidence. The incident occurred about 5 o'clock in the evening, and the respondent was about three miles from his destination. The car was crowded. Respondent stated "it was absolutely full" and that he could not "step in there without tramping over other passengers." He suffered from bruises on his hands and legs when he fell from the platform. His mother testified that she treated him for bruises on the neck and legs when he came home that night, and that he had a headache. As to the effect of the kick in the chest, she testified that when he came home his "chest was hurting" and the doctor was called, that he was in bed some, and that whenever he did any regular or steady work thereafter this pain bothered him; that previous to this injury he was a healthy boy and never complained of anything. The

doctor testified that there was a swelling in the chest which he described as "a contusion on the pectoral muscles," that this was the chief injury, and that he made no notes of any other injury. He could discover no broken bones by superficial examination and said that it would take three weeks for recovery from such an injury to the nerve and muscle tissues. He expressed the opinion that an X-ray would have shown whether or not there were any injuries to the bone coverings, that is periostitis, and that in case of such "secondary inflammation" it would be six months before the pain in the chest might be relieved. Respondent testified he suffered pain in his chest more or less for six months after the injury and up to the time of the trial. In view of the findings it must be assumed the court gave damages for future suffering. It appears then that respondent suffered from his injuries for more than six months and would continue to suffer therefrom for some time in the future.

The court found that at all times respondent conducted himself in an orderly manner and that at no time was there sufficient room or accommodations for all of the passengers, or for respondent, and that on no part of the car were there any printed or posted rules or regulations "regarding conduct of passengers relative to standing in said car or relative to moving in said car." The court further found that the "acts of force, violence, knocking, jerking, pushing, pulling, tugging, kicking, bumping, and forcing were unlawful, unnecessary, without justifiable cause or excuse"; that as a result of which respondent suffered and underwent and for an indefinite period will yet suffer and undergo, great embarrassment, shame, and humiliation, much pain, physical and mental suffering; that he was compelled to engage the services of a physician; that for four days after receiving the injuries respondent was unable to do any work as a laborer; that on the fifth day he returned to his employment and worked for several days; that after several days he was obliged to stop work again, and that thereafter he suffered so from said pain and disability he was not physically able to work for many days thereafter, thereby losing wages he would have earned; and that occasionally he still suffers pain and physical disability. The court then finds against the allegations of the amended answer that respondent carelessly or negligently resisted the efforts of the conductor and motorman to remove him from the car, or that he was obstructing the passageway or interfering with the other passengers; that it is not true he used unnecessary physical force or violence, or that he acted without care and caution for his own safety and protection, but that he did use care and caution for his own safety and protection as allowed and sanctioned by law.

The judgment was for \$1,000—\$10 for medicines, \$15 for doctor's services, and \$975 for physical and mental pain, suffering and disability, and for humiliation. An appeal was taken to the District Court of Appeal for the Second Appellate District, where an alternative judgment was rendered—that unless within 30 days respondent filed a stipulation remitting \$500 the judgment would stand reversed. *Cosey v. L. A. Railway Corporation*, 40 Cal. App. Dec. 388. Respondent declined to make the stipulation and his petition for a hearing herein was granted.

It is claimed by appellant that—

"The damages awarded are grossly excessive and the implied findings of the court as to the amount of damages sustained are not supported by but are contrary to the evidence."

It will appear from what we shall quote from appellant's brief that its position is not altogether consistent with the above-quoted claim. After reviewing the evidence, the findings, and the authorities, the brief states:

"We have always felt most aggrieved by the findings of the court, on the issue as to whether plaintiff was unduly and unnecessarily obstructing the passage of the car, and also on the issue of the quantum of force employed. Since the findings of the court on those issues are supported by the testimony of the plaintiff, we cannot successfully attack them here. Under the findings of the trial court the defendant was responsible for the injuries produced by the kick, and for the humiliation, if any, which the plaintiff sustained by being removed from the car, and then permitted to ride upon it. As we have shown, he was away from his work about four days, and incurred, according to his testimony, \$25 expense. Both in reason and under the authorities \$200 in excess of the actual damages sustained would have been amply sufficient compensation. We respectfully submit that unless the plaintiff is willing to remit everything in excess of that amount, the judgment should be reversed and a new trial awarded.

"We do not wish to be misunderstood. We should very much prefer to have an outright reversal. We do not agree with the learned judge in his findings on the facts and we have always felt that where the verdict or judgment rendered was excessive such fact was in itself evidence of sufficient bias for or against one party to the action to warrant all issues being retried by an impartial tribunal. However, candor toward this court compels us to concede that such is not the rule, where the damages, though excessive, are not so grossly excessive as to be conclusive evidence of bias, or prejudice against one party or the other, and that where the verdict is excessive and such excess may be due to an error of judgment, instead of passion or prejudice, that judgment will not be set aside, but the damages awarded simply reduced. Since we believe this case falls in the latter class, we cannot conscientiously urge that we are entitled to more than a remission of a portion of the judgment. We do earnestly insist—and, we believe, correctly—that the amount awarded in this case is out of all proportion to any possible injury, mental and phys-

ical, suffered by the plaintiff, and for this reason that the verdict should either be reversed or the plaintiff required to remit at least three-fourths of the judgment.

"We fully recognize the rule that the trial court is the one to determine all questions of fact, and that ordinarily the amount of damages to be awarded for pain, humiliation, etc., is a matter within the discretion of that court. It is an equally well-established rule that where the damages awarded are out of all proportion to the injuries proved, that the award will be set aside upon an appeal. * * * We feel aggrieved not only at the amount of the verdict, but also at the decision of the court upon the issue as to defendant's liability. We recognize, however, that under the well-settled rules the determination of the trial court upon the issue of liability is conclusive, because the evidence was conflicting. But we do feel that the damages awarded are so entirely disproportionate to any injuries proven, that we would have been derelict in our duty to our client, as well as to the public, if we did not appeal to this court for relief."

[1] We have quoted somewhat extensively the language of appellant's brief in order that its position may clearly appear. Its contention is limited to the proposition that the amount of the judgment should be reduced—not upon the ground of "excessive damages, appearing to have been given under the influence of passion or prejudice" (subdivision 5, § 657, Code Civ. Proc.), but upon the ground that the excessive amount is "due to an error of judgment" of the trial court.

There is a multitude of authorities in this state to the effect that in actions for damages for personal injuries, where the amount of the award is left to the sound discretion of the jury, or of the court, if the case is tried without a jury, the award made in the trial court is conclusive on appeal unless the amount appears to have been given under the influence of passion or prejudice. In the early case of *Aldrich v. Palmer*, 24 Cal. 513, the rule was thus declared:

"In actions for personal torts the law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury. Their verdict, as in all other cases, is subject to review by the court, but it will never be disturbed unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool dispassionate consideration of the jury. * * * Where the law furnishes no rule for the measurement of damages, their assessment is peculiarly the province of the jury, and the court will never interfere with their verdict merely on the ground of excess. Upon such a question the court has no right to substitute its opinion for that of the jury, merely because it happens to differ from theirs."

We quote from Hayne, *New Trial and Appeal*, vol. 1, § 95, p. 460:

"Damages of this character are within the exclusive province of the jury, and its conclusion is not subject to review merely because the amount is in excess of what is justified by the evidence, or what the court itself, or another jury, would perhaps have fixed. It is only when the jury disregards the evidence, and gives damages in excess of that which may be said to be fairly sustained by the evidence, under the influence of passion or prejudice, that its action is subject to review on motion for new trial."

In the recent case of *Mohn v. Tingley* (Cal. Sup.) 217 Pac. 733, 66 Cal. Dec. 68, it was said in a note filed in connection with the denial of the petition for a rehearing:

"It is clear that the question of whether or not a verdict is arrived at because of passion or prejudice, in cases where the amount of the judgment is in the sound discretion of the jury, is primarily one for the trial court upon a motion for a new trial based upon that ground (*Hayne on New Trial and Appeal*, vol. 1, p. 446; *Hale v. San Bernardino, etc., Co.*, 156 Cal. 713, 103 Pac. 83). If a motion for a new trial upon this ground is denied by the trial court, we cannot reverse the judgment unless the amount thereof is 'so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury' (*Hale v. San Bernardino, etc., Co.*, supra)."

It is therefore settled law in cases of damages for personal injuries, where the amount of the verdict or decision is left to the sound discretion of the jury, or to the trial court, that on appeal the award may not be reduced or a new trial granted upon the ground that it is excessive except where it appears the amount is the result of passion or prejudice.

[2] Since it is conceded that the findings of liability based on a conflict in the evidence must be accepted, that it is not claimed the amount of the award is the result of passion or prejudice, and that the assignment of error of judgment on the part of the trial court in fixing the amount is not reviewable on appeal, it follows that the award cannot be disturbed. The trial court was faced with the fact that of all the passengers on the car this respondent alone was directed to move to the other end, and under all the facts and circumstances presented the court probably concluded that in offering resistance the boy did no more than stand on his legal rights. In connection with the character and extent of respondent's injuries, we may note appellant's contentions that—

His "claim for humiliation should not be taken seriously. * * * Plaintiff at no time testified that he was frightened, humiliated, or ashamed. His conduct does not show that he could have suffered very sharply from any of these mental afflictions. * * * To say that this 18 year old boy is entitled to \$975 or \$900 for pain and suffering, humiliation, feelings because of his ejection, is, we believe, stating an

utter absurdity. * * * But that this negro boy suffered any humiliation in this transaction that could not be fully compensated for by a payment of \$50 to \$100 is to display utter ignorance of the psychology of 18."

It is also argued that the injury to respondent's feelings could not have been "very extensive," because he was up and about two days afterwards and rode on the same car, and was seen by the same conductor and motorman. It is true respondent did not testify that he suffered from shame and humiliation. However, under the evidence it cannot be maintained that humiliation and shame could not be inferred.

An examination of the cases in which damages have been awarded for mental suffering caused by the unlawful ejection of a passenger from a train or street car, with unnecessary force, shows that such suffering may be inferred from the nature of the wrongful acts. In *Chicago & Northwestern Railway Co. v. Chisholm, Jr.*, 79 Ill. 584, the court held that where a party who is rightfully on a railroad car and has paid his fare is forcibly and unlawfully ejected therefrom in the presence of other passengers, a jury may properly find from such facts that the party thus ejected suffered feelings of shame and humiliation, without further proof on that subject. In *Brown v. Hannibal & St. Joseph Railroad Co.*, 99 Mo. 310, 12 S. W. 655, it was said:

"Facts which are necessarily implied from those alleged need not be stated. * * * Physical pain and mental anguish usually, and to some extent, necessarily flow from, or attend, bodily injuries. It is not necessary to make specific proof of pain or mental anguish. These elements of damage are sufficiently shown by the evidence which discloses the nature, character and extent of the injuries. From such evidence the jury may infer pain and mental anguish."

In *Cleveland, C., C. & St. Louis Railway Co. v. Kinsley*, 27 Ind. App. 135, 60 N. E. 169, 87 Am. St. Rep. 245, it was held that a passenger who is wrongfully denied admission to a train may recover for humiliation though he yields to such denial without requiring the exercise of force by the employees of the railroad. In *Missouri Railway Co. v. Kaiser*, 82 Tex. 144, 18 S. W. 305, it was held that the ejection from a train of a 16 year old girl in a small town where she was an entire stranger was "well calculated" to cause mental suffering.

The conclusion arrived at renders it unnecessary to consider all the authorities cited by appellant in support of its claim that the award was excessive, or to further state appellant's arguments as to the evidence.

Judgment affirmed.

We concur: WILBUR, C. J.; WASTE, J.; KERRIGAN, J.; SEAWELL, J.; LENNON, J.; MYERS, J.

192 Cal. 315

ANGLO-CALIFORNIA TRUST CO. v. COLLINS et al. (L. A. No. 7446.)

(Supreme Court of California. Oct. 30, 1923.)

1. Replevin ⇨62—Plaintiff's allegations held sufficient to require allowance of damages for depreciation during period of detention.

In an action of claim and delivery for a tractor, plaintiff's allegations that the value of the property was \$1,700 at the commencement of the action, and that he had been damaged in that sum by its detention, *held* sufficient to require an award of damages for detention, representing the amount of depreciation suffered during the period of detention.

2. Replevin ⇨78—Deterioration of property sought to be recovered held a proper element of damages for detention thereof.

Deterioration of property sought to be recovered in an action of claim and delivery is a proper element of damages for the detention of such property, and a finding of such deterioration is equivalent to a finding of damages to such amount.

3. Replevin ⇨108—Judgment held erroneous as omitting damages for deterioration of property sought to be recovered.

Where, in an action of claim and delivery for a tractor alleged to have been worth \$1,700, the court found that its value had deteriorated until at the time of the judgment it was worth only \$350, a judgment requiring the plaintiff to take the tractor or its value on the basis of \$350 in satisfaction of his claim *held* erroneous as omitting damages for deterioration.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Anglo-California Trust Company against B. V. Collins and another in claim and delivery. Judgment for defendants, and plaintiff appeals. Reversed.

Geo. H. Stone, of San Diego, for appellant.
C. L. Brown, of El Centro, for respondents.

WILBUR, C. J. This is an appeal from a judgment in an action of claim and delivery. The action was brought on July 1, 1920. The rights of the parties in this action grow out of a contract dated June 21, 1919, between John R. Davis, plaintiff's predecessor in interest, the seller, and defendant John Kessler, the purchaser, for the sale of a farm tractor, with a four-disc plow and an eight-foot double-disc with standard attachments and equipment, for the sum of \$2,418. Under this contract of sale the seller retained the title to the property until it was fully paid for, and the purchaser paid \$800 at the time of delivery of the tractor, and agreed to pay the sum of \$161.80 per month until the full purchase price was paid. None of these monthly installments were paid. It was agreed that, if the purchaser failed to make any of the payments

due thereunder, the seller could take possession of the property, and that thereupon the rights of the purchaser should cease, and that the seller should retain the property and all moneys theretofore paid or then due "as part compensation for the use of said personal property as aforesaid." Whether or not under this stipulation in the contract the purchaser was entitled to have the \$800 paid by him applied upon the damages resulting from the loss by plaintiff of the use of the farm tractor during the period of its wrongful detention or to the item of depreciation is a question not discussed by the parties, and which we will, for that reason, pass without further notice.

It was also agreed that, in the event the seller should employ an attorney to recover the property, the purchaser would pay an additional sum equal to 10 per cent. of the purchase price of the personal property for attorney fees.

[1] The principal question raised by the appeal arises from the fact that the trial court found as a fact that the farm tractor was worth \$1,700 on the day the action was commenced, and was worth only \$350 at the time judgment was rendered, and gave an alternate judgment for the recovery of the possession of the tractor, or, if recovery could not be had, for the sum of \$350, and denied the plaintiff's claim for damages for the detention of the property. Appellant claims it should have had judgment for the amount of the depreciation of the farm tractor to the amount of \$1,350. The appeal is upon the judgment roll. The answer by the respondents to appellant's claim that the judgment should have included \$1,350 as damages for the detention of the farm tractor, the amount of depreciation thus found by the court to have been suffered by the property during its detention by the defendants, is that there are no sufficient allegations in the complaint to justify such a judgment. In this we think the respondents err, for the plaintiff alleged that the value of the property was \$1,700, and sought the return of the property or a judgment for that amount. It also alleged that it has been damaged by the detention of the farm tractor in the sum of \$1,700. It is true that this allegation of damage was for the full value of the farm tractor, and was inconsistent with the prayer that the tractor should be returned, nevertheless it was a sufficient allegation of damages to cover the situation which actually developed in the trial of the case, namely, that the tractor was worth \$1,700 when the action was brought, and depreciated during the pendency of the action to the sum of \$350 while in the possession of the defendants, by reason of the redelivery bond. The trial court found that the farm tractor belonged to the plaintiff at the time the action was instituted, and that the plaintiff at that time had the

right to the possession thereof. The tractor was taken by the sheriff upon the filing of a proper bond and affidavit by the plaintiff, and was retained by him until the defendant, within five days thereafter, filed a redelivery bond, whereupon the tractor was delivered to the defendants Collins and Kessler. The deterioration of the tractor amounting to \$1,350 either would not have accrued or would have been the plaintiff's loss, if it had been permitted to retain possession thereof, as it was entitled to do, when the sheriff secured possession thereof under the delivery bond.

[2] The deterioration was a proper element of damages for the detention of the property (*Morris v. Allen*, 17 Cal. App. 684, 121 Pac. 690; *Berry v. Bank of Bakersfield*, 177 Cal. 206, 170 Pac. 415), and a finding of such deterioration by the court was equivalent to a finding of damages to that amount.

The trial court did not otherwise expressly find upon the plaintiff's allegation as to the value of the use of the property, which plaintiff alleged to be \$50 a month, and did not expressly refer to the issue of damages, except in the conclusions of law, where it was stated "that the plaintiff is not entitled to recover any damages from the defendants or either of them for said wrongful detention." This was, in fact, a conclusion of law as to what the plaintiff was entitled to recover, and not a finding of fact. The findings do not support the judgment. In any view of the case, the judgment under the findings is inadequate to compensate the plaintiff.

[3] It is impossible to reconcile the judgment to the effect that the plaintiff take the deteriorated tractor worth \$350 in satisfaction of his claim of possession with the finding that the right of possession accrued July 1, 1920, and that the tractor was then worth \$1,700, and had ever since been wrongfully in the defendants' possession.

The plaintiff also questions the amount of the attorney fees, claiming it should be 10 per cent. of the purchase price, that is, \$241.80, instead of \$90 allowed by the trial court. As a general rule, the plaintiff is not entitled to a recovery of attorney fees in a suit for claim and delivery. *Black v. Hilliker*, 130 Cal. 190, 193, 62 Pac. 481. It is assumed by the respondents, in view of the contract between the parties for an attorney's fee, in the event one is employed to recover possession of the property, that the plaintiff would be entitled to recover attorney fees in this action, although such fees could not otherwise be recovered. The respondents content themselves with the suggestion that it cannot be ascertained upon what basis the court allowed attorney fees, for the reason that, although the contract provided for attorney fees of 10 per cent. upon the purchase price of the farm tractor and disc plows, it appeared from the evidence that the disc plows were never de-

livered to defendants, and the value of the farm tractor was not found otherwise than by fixing its value at the time the action was brought and at the time of trial, hence it is suggested that the judgment could not be reversed on the judgment roll alone for want of such finding. In view of this condition of the argument and record upon the subject of attorney fees, we will not pass upon the right to or amount of attorney fees to be allowed the plaintiff in this action.

Judgment reversed.

We concur: WASTE, J.; KERRIGAN, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.; MYERS, J.

192 Cal. 307

**HOLLYWOOD CHAMBER OF COMMERCE
v. RAILROAD COMMISSION OF STATE
OF CALIFORNIA et al. (L. A. 7509.)**

(Supreme Court of California. Oct. 29, 1923.
Rehearing Denied Nov. 26, 1923.)

Eminent domain  **2(8)—Street railroads** 
28(3)—Street railroad cannot be compelled to extend lines where it has no franchise, as this would "take property without compensation."

Pub. Utilities Act, § 36, so far as attempting to confer jurisdiction on the Railroad Commission to order a street railway company to extend its lines into a new territory in which it has no franchises, is ineffective, as the duty of such company to serve the public is limited by its franchises, and to compel it to so extend its lines would be a taking of private property without compensation, in violation of Const. art. 1, § 14.

In Bank.

Original application by the Hollywood Chamber of Commerce for mandamus to the Railroad Commission of the State of California and its members. Writ denied.

Albert J. Sherer and Robert Young, both of Los Angeles, for petitioner.

Jess E. Stephens, City Atty., and Milton Bryan, Deputy City Atty., both of Los Angeles, Hugh Gordon, of San Francisco, William W. Clary, of Los Angeles, and Carl I. Wheat, of San Francisco, for respondents.

Frank Karr, Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for amici curiæ.

KERRIGAN, J. The petitioner seeks a writ of mandate to compel the Railroad Commission of the State of California to assume jurisdiction of and to hear and determine a complaint which the petitioner filed with said Commission. In this complaint the petitioner asked the Commission to order the Los Angeles Railway Corporation to extend certain of its street car lines in the city of Los Angeles into the territory constituting a part of the

city and known as Hollywood. After hearing argument on the question the Commission, although of the opinion that it had power to make the order prayed for, dismissed the complaint without receiving any evidence, on the ground that it would be to the advantage of all parties and of the public generally if the question of jurisdiction was determined by this court prior to an exhaustive hearing on the merits.

The Hollywood district, as shown by the official map attached to the petition on file herein, occupies a strip of land about five miles long from east to west and three miles wide from north to south, lying along the northwesterly edge, but contiguous to the main residence district of the city of Los Angeles. This community, formerly a city of the sixth class, has a large population, with business houses, studios, churches, and residences. One main line of the Pacific Electric Railway Company connects Hollywood with the downtown district of Los Angeles. This line runs north from the downtown district until it reaches the western edge of Hollywood, where it turns west, and from that point it branches, and two lines run approximately parallel and about one-half mile apart through the entire territory from east to west. With the exception of two lines of minor importance and the main line first mentioned, there is no north to south service through this territory or connecting it with the main residence district of Los Angeles.

The Los Angeles Railway Corporation maintains a street car system throughout the greater part of the city of Los Angeles. Five of its lines which run in a northerly direction approach or touch at various points the southern edge of the Hollywood community, two of them extending into it for a short distance. These five lines are the ones which the Railroad Commission is requested to order the owner thereof to extend, the extensions desired ranging from one-half to two or three miles.

The Pacific Electric Railway and the Los Angeles Railway Companies in a brief filed in their behalf contend that the Commission has no jurisdiction to grant the relief prayed, alleging various reasons based on constitutional provisions protecting property rights, including section 14 of article 1, and article 5 of the amendments to the Constitution of the United States.

The city of Los Angeles also filed a brief as *amicus curiæ* in opposition to the application for the writ of mandate, contending that by reason of various provisions of the Constitution of California and of the municipal charter of Los Angeles the Railroad Commission has no jurisdiction to order the extensions here sought, the power in that behalf resting in that municipality.

Under the view which we take of this case

it is only necessary for us to consider the question whether any state agency, be it Railroad Commission or municipality, has power to order the extensions here in question.

What is in effect sought to be accomplished by the proceeding before the Railroad Commission is to compel the Los Angeles Railway Corporation to construct ten and one-half miles of double track railroad at its own expense amounting to a sum in excess of one million and a half dollars, and dedicate such railroad to public use, in a territory which it does not now and has not heretofore undertaken to serve, and it is argued in support of the application that the Commission possesses authority to make such order by virtue of section 36 of the Public Utilities Act (Stats. 1915, p. 115), which confers upon that body very wide powers in the regulation of the service of public utilities. The railway company, on the other hand, urges that obedience to such an order would be tantamount to depriving it and its shareholders of their property without due process of law, with the result of denying to them the equal protection of the laws, in that their property would be taken and appropriated to public use without just or any compensation, while all other classes of persons are guaranteed by the Constitution of the state (article 1, § 14) that their property shall not be so taken except upon making just compensation.

We entertain no doubt that neither the Railroad Commission nor any other governmental agency possesses such power. It has been repeatedly held by this court and by the Supreme Court of the United States that railroads are private property, the owners of which, in common with other property owners, are under the protection of national and state Constitutions. *Interstate Commerce Commission v. Chicago, G. W. R. Co.*, 209 U. S. 108;¹ *Chicago, M. & St. P. R. Co. v. Wisconsin*, 238 U. S. 491, 35 Sup. Ct. 869, 59 L. Ed. 1423, L. R. A. 1916A, 1133; *Great Northern R. Co. v. Minnesota*, 238 U. S. 340.² As was said in *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 665, 137 Pac. 1119, 1128 (50 L. R. A. [N. S.] 652, Ann. Cas. 1915C, 822):

"It may not be amiss to point out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public so as to justify, under the exercise of police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would better be served thereby, or that the owners themselves have proven false or derelict in the performance of their public duty."

And in the same case, at page 699 of 166 Cal., at page 1142 of 137 Pac. (50 L. R. A. [N.

¹ 28 Sup. Ct. 493, 52 L. Ed. 706.

² 35 Sup. Ct. 763, 59 L. Ed. 1337.

S.] 652, Ann. Cas. 1915C, 822), Mr. Justice Sloss said:

"I think it cannot be doubted that an order, compelling the owner of private property, against his will, to subject that property to the use of the public or of an individual, amounts to a taking of property. * * * Where the particular property has been dedicated to a public use; where the property, in other words, is employed in a public service—the owner has consented that the public may use his property within the limits to which the dedication extends. Within those limits, the use by the public does not constitute a taking, or, if it be a taking, it is one which has been invited by the owner. But the fact that the property has been offered for one public use does not authorize the public to use it for other and different purposes."

In accordance with the fundamental principles expressed in these two quotations, it was held in *Atchison, Topeka & Santa Fé Railroad Co. v. Railroad Commission*, 173 Cal. 577, 160 Pac. 828, 2 A. L. R. 975, that the Railroad Commission had exceeded its powers in ordering a railroad company to construct an extension for a distance of about fifteen miles. This decision clearly establishes the principle that railroads are private property, although devoted to public use, and that the state has no power to order a railroad company, without its consent, to establish a new line of railroad, even though it be for the benefit of the public. See concurring opinion of Shaw, C. J., in *Atchison, Topeka & Santa Fé Railway Co. v. Railroad Commission* (Cal.) 211 Pac. 460.

Within the field of original dedication the regulative authority has ample freedom of action, as a public utility undertaking to supply a given public need submits itself to the regulation and control of public authority with respect to the service it has undertaken. Thus, improved train service may be required, as may switching connections between railroads. But all of these requirements represent a legal exercise of the police power, under which the state may regulate the service which the public utility has undertaken to give the public. It is obvious that an order compelling extensions and service in a field not embraced within the limits of its enterprise is of a totally different character.

The Railroad Commission, in an opinion filed in connection with its order in this matter, recognizes the principle that a public utility cannot be required to dedicate its property to a new and additional enterprise not theretofore undertaken by it, but contends that the undertaking to serve is not limited by the franchises which the utility holds, but is a question of fact to be determined from all the circumstances attending the organization of the company.

To us it seems beyond question that the extent of the obligation of the Los An-

geles Railway Corporation to serve the public although not necessarily limited by the street car lines now in operation, is limited and defined by the franchises under which it operates. To hold otherwise is to disregard the basic principle that railroads are private property devoted to a public use, and would be a departure from the doctrine enunciated in *Atchison, Topeka & Santa Fé Ry. Co. v. Railroad Comm.*, supra, namely that a railroad company cannot be compelled to dedicate its property to a new service.

The argument of the Railroad Commission seems to be predicated upon the erroneous assumption that a street railway company's public duty is analogous to the duties of a water, gas, electric power, or telephone company, which are required to expand their facilities to meet the demands of a growing community. *Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318, 146 Pac. 640, Ann. Cas. 1916D, 277; 1 Wyman, Pub. Serv. Corp. § 797. That there is a distinction between the kind of public utilities just mentioned and a railroad company was clearly recognized in the case of *Atchison, Topeka & Santa Fé Railway Co.*, supra, where it was pointed out that gas, water, electric light, or telephone service must, in the nature of things, be brought to the consumer; consequently, the obligation of these utilities to supply a given district carries with it the duty, under reasonable limitations, to extend their mains or lines to a point on the consumer's premises where use can be made of the service. Not so with a railroad company. Before freight or passengers can be transported they must be brought or must come to some point on the line of the railroad. Further, there is a difference between the franchise rights held by these various utilities which emphasizes the distinction between their respective undertakings. A street railroad company must obtain from the municipality a separate franchise covering each of its lines, whereas these other utilities are given franchises to supply the inhabitants of the particular community with water, gas, electricity, or telephone service. It is clear, therefore that even after these last-mentioned utilities are ordered to extend their facilities, they still operate within the limits of their original franchises, in which respect they differ from a street railroad company, which, if ordered to make extensions such as are here sought, will be required to serve a territory in which it has not under its franchises the authority to operate its cars. In other words, the franchise rights of a street railroad are important in ascertaining the extent of the company's obligation to serve the public, because they represent the authority which the company has asked for and obtained from the municipality. If the company has obtained

authority to extend into a given territory, by securing the franchise rights therein, then it has impliedly undertaken to so extend when reasonably necessary, and if it refuses to do so, it may be ordered by the state to fulfill its obligation. But where, as in the present case, the company does not hold franchises allowing it to voluntarily construct these extensions, there is no justification for saying that the company has impliedly undertaken to extend its lines whenever it should become necessary.

We are of the opinion that the following decisions of public utility commissions in other states lend support to the conclusion which is herein reached: In *re Union R. Co.* (1916, N. Y.) P. U. R. Ann. 1916F, 773, it was held that the power of the commission to require an extension of a street car line depended upon the question whether the company possessed the franchise right to operate over the street on which the extension is desired. In *City of Scranton v. Scranton Railways Co.* (1915, Pa.) P. U. R. 1915C, 890, 893, the Pennsylvania commission said:

"The charter of a street railway company specifies its route and designates the streets upon which it shall be constructed, and also the termini. Before it can construct its route, consent must be obtained from the municipality, which can prescribe conditions under which the franchise is granted. After construction, extensions can only be made by a vote of its stockholders authorizing said extension, and consent of the municipality is again necessary, if permission to make said extension was not granted in the original franchise. To hold, therefore, that the commission had power to order a street railway company to make an extension beyond points named in its charter would be in effect to compel the stockholders to authorize the extension, and to require the company to enter into a contract with the municipality upon any terms which it might impose."

Similar results were reached in the cases of *Allied Associations v. Philadelphia Rapid Transit Co.* (1917, Pa.) P. U. R. 1917E, 945; *State ex rel. United R. Co. v. Public Service Commission* (1917) 270 Mo. 429, 192 S. W. 958, 198 S. W. 872; and *Towers v. United Rys. & Elec. Co.*, 126 Md. 478, 95 Atl. 170. See note, 2 A. L. R. 983. While it is true that the organic laws and statutes creating the public service commissions in these several states may be different from our laws, yet these opinions clearly indicate the importance which these commissions attached to the franchises of a street railway company as limiting its undertaking to serve the public.

We conclude, therefore, that section 36 of the Public Utilities Act (Stats. of 1915, p. 115), in so far as it seeks to confer jurisdiction upon the Railroad Commission to order a street railway company to extend its lines into a new territory in which it has no fran-

chises, is ineffective for that purpose and to that extent void.

The writ of mandate is denied.

We concur: WILBUR, C. J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.

Mr. Justice MYERS, being disqualified, does not participate in the foregoing decision.

(192 Cal. 319)

JACOBSEN et al. v. SUPERIOR COURT OF SONOMA COUNTY, DEPARTMENT NO. 2, et al. (S. F. 10771.)

(Supreme Court of California. Oct. 30, 1923.)

1. Constitutional law ⇨251—Owners of property as such enjoy constitutional rights to be protected in exclusive enjoyment of it, subject to superior right of eminent domain.

A landowner is entitled to be protected in the exclusive enjoyment of his property under the express guaranty of both the state and federal Constitutions (Const. Cal. art. 1, § 13; Const. U. S. Amend. 5), prohibiting the deprivation of property without due process of law, subject to the superior right of eminent domain, existing in the state, to take their property or so much as was necessary for public uses.

2. Constitutional law ⇨280—Eminent domain ⇨2(1)—Proposed entry by municipality on private lands to determine availability of land as a water supply source held a "deprivation of property" without due process, and a "taking or damaging."

A municipal water district, with a view of determining the availability of private lands as a source of water supply, cannot enter thereon in advance of condemnation proceedings, with a force of employees, and with mechanical structures and other appliances, to make test borings and excavations and occupy so much as needed for ingress and egress, and trample down and destroy the growing grain, and to build fences around the test holes and excavations for the better protection thereof, as such acts would constitute an interference with possession of lands amounting to a taking and damaging within Const. Cal. art. 1, § 14, and the deprivation of property without due process of law, within section 13; and Const. U. S. Amend. 5.

3. Eminent domain ⇨167(1)—Statute permitting state to survey and locate land required for public purposes contemplates existence and pendency of eminent domain proceeding.

Code Civ. Proc. § 1242, providing that, in all cases where land is required for public use, the state may survey and locate it, does not permit an entry and occupation of private lands clearly violative of Const. art. 1, §§ 13 and 14, but apparently contemplates the existence and pendency of eminent domain proceedings as a basis for whatever entry upon or examination of the lands of private owners is permitted by the succeeding clauses of the section.

4. Eminent domain ☞167(1)—Statute permitting state to survey and locate land required for public purposes permits only superficial examination not seriously impairing owner's rights.

Whatever entry upon or examination of private lands is permitted by Code Civ. Proc. § 1242, cannot amount to other than innocuous entry and superficial examination as would suffice for the making of surveys or maps which would not seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property; any other interpretation violating Const. Cal. art. 1, §§ 13 and 14, and U. S. Const. Amend. 5.

5. Prohibition ☞3(5)—Appeal from order of temporary injunction held not an adequate remedy.

Whether or not the operation and effect of a temporary injunction, permitting a water district to enter upon petitioners' lands to determine its availability as a water supply source and restraining landowners from disturbing the right of such entry, would be stayed upon appeal under Code Civ. Proc. § 963, or would require the issuance of a supersedeas in order to have that effect, such appeal would neither be plain, speedy, nor adequate, where the effect of the order is to decrease the value and usefulness of the property with the shadow of the impending injunction and threatened taking or danger hanging over it, and to that extent would constitute an invasion of petitioners' constitutional rights in the use of their properties.

6. Prohibition ☞3(5)—To the extent appeal was not adequate remedy, the right to it did not exist.

Where petitioners' remedy by appeal for relief from an injunction permitting a municipality to enter upon their land to make test borings to determine the availability of the land as a source for a water supply was neither plain, speedy, nor adequate, to that extent the case is to be regarded as though they had no such right of appeal.

7. Eminent domain ☞167(3)—Except in eminent domain proceedings, court has no jurisdiction to order the taking or damaging of private property for public use.

No court in any other action or proceeding than one in eminent domain has jurisdiction to order the taking or damaging of private property for a public use.

8. Eminent domain ☞167(3)—Order granting injunction directing taking or damaging of private property, in a proceeding not one in eminent domain, held a violation of constitutional rights.

The superior court has no jurisdiction to make an order directing the taking or damaging of private property for public use, except in an eminent domain proceeding as provided in Const. art. 1, § 14, and, where it attempted to make such an order in any other action or proceeding than the one to which it is limited, such attempt is more than a mere error and amounts to a transgression of a fundamental constitutional right.

9. Prohibition ☞6(2)—Writ held proper remedy.

Where a water district's entry and operations upon petitioners' private lands, as permitted by an injunctive order in a suit other than a proceeding in eminent domain, was a taking and damaging of petitioners' lands, in violation of Const. art. 1, § 14, and petitioners had no plain, speedy, or adequate remedy in the ordinary course of law, such as an appeal under Code Civ. Proc. § 963, the writ of prohibition was a proper remedy.

In Bank.

Application by Albert H. Jacobsen and another for writ of prohibition, against the Superior Court in and for the county of Sonoma, Department No. 2, and R. L. Thompson, as Judge thereof. Writ granted.

J. R. Leppo, of Santa Rosa, for petitioners.

Frank J. Burke, of Petaluma, and Robert M. Searls, of San Francisco, for respondents.

RICHARDS, Justice pro tem. The petitioners herein apply for a writ of prohibition directed to the superior court of the county of Sonoma to Hon. R. L. Thompson, one of the judges thereof, prohibiting the said court and the judge thereof from proceeding to try a certain action pending in said court and from rendering any final judgment therein and from enforcing a temporary injunction heretofore issued therein and from making and entering any further order or issuing any further writ or other process having the effect of restraining these petitioners from preventing the plaintiff in said action from entering upon the petitioners' said lands or from doing the things proposed by said plaintiff to be done upon their said lands and premises without their consent. The respondents herein rest their objection to the issuance of said writ upon their demurrer to the petition, upon the ground that it does not state facts sufficient to constitute grounds for the issuance of the writ. The facts which are set forth in the petition as forming the basis for the petitioners' prayer that the writ should issue, and which are thus admitted to be true, may be briefly summarized as follows:

The Petaluma municipal water district is a public corporation organized in the year 1922 under the provisions of the act of 1911 (St. 1911, p. 1290) entitled "An act to provide for the incorporation and organization and management of municipal water districts," with its later amendments, which public corporation comprises territorially the city of Petaluma and has for its purpose the supplying with water the inhabitants thereof. The petitioners herein are the owners in severalty of two considerable tracts of land adjacent to each other lying about 6½ miles from the said city of Petaluma upon which they respectively reside with their

families and which they devote to the cultivation of hay, grain, and other crops; each maintaining a dairy upon his own tract of land. Shortly after its organization in 1922, the said municipal water district began exploring the region around the said city of Petaluma for the purpose of locating sources of water supply for the uses of said city and its inhabitants, in the course of which the officials of said water district applied to the petitioners herein for permission to make certain surface surveys and examinations of the petitioners' lands for the purpose of determining their availability for reservoir sites. It was granted such permission, and, going upon said lands, made certain examinations, maps, surveys, and so forth within the terms of their said permission so to do; and when these were completed the officials of said water district requested of said petitioners' permission to go upon their said lands with well-boring outfits, tools, machinery, and appliances for the purpose of boring holes and making excavations for the avowed object of ascertaining whether or not there was underneath the surface of petitioners' said lands rock strata or other formations suitable or necessary for the construction of dams and building of reservoirs for the impounding of water for the uses of said water district. The petitioners declined to grant such permission upon the ground that the doing of the things which the water district thus proposed to do would result in substantial and irreparable injury to the petitioners' lands and crops and would be an invasion of their private property rights in their respective holdings. Thereupon the municipal water district commenced an action in the superior court of the county of Sonoma against these petitioners for the purpose of obtaining an injunction against them and each of them, enjoining them from preventing the officers or agents of said water district from entering upon or occupying the petitioners' said lands for the purpose of making the excavations, borings, and subsoil examinations set forth in detail in its complaint and in the exhibit attached thereto, which consists of a blueprint plan of the petitioners' lands showing the location of the test holes and test pits proposed to be sunk or excavated thereon. The complaint alleges that the boring of the said test holes will involve the installation of a boring rig at the indicated points upon the petitioners' lands operated by gasoline or steam engine motors, and that the test holes sunk by the use thereof will be from 3 to 8 inches in diameter and of the depth of 150 feet or more; and that the test pits proposed to be excavated would be of the dimensions of about 4 by 6 feet and of a depth not to exceed 15 feet. The complaint further alleges that in order to accomplish said work it would be necessary to employ and use four men upon said premises for

a period of about 60 days, with occasional visits from the officials of plaintiff in the course of inspection of the said work. It further alleges that at some of the places which the plaintiff thus proposes to enter for the doing of said work, there are growing crops of hay and grain which will to some extent be trampled down and damaged or destroyed during the course thereof. The complaint further proceeds to allege that if a suitable foundation for a dam and reservoir is found to exist through the aforesaid operations upon the petitioners' said lands, the use of the same for such dam and reservoir purposes would be a public use, and if said lands were found suitable for such purposes the plaintiff would proceed to acquire the same by purchase or through the exercise of eminent domain, but that as yet no proceedings looking to the acquisition of the said lands by either method has been initiated or determined upon. The complaint finally alleged that upon the completion of the examination of the premises by the means thus detailed, the plaintiff would restore the lands of petitioners to their original condition by filling in said test holes and excavations and by removing their appliances from said lands. Upon the filing of the said complaint, the plaintiff applied for a temporary restraining order after notice, and an order to show cause was issued thereon, upon the return day of which the defendants in that action who are the petitioners herein were present in court; and the matter being called for hearing, the defendants by way of demurrer to the complaint objected to the jurisdiction of the court over the subject-matter of the action; and upon the overruling of said demurrer presented their answer, which, while general in its terms, was by stipulation of the parties treated as a specific denial of the averments of the complaint. The matter being submitted, an order and temporary injunction was made by the court, wherein it was recited that the substantial averments of the complaint were true, and wherein the court permitted the plaintiff to enter upon the lands of defendants for the purpose of conducting thereon their operations set forth in its said complaint. The court expressly found and recited in the body of its said order that no resolution, ordinance, or other order had ever been passed or adopted by the plaintiff or by its board of directors authorizing condemnation proceedings or other steps for the acquisition of the lands of the defendants or that the same were required for public use; and that no proceedings for the condemnation of the defendants' said lands had been commenced or authorized, and that the reason why no such condemnation proceedings had been authorized or instituted was that the plaintiff was unable to institute such proceeding or to submit to the voters in said water district the proposition

to authorize by bond issue or tax levy the collection of the necessary funds to purchase so much of said property as might be required for such public use, until by the making of such subsoil examination of the said premises it could be determined that the same were suitable for such use. The court in its order for the issuance of the temporary injunction provided that the plaintiff should deposit with the clerk of the court the sum of \$1,000 in cash as security for any damages which might be caused to the property of the defendants in the course of the execution of the work provided for in said order. The court, while thus making its said order for a temporary injunction, suspended the operation thereof for a brief period in order to enable the defendants to make application for a writ of prohibition to this court, and within the period thus permitted the present application was filed. The foregoing constitutes the essential facts presented to this court upon the hearing of this application.

It is conceded by the respondents in their briefs presented herein that if the entry upon and examination of the lands of the petitioners herein, as applied for and permitted in the above-mentioned action, would amount to the taking or damaging of petitioners' property within the meaning of section 14 of article 1 of the state Constitution, the said order of the court would be violative of that provision of the Constitution. It is, however, insisted by the respondents herein that the acts of entry and examination and excavation as proposed by the municipal water district and permitted by the court in said action would not amount to such a taking or damaging of petitioners' said properties as to come within the inhibition of said clause of the Constitution, but that they were such acts as were expressly permitted by the provisions of section 1242 of the Code of Civil Procedure.

[1] We are unable to give our assent to either of these propositions. The petitioners herein are the sole owners of each of their respective properties and as such hold their rights to be protected in the exclusive enjoyment of every portion thereof under the express guaranty of both the state and federal Constitutions, which declare that "no person shall be deprived of life, liberty or property without due process of law." State Constitution, § 13, art. 1; U. S. Constitution, art. 5, Amendments. These constitutional guarantees are among the most sacred inheritances of the American people, derived as they are from those earlier English Constitutions going back to Magna Charta and being reaffirmed in those succeeding petitions, declarations, and bills of right which form the fundamental background of the British Constitution. These rights, which the petitioners herein thus had to the undisturbed possession and use of their respective holdings,

they held, of course, subject to the superior right of eminent domain existing in the state or its representatives to take their property, or so much thereof as was necessary for public uses. This public right, however, has always and everywhere been limited and safeguarded by express provisions of the Constitutions and statutes of the several states, and it has been uniformly held that being in invitum and in derogation of the common right, its exercise is strictly defined and limited by the express terms of the Constitution or statute creating it. 10 R. C. L. 196; 10 Cal. Jur. p. 290, and cases cited; *Damrell v. B. S. S. J. Co.*, 40 Cal. 158; *Lindsay, etc., v. Mehrrens*, 97 Cal. 678, 32 Pac. 802. The first Constitution of the state of California (Const. art. 1, § 8) contained the provision reading, "nor shall private property be taken for public use without just compensation." This clause in the original Constitution was variously interpreted during the 30 years that it remained the organic law of the state, but was generally construed as providing for a proceeding in court in the nature of a condemnation suit wherein the necessity for the taking of the property for the alleged public use could first be litigated and determined and wherein also the damages resultant upon such taking could be ascertained and provided for. *Weber v. County of Santa Clara*, 59 Cal. 266. In the early case of *Fox v. W. P. R. R. Co.*, 31 Cal. 538, this court, in construing the Railroad Act of April 27, 1863 (Stats. 1863, p. 610), permitting the trial court in a condemnation proceeding to make an order giving railroad corporations the right to enter upon private lands and to proceed with the survey and construction of its road thereon pending proceedings for the condemnation of the same, held this not to be violative of the foregoing provision of the Constitution. But the court receded from this position in the later cases of *Davis v. San Lorenzo R. R. Co.*, 47 Cal. 517, *San Mateo Water Works v. Sharpstein*, 50 Cal. 284, *Sanborn v. Belden*, 51 Cal. 266, and *Vilhac v. Stockton & I. R. R. Co.*, 53 Cal. 208, in the first of which cases last above cited the court held that the statute which permitted the quasi public corporation to deprive the owner of the use and enjoyment of his lands for an indefinite period while condemnation proceedings were pending amounted to a taking of the lands of such private person without compensation and was for that reason violative of said constitutional provision. The court did not in that case determine whether a statutory provision for a bond to be given for the payment of damages incident upon such taking would suffice to satisfy the constitutional requirement as to compensation; but the court, in the later case of *San Mateo Water Works v. Sharpstein*, 50 Cal. 284, held that an order of the trial court permitting the plaintiff water cor-

poration, in a condemnation proceeding, to take possession of and use the lands of a private owner during the pendency of the proceeding upon executing a bond in a stated sum for the payment of the compensation or damages thereafter to be ascertained, was void as in excess of the jurisdiction of the court and as violative of the foregoing provision of the state Constitution, which required simultaneous compensation upon the taking of private property for a public use. In the Constitution of 1879 the foregoing constitutional provision was further amplified and limited by the adoption of the provision in section 14 of article 1 thereof reading, "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for, the owner," thereof. In the case of *Steinhart v. Superior Court*, 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404, 92 Am. St. Rep. 183, the question arose as to the power of the trial court in condemnation proceedings to make an order permitting the plaintiff, a railroad corporation, in such suit to enter upon certain lands of a private owner, the defendant therein, during the pendency of the proceedings and before the value of the land to be taken had been ascertained. Such order was sought to be justified under the provisions of section 1254 of the Code of Civil Procedure as it then read, permitting such a procedure. In holding that such order would be void as violative of the constitutional provision last above quoted, the court again reviewed the earlier cases above referred to, and in so doing made use of the following significant language:

"At the time the present Constitution was adopted (in 1879), the law as declared by the Supreme Court was as follows: The possession and use in terms authorized by the statute, before compensation had been made and while the proceeding was pending, is a taking within the meaning of the Constitution, but the requirement of the former Constitution, which only provided that private property should not be taken for public use without just compensation, was satisfied by a provision which insured the payment on reasonable terms as to delay and difficulty in the enforcement of the right. Viewed in the light of these facts, the change made in the language by the new Constitution becomes significant. The following italicized words were added, and no other change was made in the general provision: 'Private property shall not be taken or *damaged* for public use without just compensation *having been first made to or paid into court for the owner.*'"

"The purpose of the amendment is perfectly obvious. If the preliminary possession during the pendency of the proceeding is a taking within the meaning of the Constitution, it cannot be authorized until the damage resulting therefrom has been judicially determined and the amount ~~has~~ been paid or tendered to the owner. * * *

"To hold that possession of land may be given to a person seeking to acquire a right of way by condemnation, during the pendency of

the proceeding and before the amount of compensation has been determined and paid to the owner or into court for him, would be to hold that this so-called temporary possession is not a taking of private property for a public use. But both on authority and reason it is so."

[2] In view of the foregoing decisions of this court, it must be held that if the acts of the Petaluma municipal water district proposed to be done upon and in relation to the lands of these petitioners, as detailed in its complaint in said action for an injunction and as recited by the trial court and the judge thereof in the order for the issuance of a temporary injunction made therein, amount pro tanto to a taking of the lands of these petitioners, or of so much thereof as is proposed to be occupied by the said water district in the doing of such acts, then such taking and the order of the said court permitting the same must be held to be violative of both of the provisions of the Constitution above referred to and to amount to a deprivation of these petitioners of their property without due process of law. As to this branch of the case we entertain no doubt that the proposed acts of said public corporation sought to be done and sanctioned under the order of the respondents herein amount to an invasion of the petitioners' property rights under both of said provisions of the Constitution. The said corporation proposes to enter upon the petitioners' private lands, in advance or absence of any condemnation proceeding, with a force of employees and with mechanical structures operated by steam or gasoline enginery and with other appliances and implements suited to the execution of its intended purpose, which is that of making a number of test borings from 3 to 8 inches in diameter and of a depth of 150 feet or more at various points upon petitioners' said lands, and also of making at other places thereon excavations of an area of 4 by 6 feet and of a depth of 15 feet, and of occupying so much of said lands as shall be needed for ingress and egress and for the accomplishment of the foregoing purposes, and of trampling down and destroying the growing grain of the petitioners over the area to be occupied (during such operations, and of building fences around such test holes and excavations for the better protection thereof pending such operation. It is idle to attempt to argue that such entry, occupation, disturbance, and destruction of the properties of these petitioners would not constitute such an interference with their exclusive rights to the possession, occupation, use, and enjoyment of their respective holdings as would amount to a taking and a damaging thereof to the extent and during the period of such entry upon said lands and of the operations of the corporation thereon.

[3, 4] The respondents herein attempt to justify their claim of right to such entry and

occupation and to uphold the court's order permitting the same under the provisions of section 1242 of the Code of Civil Procedure, which reads as follows:

"In all cases where land is required for public use, the state, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of section twelve hundred and forty-seven. The state, or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantonness, or malice."

To give to the foregoing section of the Code the interpretation which the respondents would have us place upon it would be to render it clearly violative of the constitutional provisions above referred to under the authorities above cited construing the same. We are not required either by the terms of said Code provision nor by the exigencies of this case to go so far. This section of the Code is to be found under title 7 of part 3 thereof, which treats of the subject of "eminent domain" and deals with proceedings for the condemnation of private property for public use. The opening sentence of the section apparently contemplates the existence and pendency of such proceedings as a basis for whatever entry upon or examination of the lands of private owners affected thereby is permitted by the succeeding clauses of the section. But however this may be, it is clear that whatever entry upon or examination of private lands is permitted by the terms of this section cannot amount to other than such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property. Any other interpretation would, as we have seen, render the section void as violative of the foregoing provisions of both the state and the federal Constitution.

[5, 6] The respondents finally contend that prohibition is not the proper remedy for the reasons: First, that the trial court as a court of equity had jurisdiction to make said order; and, second, that its action in so doing was merely error against which the petitioners herein had a plain, speedy, and adequate remedy by appeal. It will be conceded that the statute confers the right of appeal from an order granting an injunction. Code Civ. Proc. § 963. If the order herein from which such appeal might have been taken is to be treated as a merely prohibitive order, it has been decided in numerous cases that the operation of such order would not be stayed by such appeal. *Merced Co. v. Fre-*

mont, 7 Cal. 130; *Swift v. Shepard*, 64 Cal. 423, 1 Pac. 493; *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333; *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156, 563; *Rogers v. Superior Court*, 126 Cal. 183, 58 Pac. 452; *Clute v. Superior Court*, 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54; *Hulbert v. Cal., etc., Co.*, 161 Cal. 239, 118 Pac. 928, 38 L. R. A. (N. S.) 436; *United Railroads v. Superior Court*, 172 Cal. 80, 155 Pac. 463. In a number of the cases above cited, a distinction is drawn between a prohibitive and a mandatory injunction, in that regard it being held that, in case of the former, application must be made for a writ of supersedeas to the appellate tribunal, but that, in case the injunction is mandatory, it will be stayed as to its operation by the appeal. *Clute v. Superior Court*, supra. But whether or not the operation and effect of the temporary injunction issued in the instant case would be stayed upon appeal, or would require the issuance of a supersedeas in order to have that effect, is to our minds immaterial, since it seems clear to us that such appeal would not be as to these petitioners a plain, speedy, or adequate remedy for the invasion of their property rights which is accomplished by the order assailed herein. The effect of said order, by virtue of its very existence pending any appeal which the petitioners herein might take therefrom, is to cast a shadow over the petitioners' right to the full and exclusive use, enjoyment, and disposition of their said properties which no mere stay in the operation and enforcement of the order could remove. That their property is less valuable, less usable, less leasable, less salable with the shadow of this impending injunction and threatened taking or damage hanging over it, would seem to be beyond dispute or question, and to that extent their constitutional rights in and to their respective properties would have been invaded notwithstanding said appeal. Their remedy by that method is neither plain, speedy, nor adequate, and to the extent that it is not this case is to be regarded as though they had no such right of appeal.

[7, 8] This brings us to the first of the respondents' above contentions, viz. that the trial court, a court of equity, having had jurisdiction to make said order, it had jurisdiction to err in making it, and hence that prohibition will not lie. The Petaluma municipal water district is a public corporation organized solely to serve a public use. The only purpose for which it can acquire, hold, and use property is for such public use. The only means by which it can acquire such property without the owner's consent is through the exercise of the right of eminent domain. The only legal procedure provided by the Constitution and statutes of this state for the taking of private property for a public use is that of a condemnation suit, which

the Constitution expressly provides must first be brought before private property can be taken or damaged for a public use. Constitution, art. 1, § 14. Said section of the Constitution as amended in 1918 does provide that the state or certain specified political subdivisions thereof may take immediate possession and use of rights of way when required for a public use "upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposits as the court in which such proceedings are pending may direct * * * to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking." This exception only serves to emphasize the otherwise general rule that no court in any other action or proceeding than an action in eminent domain has jurisdiction to order the taking or damage of private property for a public use. This court in the cases above referred to, and in the very recent case of *Weiler v. Superior Court*, 188 Cal. 729, 207 Pac. 247, has held upon application for writs of certiorari that the superior court has no jurisdiction in a condemnation suit to order the invasion of private property for a public use until just compensation has first been made therefor in such proceedings. It would seem to follow irresistibly that a superior court has no jurisdiction to make such an order in any other action or proceeding than the one to which it is limited in its power to make any order or decree at all directing the taking or damage of private property for a public use. Such an attempt on the part of the superior court amounts to more than mere error. As was well said by this court in the case of *McClatchy v. Superior Court*, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691, in which another fundamental right of the citizen was attempted to be denied him and in which it was urged that the action of the court in so doing was merely error and hence not reviewable upon certiorari:

"It was error, certainly, but it was more than that. It was a transgression of a fundamental right guaranteed to every citizen charged with an offense, or whose property is sought to be taken, of being heard before he is condemned to suffer injury. Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure, which has the effect to deprive one of a constitutional right, is as much an excess of jurisdiction as where there exists an inceptive lack of power. 'The substance and not the shadow determines the validity of the exercise of the power'"—citing *Postal Tel., etc., Co. v. Adams*, 155 U. S. 689, 698, 15 Sup. Ct. 268, 360, 39 L. Ed. 311.

[9] The facts in this case being admitted and the respondent herein having conceded

that if its entry and operations upon the lands of the petitioner amounts to a taking and damaging thereof within the meaning of section 14 of article 1 of the Constitution, the order of the court assailed herein would be violative of that constitutional provision, it would seem that the writ of prohibition is a proper and appropriate remedy, where, as in this case, the petitioners have no plain, speedy, or adequate remedy in the ordinary course of law.

Let the writ issue as prayed for.

We concur: WILBUR, C. J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; KERRIGAN, J.

192 Cal. 357

**BILLIG v. SOUTHERN PAC. CO. et al. ROB-
ISON v. SAME. SAYRE v. SAME.
(L. A. 7191.)**

(Supreme Court of California. Nov. 1, 1923.
Rehearing Denied Nov. 28, 1923.)

1. Railroads ⇨327(1)—Duty of traveler to stop, look, and listen.

It is the duty of a person approaching the crossing of a suburban railroad outside the limits of cities, whether it is a steam or electric railroad, or a railroad on which motor cars propelled by gasoline are being used, to stop, look and listen, and to yield the right of way to trains or cars.

2. Railroads ⇨320—Engineer may presume person approaching crossing will use care.

When a person is approaching a place of danger on a railroad, and all the warnings of danger have been given that reasonable care requires, those in charge of the engine, seeing him thus acting, have the right to presume that he will exercise his faculties and use reasonable care for his own safety which the law requires, until they have reason to believe that he will not do so.

3. Carriers ⇨318(7)—Evidence held sufficient to show suburban railroad not negligent in colliding with truck.

In passengers' actions for personal injuries resulting from a collision between a gasoline propelled motor car of a suburban railroad and a motor truck, evidence that the car was lighted within, and that its headlight threw a light several hundred feet ahead, that its bell was ringing, that the automatic crossing bell was ringing, and that the electric wigwag signal was oscillating, held sufficient to show that the railroad was not negligent.

In Bank.

Appeals from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Three separate actions by Margaret M. Billig, a minor, by her guardian ad litem, Harvey E. Billig against the Southern Pacific Company and others, by Irma E. Robison against the Southern Pacific Company and others, and by T. D. Sayre against the South-

ern Pacific Company and others. Judgment for plaintiffs, and named defendant appeals. Reversed.

W. I. Gilbert, of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

RICHARDS, Justice pro tem. These three actions, commenced separately, were by stipulation of the respective parties tried together and, while separately appealed, have been also, by stipulation, presented for our review upon one transcript and a single set of briefs. Each of said actions was commenced for the recovery of damages from the defendants, who were the same in each case, for injuries arising out of a collision between an interurban gasoline motor car of the defendant Southern Pacific Company and a motor truck owned by the defendant Wm. C. Harris, and being operated by the employé of said defendant Harris and being used at the time of said collision by the operator thereof in the transportation of a truck and trailer load of gasoline upon a public highway, intersecting at the point of the collision the tracks of the Southern Pacific Company, upon and along which its said motor car was being propelled by the latter's agents and employees. The plaintiffs in each case were passengers upon said motor car. Upon the trial of these consolidated cases before a single jury the plaintiffs respectively recovered the following verdicts against the defendant Southern Pacific Company and Wm. C. Harris, viz. Margaret M. Billig, \$15,000; Irma E. Robison, \$20,000; T. D. Sayre, \$10,000; which verdicts, with costs, ripened into judgments in favor of said plaintiffs respectively. An appeal was taken by the defendant Wm. C. Harris from each of said judgments, but upon said appeal said judgments were affirmed. *Billig v. Southern Pacific Co.* (Cal.) 209 Pac. 241. The questions presented and decided upon said appeal are not, however, germane to the instant appeal. The Southern Pacific Company also appealed to this court from each of said judgments, and the same were thereafter transferred to the District Court of Appeal for the Second Appellate District, Division One, for hearing and determination, wherein said judgments were affirmed, whereupon the said appeals were, upon petition of the said appellant, transferred to this court for final hearing and determination.

The essential facts presented by this single record upon these appeals are substantially without conflict or contradiction. The railroad track of the Southern Pacific Company, along the line of which this collision occurred, runs from Los Angeles to Long Beach, passing several smaller towns or stopping places along its route, and crossing at various angles a number of public highways or thoroughfares in its course. Among these is Long Beach boulevard, which is a much-

traveled thoroughfare between Los Angeles and Long Beach. The route of said railroad line lies, during much of its distance, between these two cities outside the city limits of either, and said railroad line, for a considerable distance on each side of the place where said collision occurred, is not within the limits of either city. The motor car which the Southern Pacific Company was operating along said railroad line at the time and place of said collision, and upon which the plaintiffs were passengers, was of the type usually known and described as an interurban car, being approximately 70 feet in length, 8 feet wide, weighing about 70,000 pounds, being operated by a gasoline motor built into the car, and of approximately 200 horse power; the car, including its headlight, being lighted with acetylene gas light, the headlight being at the top and in front of the car and being of 250 candle power. The car was equipped with automatic air brakes of a modern and approved pattern, and was controlled and operated by an engineer who, with the controlling appliances, occupied the forward end of the car, having a full view of the region ahead of the advancing car. The car was also equipped with a bell of the type, in point of size and resonance, similar to those in common use upon the engines of steam railroad trains. It was neither shown nor contended that the car or its appliances or the track upon which it was being operated at the time and place of this collision was defective in any way contributing to the accident out of which the plaintiffs' injuries arose. The Long Beach boulevard and the private right of way upon which the tracks of the appellant were located intersect at the point of the collision at an angle which is slightly acute but is such an angle that a lighted car or train, approaching the intersection from the direction of Los Angeles, can be plainly seen by the drivers of vehicles upon said boulevard for a distance of at least 600 or 700 feet along said track from the point of intersection; the region immediately surrounding said point of intersection being practically open country, affording an unobstructed view to both operators of cars upon the track and operators of vehicles approaching its intersection with the boulevard. At this point of intersection there are railroad crossing signs warning travelers upon the boulevard to stop and look and listen, and there is also an electrically operated wigwag signal, consisting of a large disc with a red light in the center, which oscillates from side to side, ringing a bell, beginning when approaching cars or trains are about 1,500 feet distant from the intersection, and continuing until the car or train has gone some distance past it. On the evening of January 19, 1921, at about 5:44 o'clock, the aforesaid car of the Southern Pacific Company, which had left Los Angeles at 5:20

p. m. of that day with a carload of passengers, including these plaintiffs, approached this intersection. It was running on its official schedule time, and was proceeding at a rate of speed which was variously estimated by observers at from 25 to 40 miles an hour. It is not contended that either of these estimated rates of speed or any other rate between them at which said car might have been actually traveling would be inherently dangerous to passengers on the car, in the absence of an intersecting roadway or of any obstruction to the passage of the car over the same. It was not therefore negligence in those operating said car to have propelled the same at either rate of speed, unless the presence of the intersecting roadway or the possibility or actuality of obstructions thereon rendered it so.

As to the defendant Wm. C. Harris, the evidence showed that he was doing business under the name of Harris Bros. Truck Company, and under that name was the owner of an auto truck with trailer, which combined vehicle was being driven along and upon Long Beach boulevard on the way to Long Beach just prior to and at the time of said collision by an employee of said Harris. This auto truck is described as weighing approximately 5 tons and being with its trailer about 44 feet in length. It was equipped with headlights and was engaged at the time in carrying a truck and trailer load of gasoline toward Long Beach, and was traveling at a rate of speed variously estimated to be somewhere between 6 to 18 miles an hour and according to the testimony of its driver was susceptible of being stopped within 20 feet while going at the speed it was traveling at the time. It was not stopped or halted, however, but was driven up to the intersection and onto the railroad track immediately in the path of the advancing car, thus causing the collision wherefrom the plaintiffs' injuries resulted.

The driver of the truck undertakes to testify that as he approached the crossing he looked up the track and did not see the lights of the approaching car. He also testifies that he looked up at the wigwag signal when he was 6 feet from the crossing and saw it begin to move, its light come on, and heard its bell begin to ring. With respect to the lights of the car, this witness is positively contradicted by the testimony of the plaintiffs themselves, who testified that the lights of the interior of the car at least were so brilliantly lighted as to enable them and other passengers to read thereby; while every other witness in the case except the driver of the truck who saw the approaching car testified that its headlight was lit and its interior lights plainly visible. He therefore must have seen them if he had looked up the track as he testified he did; while as to the wigwag the undisputed evidence in

the case shows that it is located 9 or 10 feet from the east side of the track, and hence that the truck driver would be past it and practically upon the track when he says he first saw it begin to move and its light come on; and he nowhere states that he observed it at all until he had reached that point. Read as a whole his testimony as to whether the wigwag was moving and was lighted with its bell ringing as he approached the crossing is negative and amounts to no more than that he saw the wigwag for the first time when within 6 feet of the crossing, and that its movement within his vision began at that time. The evidence of every other witness who was in a position to see the wigwag prior to the collision is positive to the effect that it was moving with its light visible and its bell ringing before the truck had reached a point where it could not have been easily halted in time to have avoided the collision. The inference is irresistible that the driver of the truck was for some reason neither looking nor listening as he approached this crossing, since, had he been so doing, he must have observed the visible signs and various signals of the oncoming car.

Before proceeding further to a consideration of the facts and circumstances which immediately preceded and attended said collision, it will be in proper sequence to determine and declare the law governing the rights and duties of those persons who were engaged in the operation of the motor car and of the auto truck at the place and at and immediately preceding the time of said collision. In the recent case of *New York Lubricating Oil Co. v. United Railroads* (Cal.) 215 Pac. 72, it was declared that the rule governing the duty of a person approaching a suburban electric railroad track at a crossing was the same as that required of a person approaching or crossing the tracks of a steam railway, citing *Martz v. Pacific Electric Railway Co.*, 31 Cal. App. 592, 161 Pac. 16; *Heitman v. Pacific Electric Railway Co.*, 10 Cal. App. 397, 102 Pac. 15; *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 115 Pac. 320; *Phillips v. Wash. Elec. Ry. Co.*, 104 Md. 455, 65 Atl. 422, 10 Ann. Cas. 334.

[1] In the foregoing cases and in others yet to be cited the rule is that it is the duty of a person approaching the crossing of a suburban railroad being operated outside of the limits of cities, whether the same are steam or electric railroads or are railroads upon which motor cars propelled by gasoline are being used, to stop and look and listen for such approaching trains or cars and to yield the right of way to such trains or cars. *Green v. Southern Cal. Ry. Co.*, 138 Cal. 1, 70 Pac. 926; *Murray v. S. P. Co.*, 177 Cal. 1, 169 Pac. 675; *Herbert v. S. P. Co.*, 121 Cal. 227, 53 Pac. 651; *Griffin v. San Pedro, L. A. & S. L. R. Co.*, 170 Cal. 772, 151 Pac. 282, L. R.

A. 1916A, 842; *Thompson v. S. P. Co.*, 31 Cal. App. 567, 161 Pac. 21; *Basham v. S. P. Co.*, 176 Cal. 320, 168 Pac. 359; *Simoneau v. Pacific Elec. Co.*, 159 Cal. 494, 115 Pac. 320; *Lofthus v. Pacific Elec. Ry. Co.*, 166 Cal. 464, 137 Pac. 34; *Heitman v. Pacific Elec. Ry.*, 10 Cal. App. 397, 102 Pac. 15; *Baker v. S. P. Co.*, 184 Cal. 357, 193 Pac. 765; *Young v. S. P. Co. (Cal.)* 210 Pac. 259, 262. In the case last above cited the court, in applying the foregoing rule to the facts of that case, said:

"The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing. Absent-mindedness or forgetfulness will not suffice as an excuse for the neglect of a person about to cross a railroad track to look and listen for a possible approaching train. And a person who attempts, regardless of warnings, to cross in front of a moving train, even though he be apparently in a condition of mental abstraction and consequently indifferent to the peril of his situation, is nevertheless negligent."

And upon a former appeal of the same case this court, upon the same facts, held that such a person would be negligent as a matter of law. *Young v. S. P. Co.*, 182 Cal. 369, 190 Pac. 36.

[2] Turning from the right and duty of persons approaching upon a highway at its intersection with a suburban railroad to the right and duty of the engineer or motorman in charge of such suburban train or car in approaching such intersection, this court has held in numerous and uniform cases that such engineer and motorman has the right to presume that a person thus approaching the crossing of a suburban railway will perform the duty which the law imposes upon him under the foregoing authorities, and in the reasonable exercise of his faculties of observation and caution, will not essay such crossing until the danger due to the approaching train or car has passed, and it has accordingly been held that the operator of such train or car was not bound to check the otherwise rightful speed of his train or car in approaching and passing such crossing until at least he has reason to believe that such person so approaching such crossing is not performing, or is not likely to perform, his duty in the foregoing regard. In the case of *Basham v. Southern Pacific Co.*, 176 Cal. 320, 168 Pac. 359, the rule is thus stated:

"When a person is approaching a place of danger, and all the warnings of the danger have been given that reasonable care requires, those in charge of the dangerous engine, seeing him thus acting, are not obliged to presume, and it cannot be said that they act unreasonably in not presuming, that the person will continue in his approach until he gets into the very place of danger, when it is obvious that he could * * * with the least care, stop and avoid it."

[3] Having in view the foregoing principles, let us return to the consideration of the

facts and circumstances of this case immediately preceding and attending this collision. The interurban gasoline motor car of the defendant Southern Pacific Company in charge of an experienced motorman or engineer was at the hour of 5:44 of the day in question proceeding upon its regular evening trip between Los Angeles and Long Beach. It was mechanically in perfect order, having been officially inspected an hour or two before the trip began and found to be so. It was running on schedule time and was proceeding at the variously estimated speed of from 25 to 40 miles per hour at the time it approached the intersection of the railroad track upon which it was running with Long Beach boulevard. At said time of the day and year the sun had set some half hour before, and twilight was coming on. The lights within the car were lighted, and, according to the testimony of the plaintiffs themselves, who were among its passengers, were sufficiently brilliant to read by easily, and, according to the testimony of outsiders going or living along said boulevard, were plainly visible. The headlight upon the car was lighted and shed a radiating light ahead along the track and upon each side of it for several hundred feet, and was such a light as must have been seen by any persons approaching the crossing along the boulevard and exercising their ordinary faculties for observation. The car was equipped with a bell of the type used upon ordinary locomotives, and which was being kept ringing as the car proceeded on its way. It was also equipped with air brakes of an approved type, capable of stopping the car within a reasonable distance, depending upon its speed and load. At the crossing there were the usual warning signs, warning passersby against the danger of approaching trains, and there was also installed there an electrically operated wigwag signal of approved design, equipped with a red light and bell, and which automatically began to oscillate and ring when an approaching car reached a point upon the railroad track approximately 1,500 feet from the crossing, and which continued its motion until the car had passed by. These visible precautions at the crossing were known to the engineer in charge of the car to exist. When the car reached a point about 150 feet from the crossing the engineer observed the motor truck and trailer of the defendant Harris proceeding along the boulevard and approaching the crossing at a speed which the engineer estimated to be about 15 or 18 miles an hour, but which the driver of the truck stated was about 11 miles an hour, diminishing as the truck neared the crossing. At the time the engineer first observed the truck it was lighted, was in charge of a driver, and was to all appearances under control. According to the testimony of the driver the truck could be

stopped within 20 feet, and there is nothing to indicate to the contrary, so as to put the engineer upon notice that the truck could not be brought to a standstill within some such distance. The engineer states that as soon as he observed the oncoming truck he gave four blasts on the whistle with which his car was equipped, two long and two short blasts, which are the standard danger signals of railroads at crossings, and there is ample evidence from outside witnesses to show that said signals were given. The engineer further testifies that he first observed that the driver of the truck did not intend to stop when his car was within 50 feet of the crossing, and that he at once used every means within his power to bring the motor car to a stop so as to prevent the collision, but that it was impossible to do so within that distance, and within a second or two thereafter the collision occurred. The practically undisputed evidence in the case shows that a motor car of the size and weight of this one, when proceeding at the rate of 25 miles an hour, cannot be brought to a stop within a distance of less than 100 feet under the most favorable conditions. The expert called by the plaintiffs themselves so testified, and if this car was, according to the testimony of certain of the plaintiffs' witnesses, traveling at a rate approximating 35 or 40 miles an hour it could not have been stopped within a distance of less than from 175 to 350 feet.

Applying the principles of law hereinbefore set forth to the facts of this case as above recited, the conclusion is irresistible that actionable negligence on the part of the Southern Pacific Company, appellant herein, has not been shown. There is not a scintilla of evidence in the case to show that the engineer of the appellant's motor car observed the motor truck upon the boulevard approaching the crossing when the car was further away from the crossing than 150 feet, but, even if there had been such evidence, the situation would not be changed, since the engineer, at whatever point he was along said track when he first observed or could have observed the approach of the motor truck toward the crossing, was entitled to proceed at the speed his car was going in reliance upon the presumption that the driver of the motor truck would make use of the ordinary facilities for observation of a reasonable man, and would stop his vehicle before the crossing was reached. There is no sufficient evidence to show that there was anything in the size, position, control, or movement of the motor truck when the engineer first observed it to indicate that it was not approaching under perfect control, or that it would not or could not be halted before the crossing was reached, nor is there any basis in the record before us for either the assumption or the argument that the engineer, at whatever

point he was when he first observed or could have observed the motor truck, could or should have suspected or realized that it was proceeding or would continue to proceed without stopping, to the crossing, regardless of the visible presence of the approaching car or of its danger signals by bell and whistle and of the several warning signals at the crossing, which, according to the undisputed evidence, were functioning within the direct line of vision of the driver of the truck. The testimony of the engineer, given upon the trial of the cause, that his first realization that the motor truck was not to stop before the crossing was reached by it came when his car was within 50 feet of the crossing is supported by every inference and intendment in the case. The respondents, however, contend that there is sufficient evidence to support the conclusion that the motorman discovered the proximity of the truck to the railroad track when he was 150 feet from the point of collision and when the truck was 100 feet from the point of collision; that he then saw and knew that the truck could not be stopped before coming upon the tracks, and that the evidence disclosed that at the speed he was operating he could have come to a standstill by the application of the emergency brake within 100 feet, and thus 50 feet short of the point of contact. The argument is that under these circumstances he was guilty of negligence for which the company was responsible. At the coroner's inquest this witness testified as follows:

"Q. How far back did you start to use the brakes? A. Well, I immediately applied the brakes when I seen him coming so fast. I had figured he could not stop, and I applied the brakes. Q. That would be when you saw him about 100 feet away? A. Yes, sir."

At the trial his attention was called to this testimony, and he was questioned as follows:

"Q. Were these words you spoke at that time the truth? A. Yes, sir."

From this testimony it is argued that the jury would have been justified in finding that the motorman knew that the auto truck could not stop when he first saw it 100 feet away from the track. The difficulty with the contention advanced by the respondents is that the testimony of the motorman as to the relative locations of the motor car and the motor truck were mere estimates. It would be absurd to give full weight to these estimates as to the positions of objects changing their relative locations between 50 and 100 feet a second, and to ignore all the other testimony of the witness in connection with such estimates. At the coroner's inquest he testified that the moment he made up his mind that the truck could not stop he applied his brakes. If other testimony justified the conclusion that he could stop in 100 feet

when he was traveling 25 miles per hour, and if he applied his brakes as he testified he did at the moment he saw that the truck could not stop, then it is clear either that he was going at a higher rate of speed than 25 miles per hour or that the motor car could not be stopped in 100 feet at that speed, or that the car was nearer to the point of collision than the witness then stated. The truck, if it was going at the speed estimated of 18 miles an hour, would cover the distance of 50 feet in less than two seconds. Upon the trial the motorman estimated the distance of the auto truck from the track, at the time he made up his mind it would not stop, at 50 feet, and his own distance at 80 feet from the point of collision, and under all the evidence it is clear that the motor car could not be stopped in the intervening distance of 80 feet. There is still another reason for concluding that the testimony of the motorman as to the point where he made up his mind that the truck could not stop, when testifying before the coroner's inquest, was an inadvertence, if such testimony be construed as meaning that he so made up his mind when the truck was 100 feet from the track, and that is because the auto truck could be stopped in 20 feet; hence he could not have known that the auto truck could not stop before reaching the track when it was 100 feet from the track, because as a matter of fact it could stop in 20 feet. It is not at all clear that the motorman intended to testify at the trial that he determined that the truck could not stop when the truck was at a distance of 100 feet from the track, when he said his testimony before the coroner's inquest was true, for such a statement was inconsistent with his whole testimony, and he evidently did not notice any inconsistency. It is true that what he said was susceptible of this interpretation, but, taken in connection with all his testimony at the trial, and such portions of it at the coroner's inquest as were called to his attention upon the trial, the jury would not have been justified in inferring that the motorman knew when the truck was 100 feet away from the track that it could not stop. If the verdict is based upon that finding, it is not supported by the evidence. It follows irresistibly that no precaution which the engineer of this car was

legally or reasonably bound to take, and no action which was actually or reasonably within his power or duty, could have avoided this collision. The only theory upon which the appellant herein could, under the facts of this case, be held to be guilty of negligence and hence legally responsible to these plaintiffs for their injuries, caused through this collision, is that advanced by the respondents herein as to the law governing this case which, as presented in their briefs, is that—

"The operator of a railroad train, while carrying passengers for hire when approaching a much used public highway where a vehicle is seen approaching the railroad crossing such highway has no right to presume that such vehicle will stop or not attempt to make the crossing ahead of his moving car."

In support of this theory as to the law of this case the respondents chiefly rely upon the cases of *Bilton v. S. P. Co.*, 148 Cal. 443, 83 Pac. 440; *Tousley v. Pac. Ry. Co.*, 166 Cal. 457, 137 Pac. 31; and *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 569, 87 Pac. 24. The rule laid down in these cases, however, has no application to the operation of steam or motor railroads outside of cities and engaged in interurban operation. This is clearly pointed out in the authorities hereinbefore referred to, distinguishing these latter cases and stating the correct rule applicable to the operation of interurban railroads. To give application of the rule for which the respondents contend to steam or motor railroads engaged in interurban travel operating outside of cities would be to render practically impossible our modern and up-to-date methods of rapid transit between towns and cities.

The appellant herein urges certain other contentions relating to alleged errors of the trial court in the giving of certain instructions relative to the application of the doctrine of *res ipsa loquitur* to the case as presented to the jury, but in view of our conclusions as to the main features of these cases we do not deem it necessary to deal with these contentions.

The judgments are reversed.

We concur: WILBUR, C. J.; LENNON, J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; KERRIGAN, J.

192 Cal. 343

MORRIS v. STANDARD OIL CO.
(L. A. 7480.)

(Supreme Court of California. Oct. 31, 1923.)

1. Attorney and client ⚡93—Attorney has authority to remit from personal injury judgments obtained for his client.

The authority of an attorney, whether he represents an adult or a minor, extends to remission from judgments for personal injuries obtained for his client.

2. Infants ⚡90—Attorney may accept remission of judgment for minor without signature of "guardian ad litem."

Code Civ. Proc. § 283, subd. 1, providing that an attorney shall have authority to bind his client in all steps of the action by his agreement filed with the clerk or entered on the minutes, held to apply to remission from a judgment for personal injuries suffered by a minor represented by a guardian ad litem under order granting new trial, unless there was a remission, and it was not necessary for the guardian, who had engaged the attorney to sign the remission, a guardian ad litem being a person appointed by a court to look after the interests of an infant when his property is involved in litigation, his duty ending when the suit is prosecuted to final judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guardian ad litem.]

3. Infants ⚡90—Approval of court to remission of claim by attorney to avoid new trial held not necessary.

Where an attorney representing a guardian ad litem, in order to avoid a new trial, made a remission of more than half of a judgment secured in a personal injury action brought by the ward, such remission was binding, and it was not necessary to obtain the approbation of the court, even if the remission be assumed to constitute a compromise or compounding of the claim within Code Civ. Proc. §§ 372, 1769.

4. Infants ⚡90—Attorney may remit from judgment obtained after entry and docket thereof.

An attorney may bind an infant represented by guardian ad litem in a personal injury suit a remission from a judgment to prevent a new trial, although it has been entered and docketed, notwithstanding Code Civ. Proc. § 283, subd. 2, relating to the authority of an attorney, and section 1810b, requiring appointment of a general guardian when a judgment for a minor is for money.

5. Damages ⚡132(6)—\$12,000 held not excessive for injuries to legs of 13-year old boy.

Verdict reduced to \$12,000 held not excessive, where a 13-year old boy sustained injuries to both legs in an automobile collision, the flesh being torn from the bone, and the joints exposed, the evidence being conflicting as to whether the injuries would be outgrown, and as to improvement in the functional use of the limbs.

6. New trial ⚡162(1)—That jury found same amount of damages previously held excessive held not to deprive court of jurisdiction to require remittitur.

Where, in a personal injury action, judgment was reversed for excessiveness of the damages, and a new trial granted on the question of damages, and the second jury returned a verdict in the same amount, the trial judge had jurisdiction to require a remittitur as a condition for avoiding a new trial, and was not bound to accept the second verdict as final.

7. Interest ⚡53—Interest held not recoverable from time of first trial where remittitur of recovery required.

Where, in a personal injury action, plaintiff recovered damages before two juries, and was then required to remit part of the recovery, there could be no recovery for interest from the time of the first judgment, the amount of the recovery not then being ascertained, though the question of liability was not retried.

8. Appeal and error ⚡766—Failure to print complaint and answer in record not ground for dismissal.

In view of Code Civ. Proc. § 953c, as amended by St. 1919, p. 261, an appeal need not be dismissed because the complaint and answer are not printed in the record.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Milton Morris, a minor, by J. M. Morris, his guardian ad litem, against the Standard Oil Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Lawler & Degnan, of Los Angeles, Dorsey Whitelaw, of El Centro, and George H. Moore, of Los Angeles, for appellant.

A. L. Hubbell, of Calexico, for respondent.

LAWLOR, J. This is an action for damages for personal injuries, brought by the plaintiff, Milton Morris, a minor, by his guardian ad litem, J. M. Morris, father of plaintiff, against the Standard Oil Company, a corporation.

The facts in the case are these:

Plaintiff's age at the time of the accident was thirteen years. He was riding a bicycle in a southerly direction on the west side of Imperial avenue, north of Seventh street, in the city of Calexico, Imperial county. At the same time an automobile truck belonging to the defendant was being driven in a northerly direction on the east side of Imperial avenue, and turned, without warning, to the west at the intersection of Seventh street and Imperial avenue. The plaintiff was knocked down, and the rear wheels of defendant's truck caught him, injuring him by tearing and lacerating his right leg and left ankle and foot.

On the trial the jury rendered a verdict in favor of plaintiff for \$25,000, and on June

19, 1922, judgment was entered for that amount. On June 28, 1922, defendant gave notice of intention to move for a new trial, upon which motion the court ruled as follows on July 31, 1922:

"The said motion for a new trial is hereby granted on the grounds of excessive damages having been awarded by the jury and insufficiency of the evidence to justify the verdict; provided, however, that if plaintiff accepts within 30 days \$12,000 damages in lieu of the amount awarded in the jury's verdict then the motion for a new trial is hereby denied."

Five days later respondent filed an "election to remit" in the following words:

"Comes now the above-named plaintiff by A. L. Hubbell, his attorney, and elects to remit the sum of \$13,000 from the judgment, rendered in favor of plaintiff on the 19th day of June, 1922, in accordance with order of court herein granting a new trial unless such remission is made.

"Plaintiff claims interest on said judgment from the 16th day of April, 1921, the date of judgment fixing plaintiff's right to a recovery of damages.

"Plaintiff stipulates and agrees to stay execution until the 20th day of August, 1922.

"A. L. Hubbell, attorney for plaintiff."

The defendant, on August 18, 1922, gave notice that it—

"hereby appeals to the Supreme Court of the state of California, from all of that portion of that certain order of said superior court made and entered in said action on July 31, 1922, denying defendant's motion for a new trial therein as follows: 'Provided however, that if plaintiff accepts within 30 days \$12,000 damages in lieu of the amount awarded in the jury's verdict, then the motion for a new trial is hereby denied.' Defendant also hereby appeals to the Supreme Court of the state of California from that certain judgment made and entered in said action on the 20th day of June, 1922, and from the whole thereof. Dated August 18, 1922."

There was a former appeal in the cause to the district court of appeal of the First Appellate District, Division No. 1. *Morris v. Standard Oil Co.*, 188 Cal. 468, 205 Pac. 1073. On that trial respondent recovered judgment for the same amount—\$25,000—and an appeal was taken by appellant on two grounds—contributory negligence and excessive damages appearing to be given under the influence of passion or prejudice. The judgment was reversed on the ground of excessive damages, and a petition for hearing in this court was granted. The opinion of the District Court of Appeal was adopted in the decision herein (188 Cal. 468, 205 Pac. 1073), and the judgment was reversed, and a new trial granted with the following direction to the lower court:

"There is no necessity for again trying any of the issues of the case except that of the amount of damages. All the other issues are

sufficiently disposed of in the foregoing opinion, and the evidence does not indicate any necessity for further investigation thereof in the court below.

"The judgment is reversed and the cause is remanded to the lower court for a new trial, solely upon the issue of the amount of damages, with directions to that court, upon the settlement of that issue, to render judgment in favor of the plaintiff for the amount so found."

Before considering appellant's final point that the amount of the judgment for \$12,000 is still excessive within the meaning of subdivision 5, section 657, Code of Civil Procedure, we will dispose of its contention that:

"Either the judgment entered and docketed * * * on June 19, 1922, was final in the court in which it was pronounced when the remission was filed, or there was no judgment at all, because the motion for a new trial had been granted."

It is argued that the signature of the attorney to the remission was not sufficient to bind respondent—that it should have been signed by the guardian ad litem, that the court failed to approve the remission, and that an attorney has no authority to bind either a minor or an adult by joining in a modification of a judgment after it has been entered and recorded.

With respect to the first point it is contended that the "remission which has the effect of waiving more than half of the judgment was not signed either by the guardian ad litem, or by any general guardian; it is signed only by the attorney for plaintiff"; and that—

The "plaintiff is a minor, and, unless the consent and agreement is absolutely binding on the plaintiff and his guardian, the plaintiff can at any time before he is 21 years of age repudiate the remission—even though the judgment as reduced were fully paid—without refunding a dollar of the judgment so paid. In so doing he could not even be embarrassed by the assertion that his guardian had signed the agreement or received the money. His guardian ad litem or a general guardian could procure the invalid remission and satisfaction to be annulled, dismiss the action and commence another, or proceed to a third trial and judgment in the present case. The defendant has the right to a final, binding adjudication."

The guardian ad litem engaged the attorney. A guardian ad litem is:

"A person appointed by a court to look after the interests of an infant when his property is involved in litigation. He manages the defense of an infant defendant, where there is no parent, or other guardian. He is a species of attorney, whose duty is to prosecute for the infant's rights, and to bring those rights directly under the notice of the court. He can do nothing to the injury of the infant. His duty ends when the suit ends; when it is prosecuted to final judgment." *Anderson's Dictionary of Law*, p. 498.

In *Beliveau v. Amoskeag Mfg. Co.*, 68 N. H. 228, 40 Atl. 735 (44 L. R. A. 169, 73 Am. St. Rep. 577), it was said:

"The representative may, in the exercise of an undoubted authority, employ an attorney at law in the management and control of the suit. * * * In such a case, the attorney becomes clothed with the ordinary powers pertaining to an attorney of record. * * * His authority is as extensive as it is in other cases, and the infant, through his representative, is bound by the attorney's acts within the ordinary scope of his authority the same as an adult would be, and has a like remedy against the attorney for any abuse of such authority, express or implied."

As to the power of an attorney, as such, employed by the guardian ad litem of an infant to prosecute an action for personal injuries, the question arose in that case whether the settlement of the suit by the attorney was binding on the ward. The court declared:

"No recognizable distinction is believed to exist between the case of an entry of judgment in regular course by an attorney of a party sui juris and the case of a like entry by an attorney properly employed by the representative of an infant to conduct the suit. The authority of attorneys of record to make such entries is always presumed, if nothing appears to the contrary, and when made they are conclusive as between the parties, in the absence of fraud or mistake."

[1, 2] The authority of an attorney, whether he represents an adult or a minor, extends to remission from judgments. *Mead v. Buckner*, 2 La. 282; *Case v. Hawkins*, 53 Miss. 702; *Picketts' Executors v. Ford*, 4 How. (Miss.) 246; *Lamb v. Williams*, 6 Mod. 82, 1 Salk. 89; *Earl of Yarmouth v. Russell*, 2 Ld. Raym. 1142. There is no statutory requirement that there shall be formal consent by the client to the remission, and the cases cited by appellant are to the effect that, when an attorney has full authority to represent his client and it is not made to appear to the court that the client in fact refused to give consent, the act of the attorney will bind the client. *Preston v. Hill*, 50 Cal. 43, 19 Am. Rep. 647; *Trope v. Kerns*, 83 Cal. 553, 23 Pac. 691; *Knowlton v. Mackenzie*, 110 Cal. 183, 42 Pac. 580. Subdivision 1 of section 283, Code of Civil Procedure, provides that an attorney shall have authority to bind his client in all steps of the action by his agreement filed with the clerk, or entered upon the minutes of the court, and the remission in this case is such an agreement, and it was filed as required by the section. Appellant, in its contention as to this subdivision, has cited a number of authorities as having "authoritative force and illustrative value" to the effect that, as the custom and practice is to state in the orders that, unless the plaintiff accepts the remission within a certain period, the motion for a new trial will be granted, it must be held that the plaintiff must sign the remission in

every case. But, where there is no specific provision requiring the signature of the guardian ad litem, and there is no suggestion of a lack of consent by such guardian, the signature of the attorney is sufficient without that of the guardian ad litem to bind the minor.

[3] As to the second proposition—that the court did not approve the remission—appellant cites sections 372 and 1769, Code of Civil Procedure. We shall assume for the purposes of the decision that the remission constituted a compromise or a compounding of the claim within the meaning of the above sections.

It is a fact that there was no formal "approbation of the court." The statute does not require that the approval shall be expressed in any particular manner, or that it shall, in terms be entered in the minutes. We have found no authority in this state as to how the approval is to be given. It has been held elsewhere that, in the case of a sale of real property of a minor, the confirmation by the court of the sale required by the statute need not necessarily appear by a formal entry of record; it is sufficient if the approval appear from the clerk's minutes, or if it can be gathered from the whole record. *The American Law of Guardianship*, Woerner, p. 275; *Henry v. McKelvie*, 78 Mo. 416, 430; *Gilbert v. Cooksey*, 69 Mo. 42. The same rule was applied in *Daffron v. Modern Woodmen of America* (1915) 190 Mo. App. 303, 176 S. W. 498, involving a settlement of a void benefit policy by a guardian ad litem. There is authority for the proposition that the approval of the court may be implied from the entry of judgment in regular course. *Tripp v. Gifford*, 155 Mass. 108, 29 N. E. 208, 31 Am. St. Rep. 530; *Walsh v. Walsh*, 116 Mass. 377, 17 Am. Rep. 162; *Bunnell v. Bunnell*, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607; *Missouri Pacific Ry. Co. v. Lasca*, 79 Kan. 311, 99 Pac. 616, 21 L. R. A. (N. S.) 338, 17 Ann. Cas. 605; *Burke v. Northern Pacific Ry. Co.*, 86 Wash. 37, 149 Pac. 335, Ann. Cas. 1917B, 919; *Franklin Savings Bank v. Taylor*, 53 Fed. 854, 4 C. C. A. 55; *Glover v. Bradley*, 233 Fed. 721, 147 C. C. A. 487, Ann. Cas. 1917A, 921; *Robison v. Floesch Const. Co.*, 291 Mo. 332, 236 S. W. 332, 20 A. L. R. 1239. We quote from *Beliveau v. Amoskeag Mfg. Co.*, supra, that it is not in every instance necessary to formally bring the settlement to the attention of the court.

"We apprehend it makes no difference, practical or legal, whether the agreement of the counsel to make them is expressed orally in open court and the entries are thereupon made upon the records by its order, or whether the agreement is reduced to writing by the counsel, and duly filed and entered upon the records, without being expressly brought to the court's attention and without obtaining its sanction, which in practice is never refused, and, at most, is but the merest formality. In such a case, the assent of the court is to be presumed."

The primary duty of the court is to guard the interests of the minor, and, if an order or judgment is entered by the court with all the facts before it, after due judicial examination and adjudication, it will be binding upon the minor. It is only where it affirmatively appears that the court did not make any judicial inquiry as to whether the settlement or consent decree was for the benefit of the minor that it is not binding. *Rankin v. Schofield*, 71 Ark. 168, 66 S. W. 197, 70 S. W. 306, 100 Am. St. Rep. 59; *Thompson v. Maxwell Land Grant & Ry. Co.*, 168 U. S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539; *Cotterell v. Koon*, 151 Ind. 182, 51 N. E. 235; *Ferrell v. Broadway*, 126 N. C. 258, 35 S. E. 467; *Millsaps v. Estes*, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496. In *Tripp v. Gifford*, supra, it was declared:

"Sometimes, but very rarely, the proposed arrangement is brought to the attention of the court, and its sanction obtained. In most instances, however, the settlement is made and the judgment entered without calling the attention of the presiding justice to it, or obtaining his approval. That such judgments conclude the minor we have no doubt, * * * and, even in equity, if a decree is entered against him by consent without special inquiry, he will be bound by the decree."

It would be idle to hold, under the circumstances presented here, that the court did not give its approbation to the remission with regard to the best interests of the minor. In deciding that \$12,000 was the full value of respondent's claim for damages, the court must necessarily have concluded that, in executing the remission, the attorney secured for respondent all that he was entitled to receive. In strictness, the guarding of the best interests of respondent was not an element in the inquiry as to what would be suitable damages for the injury; but the determination of that question necessarily involved the other—whether the attorney was acting for the best interests of respondent in agreeing to accept the lesser sum.

[4] On the third proposition—that an attorney cannot bind his client, whether minor or adult, by joining in a remission of a judgment which has been entered and docketed—appellant relies on subdivision 2, section 283, Code of Civil Procedure. With reference to this subdivision it is urged that "it is directly and primarily applicable"—that after judgment an attorney has power only upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment. This contention is the equivalent of a claim that, when a money judgment in favor of a minor has been entered and docketed, the authority of the attorney for the guardian ad litem is limited to the discharge of the judgment and to prosecute the appeal. This, in effect, would be to deny to the minor one of the incidents of the remedy of a motion for a new trial—that is

to say the right to accept a less sum, where there is no suggestion the guardian ad litem does not consent to the reduction or that the court does not give its approval. This is not the law. Where the authority of the attorney is not disputed by the client, he may, after the entry of judgment, represent the client on a motion for a new trial, and in the absence of fraud or mistake agree to the reduction of the judgment. The attorney's execution of the remission is merely a step in fixing the amount of the judgment. It follows that subdivision 2 has no application where a motion for a new trial has been made and is undetermined.

Appellant contends that the above claim is fortified by section 1810b, Code of Civil Procedure, to the effect that "if said judgment is for money, and there is no general guardian of said minor, one shall be appointed by the court, and the entire amount of the judgment shall be paid to and * * * cared for by such general guardian, under the control of the court." This contention involves the claim, already disposed of, that the entry and docketing of the judgment for \$25,000 on June 19, 1922, precluded the reduction thereof. It would appear from the reply brief of appellant that, in a letter to the attorney for respondent, appellant inquired whether section 1810b had been complied with. The reply was in the affirmative. As a matter of fact, no general guardian was appointed. The explanation is given in respondent's brief that the appointment could not be made, because there was no property to be delivered to a general guardian. Section 1810b is addressed to the payment of the judgment, and not to matters preliminary thereto. The payment of the judgment had not been reached, and we will not assume that a general guardian will not be appointed to effect a satisfaction of the judgment.

It is clear from the foregoing that the signature of the guardian ad litem was not necessary to render the remission binding on respondent; that the court gave its approval; that the act of the attorney in executing the remission before the motion for a new trial was determined was the act of the guardian ad litem and binding on respondent, even though the judgment for \$25,000 had been entered and docketed.

[5] This brings us to consider appellant's final contention that the reduced judgment of \$12,000 is still so grossly excessive as to appear to have been given under the influence of passion or prejudice. On appeal this presents a question of law, that is to say, whether or not the trial court abused its discretion in fixing the sum of \$12,000.

The injuries of respondent, according to the uncontradicted testimony, were to the right leg, the flesh being torn off from a point 4 inches above the knee to a point 5 inches below the knee, three-fourths of the way around the leg, and the tissue of the knee

joint being torn open "one inch so you could see the inside of the joint"; the tissues of the left ankle and foot were badly torn, the injury being of the same nature as that of the right knee. Dirt and clothing were ground into the wounds, causing infection. The flesh that was not actually torn off, "was so bruised and killed by the physical violence that it later sloughed off" and an infection set in, adding to the loss of tissue. The boy suffered greatly, and for two or three weeks after the accident it was necessary to give him opiates. Six weeks afterwards, from 20 to 30 square inches of skin were grafted on the raw places on the left ankle and foot, and on the seventh week 40 square inches were grafted on the right knee. In order to perform the original operation an anæsthetic was necessary. Efforts were made by the use of some mechanical device to keep the muscles and joints from stiffening. This device was used three and a half months and caused great pain and "hurt terrible." An ulcer or running sore on the right knee required constant dressing, and did not heal until over a year after the accident. The respondent's right knee is stiff and bent, and the right leg is somewhat shorter than the other, due to this bowing at the knee joint; the left foot is deformed, there is no lateral motion in the ankle, and there is a limitation in the extension of the foot. One of the physicians testified:

"The flexion of the knee joint was only possible to about 45 degrees. The lateral motion of the left ankle joint was also limited about 50 per cent. * * * At the time the treatment was completed, he was able to walk without the aid of crutches with a slight limp. * * * The scar about the right knee extended over an area from 4 inches above to 4 inches below the knee joint, running posteriorly, behind the leg, and there was also a band which extended across the front of the leg. The flexion in the knee joint was limited to a right angle or 90 degrees; the extension of the joint was limited about 5 per cent. There was the appearance of an external bowing of the leg, which was due mainly to the contraction of the scar tissue. * * * There was a scar across the left ankle joint extending from one malleolus to another. * * * There is a deformity of three outer toes apparently due to the injury. The toes are healed in a position of partial extension and the motion is fairly well limited. The motion in the left ankle joint is limited in extension to about 135 degrees. The flexion is practically normal."

As a result of the injury, both feet of respondent have become "flat," and the circulation in the injured limbs is impaired, the result being that cold weather affects the injured limbs to a great extent. The right leg showed a diminution in size of $1\frac{1}{4}$ inches below the knee. The flesh over the injured portions of the knee and ankle is scar tissue, which is sensitive to pressure, and the tend-

ency of which is "to contract and keep on contracting." The question was asked whether the motion in the stiffening joints would improve by treatment, and the answer was given that "the scar is deep and is close to the bone and tendons, and it is doubtful if he ever gets much more movement there." Respondent is described as having been rendered emotional and nervous by the injury. It was over a year before the right knee healed, and he missed a year of school. There is a conflict in the testimony as to what extent respondent will outgrow the injuries, and as to the improvement in the functional use of the limbs. It was testified that he would never have normal action and motion in either the right leg or left ankle—Dr. C. E. Early, a witness for appellant, saying he would "always have a certain degree of limitation of motion in both his left ankle and right knee." The evidence is in conflict as to whether or not the shortening of the right leg was caused by the contraction of the scar, resulting in curvature of the spine and flat feet, and whether or not these conditions could be improved and eradicated by treatment. X-ray pictures showed a porous condition of the bone, and there was evidence that this might not be due to the injury but to the youth of the boy. In view of the evidence we cannot hold that the award of \$12,000 is the result of passion or prejudice, or that, as appellant contends, "the amount allowed by the trial court after the reduction is to suggest at first blush that the amount is punitive in its nature."

[6] Respondent makes several contentions in support of the claim that the judgment was never modified, and that, therefore, it stands for the original sum of \$25,000. It is first contended that the order on the motion for a new trial not having been given in open court should have been signed by the judge, and not having been so signed it was a nullity. The minute entry shows the order was made in open court, and it is not claimed that any steps were taken to have the minute entry amended. Nor does it appear that the point was otherwise made in the court below. It is next urged "that the trial judge had not jurisdiction to require the respondent to accept a reduced judgment, or have a new trial, after a second jury had rendered a verdict for the same amount given by the first jury." This contention proceeds upon the theory that as this court remitted the case for retrial on the sole issue of the amount of the damages, when the jury fixed the amount the court had no alternative but to accept such sum as final. This point is without merit, for it was the duty of the trial court in considering the assignment of excessive damages on the motion for a new trial to review the evidence received on that issue and determine anew whether the amount awarded was justified. The action of this court limiting the retrial to the amount of the damages put

that issue at large to be determined just as if there had been no previous trial of the cause.

[7] Respondent, in the "election to remit" incorporated a demand for interest on the reduced judgment from April 16, 1921—the date of the entry of the first judgment. It is urged here that the liability of appellant having been fixed on the first trial and confirmed on appeal, it became the law of the case, and the subsequent judgment should bear interest from the date of the former. Interest has relation to an ascertained principal sum. The amount of the judgment in this case after reversal was not ascertainable until the question of excessiveness presented by the motion for a new trial had been determined, and hence appellant would not meanwhile be in default for interest. *Cox v. McLaughlin*, 76 Cal. 60, 67, 18 Pac. 100, 9 Am. St. Rep. 164.

[8] Respondent's final point, that the appeal should be dismissed because the complaint and answer were not printed in the record, and that this cannot be dispensed with is sufficiently answered by the concluding portion of section 953c, Code of Civil Procedure (Stats. 1919, p. 261).

Judgment affirmed as modified.

We concur: WILBUR, C. J.; LENNON, J.; WASTE, J.; MYERS, J.; KERRIGAN, J.; SEAWELL, J.

192 Cal. 369

MUTUAL BEN. LIFE INS. CO. OF NEWARK, N. J., v. RICHARDSON, State Treasurer. (S. F. 10446.)

(Supreme Court of California. Nov. 2, 1923.
Rehearing Denied Nov. 28, 1923.)

Taxation §140—"Gross premiums" received on which tax was payable held not to include "dividends" credited to policy holders.

Under Const. art. 13, § 14, requiring insurance companies doing business in the state to pay an annual tax on all gross premiums collected, where the policies of a mutual insurance company provided that "dividends" which constituted the policy holders' share of the divisible surplus after the payment of all expenses out of the premiums collected might be applied in reduction of the premium for the ensuing year, *held*, that the gross premiums collected the succeeding year on which the tax was payable was the amount actually paid in by the policy holders after deducting the dividend credits and not the total assessment for the year.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dividend; Second Series, Gross Premiums.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by the Mutual Benefit Life Insurance Company of Newark, N. J., against Friend W. Richardson, as treasurer of the state of California. Judgment for plaintiff, and defendant appeals. Affirmed.

U. S. Webb, Atty. Gen., and Raymond Benjamin, of San Francisco, for appellant.

David L. Levy, and Sapiro, Levy, Hatfield & Hayes, all of San Francisco, for respondent.

MYERS, J. This is an appeal by defendant from a judgment in favor of plaintiff in an action to recover certain taxes paid to the state by plaintiff upon the business done by it within this state during the year 1916, under the requirement of section 14, article 13 of the Constitution as adopted in 1910, which provides as follows:

"Every insurance company or association doing business in this state shall annually pay to the state a tax of one and one-half per cent. upon the amount of the *gross premiums received* upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state. * * *" (Italics added.)

It was proved at the trial and the court found that plaintiff is a mutual company and conducts its business of life insurance on the mutual plan. It has no capital stock and no stockholders, its board of directors being selected by the policy holders. Plaintiff writes insurance upon the lives of its policy holders on the level premium plan, by virtue of which the maximum annual payment which any member or policy holder can be called upon to pay is the same throughout the life of the policy, and is therein stipulated. Under this plan each policy holder receives his insurance at cost.

Plaintiff calculates its premium rates upon the following factors:

(1) The adoption of a table of mortality showing the probable death rate for each age of life. Plaintiff uses a table showing an admittedly higher death rate than that which will probably be realized, with the result that at the end of the year it is found that the demand upon the premium necessary to take care of death losses is less than that contemplated in fixing the amount of the premium.

(2) The adoption by plaintiff of an assumed rate of interest to be realized upon its invested assets during the lifetime of the policy. This assumed rate of interest is in fact lower than that which plaintiff expects to and actually does realize.

(3) The addition to plaintiff's other requirements of a sum, technically known as "loading," for the purpose of meeting the expenses of conducting the business as well as any unforeseen contingencies, such as excessive death losses and unusual investment

conditions. The provision for these expenses and contingencies is also greater than experience shows to be required.

Upon the assumed factors above set forth, the level or constant premium rates stipulated in policies of insurance by plaintiff are computed. This is done as a measure of precaution with the knowledge that the premiums so stipulated will be in excess of plaintiff's requirements.

The premiums which plaintiff collected and received during the calendar years 1915 and 1916, respectively, were computed in the manner above set forth.

The plaintiff's policies of insurance, issued on the participating plan, contain, or are subject to, the following provisions:

"Upon payment of the second year's premium, and at the end of the second and of each subsequent policy year, this policy while in force will be credited with such dividends as may be apportioned by the directors, and such annual dividends will include the portion of the divisible surplus accruing hereon. Dividends thus credited will be paid in cash, or, at the option of the insured, will be applied either in reduction of premium, or upon the addition or accelerative endowment plan; but, if dividends have been applied upon the addition plan, subsequent dividends cannot be applied upon the accelerative endowment plan, or vice versa. If settlement of this policy be made in accordance with privileges No. 2 or No. 3, or No. 4, the stipulated payments under privilege No. 2 or No. 3, or the installments certainly payable under privilege No. 4, will be increased by such annual dividends as may be apportioned by the directors, but such dividends will be payable only in cash.

"Under the addition plan, dividends are applied to the purchase of additional participating insurance (herein referred to as dividend additions) payable with the policy, such insurance being purchased at the company's rates therefor published and in force at this date. This policy may be converted into a fully paid-up participating policy, payable at the same time as this policy, subject to any outstanding indebtedness of this policy whenever the reserve on such additional insurance, together with the reserve on the original policy, computed on the basis hereinbefore mentioned, shall equal the net single premium therefor, computed on the same basis.

"Under the accelerative endowment plan, dividends are applied to the conversion of the policy into an endowment, payable at a specified and gradually diminishing age; or, if preferred, into a fully paid-up participating policy, payable at the same time that this policy is payable according to its terms."

At the end of the year ending December 31, 1915, plaintiff credited to each policy entitled thereto its rightful share of the divisible surplus arising from the three sources above named, and thereafter during the year 1916 as the premiums fell due, plaintiff notified its policy holders of the amount thereof, and that, in accordance with the policy contract, if the policy holder so elect-

ed, plaintiff would maintain the insurance in force for the ensuing year, in return for, and would accept and receive as the renewal premium the difference between the premium stipulated in the policy and the amount of dividend credited thereto. During the year 1916 numerous policy holders in California elected to have the stipulated renewal premium thus reduced by, and to obtain insurance for the ensuing year by payment of, such difference. Said policy holders actually paid such abated premium and no more during said year 1916, and the total amount of the gross premiums received by plaintiff from its business in California during said year was \$661,604.44. Notwithstanding this, the board of equalization added to that amount the sum of \$123,393.97, which was the aggregate amount of abatements made as aforesaid. Such abatements were, in fact, portions of premiums paid in previous years, and found to be unnecessary, and upon which the plaintiff had paid the tax for the year when received. The present action is to recover the taxes paid by plaintiff under protest upon the aggregate amounts of those abatements.

The solution of the question thus presented may perhaps be aided by considering concretely a typical case found in the transcript. One Wallace held a \$1,000 policy with plaintiff, taken out in June, 1915. The first year's premium was \$18.80, which he paid plaintiff. On this \$18.80 plaintiff paid the tax required by law. In June, 1916, plaintiff found that Wallace was entitled to two dividends aggregating \$4.92. Wallace received a notice advising him that his premium of \$18.80 would be due June 23, 1916, and that this first year's premium deposit entitled him to receive two "dividends," amounting to \$4.92; that in renewing his policy for another year he could apply the \$4.92 dividends to the \$18.80 premium due; that by allowing the company to keep the dividends due him of \$4.92 he could pay the premium of \$18.80 for the second year, if, in addition to the \$4.92 due him and retained by the company, he sent in \$13.88 more. This is what Wallace did. Plaintiff claims that in the second year the gross premium received by it from Wallace was but \$13.88. Defendant took the position that the gross premium received by plaintiff from Wallace during the second year was \$18.80, made up of the \$13.88 paid by Wallace in cash and \$4.92 "dividends" retained by the company. Plaintiff brought this action to recover the tax which it was compelled to pay upon the \$4.92, which it claims was not received by it during the second year.

The question thus presented is stated by counsel for appellant as follows:

"In the second year of Wallace's policy did the company receive a gross premium of \$18.80 or \$13.88? If they received \$18.80, the judg-

ment should be reversed. If they received \$13.88 the judgment should be affirmed."

This question seems almost to answer itself. Learned counsel on both sides have, with commendable industry and ability, submitted exhaustive briefs herein, wherein are collated and carefully analyzed the various cases from other jurisdictions thought to have some bearing upon the question. But the problem does not appear to us to require a resort to such methods for its solution. If we assume that Mr. Wallace's policy was issued upon the 20-year payment plan, as was the sample policy of the plaintiff which was introduced in evidence by the defendant, and assume further that the company's experience during each of the 20 years would be similar to that of the year 1915, a simple computation discloses that Mr. Wallace would have been required to pay, and would have paid, during the 20-year period, an aggregate of \$282.52 in premiums. This would be the total amount actually received by the company from Mr. Wallace in the payment of premiums under this policy. But if appellant's contention be correct, the company would be required during this period to pay taxes upon the aggregate sum of \$376 as gross premiums received by it from Mr. Wallace. The \$93.48 representing the difference between these two sums certainly would not have been actually received by the company. Moreover, the company would not under the terms of its policy have been entitled to collect this amount from Wallace, and he could not have been required to pay it. It is true that the policy contained a provision for the payment of an annual premium of \$18.80, but it also contained the provision that—

"Upon payment of the second year's premium, and at the end of the second and of each subsequent year, this policy, while in force, will be credited with such dividends as may be apportioned by the directors, and such annual dividends will include the portion of the divisible surplus accruing hereon. Dividends thus credited will be paid in cash, or, at the option of the insured, will be applied either *in reduction of premium*, or upon the addition or accelerative endowment plan. * * *" (Italics added.)

Assuming, as the law presumes, that the officers of the company would act fairly and regularly in the transaction of its business,

the "dividends" which the policy holder was thus entitled by the terms of his contract to have credited to his policy during each year after the first year thereof, would represent, as the evidence shows them to have represented, during the year 1916, the difference between the premium rate specified in the policy and the actual cost of that item of insurance for that period. Some language is used in the case of Northwestern Mutual Life Ins. Co. v. Roberts, 177 Cal. 540, 171 Pac. 313, which appears upon its face to give support to the contentions of appellant herein. But that language must be read in the light of the facts proved and the facts found in that case. That action was brought upon the theory that the "dividends" returned to the policy holders were "return premiums" within the meaning of that phrase as used in the constitutional provision above quoted. The findings and judgment therein were in favor of the defendant. What was said in the opinion in that case concerning the facts as to the sources from which the "dividends" were derived was based upon the facts as disclosed by the evidence in that case, properly interpreting that evidence in support of the findings and judgment. The findings herein expressly and completely negative the existence of such a state of facts as was there referred to, and no claim is made herein that they are not fully sustained by the evidence. The findings herein present substantially the precise situation upon the facts which obtained in the case of Mutual Benefit Life Ins. Co. v. Herold (D. C.) 198 Fed. 199, which was cited and distinguished upon its facts in the Northwestern Case, *supra*.

We are unable to escape from the conclusion that the plaintiff received no more than \$13.88 from Mr. Wallace during the second year of his policy, and that it should not be required to pay a tax upon any greater sum.

The judgment is affirmed.

We concur: WASTE, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.; RICHARDS, Justice pro tem

WILBUR, C. J., deeming himself disqualified, does not participate in the foregoing opinion.

192 Cal. 333

MILLER & LUX, Inc., v. SUPERIOR COURT OF CALIFORNIA IN AND FOR MERCED COUNTY et al. (two cases).**LAS ANIMAS & SAN JOAQUIN LAND CO., Inc., v. SAME.****(S. F. 10651-10653.)**

(Supreme Court of California. Oct. 31, 1923. Rehearing Denied Nov. 28, 1923.)

1. Dismissal and nonsuit § 60(1)—Stipulation extending statutory period for dismissal did not waive defendant's right to dismissal after expiration of extended time.

Under Code Civ. Proc. § 583, requiring dismissal of an action not brought to trial within 5 years after answer is filed, except where the parties stipulated in writing for an extension of the period, any stipulation of defendant extending the statutory period to definite dates did not operate as a waiver for all future time of the right of defendants to a dismissal after the expiration of the extended period.

2. Dismissal and nonsuit § 60(1)—Written stipulations continuing date of trial within statutory period did not extend beyond statutory period.

Neither did written stipulations entered into within the 5-year period continuing trials from time to time within the statutory period extend the time beyond the 5-year period.

3. Dismissal and nonsuit § 60(1)—Written stipulation waiving statutory right to dismiss action beyond statutory period would extend statutory period to date so extended.

Written stipulation expressly waiving the benefit of Code Civ. Proc. § 583, giving defendant the right to have an action dismissed if not tried within 5 years after filing of answer, except where parties extend the period by stipulation in writing, or postponing the case to a time beyond the statutory period, would extend the statutory period to the date to which the trial was postponed.

4. Dismissal and nonsuit § 60(1)—Stipulation to extend time for trying case is required to be in writing.

Under Code Civ. Proc. § 583, providing that an action shall be dismissed unless brought to trial within 5 years after filing of answer, except where parties by stipulation in writing extend the time, a written stipulation is necessary.

5. Dismissal and nonsuit § 60(7)—Insistence that trial of similar case precede that of instant case held not equivalent to written stipulation extending time for bringing to trial.

Under Code Civ. Proc. § 583, mere insistence of defendant's counsel that the trial of a similar case precede the instant case was not equivalent to a written stipulation to extend time within which case must be brought to trial to prevent dismissal.

6. Dismissal and nonsuit § 60(7)—Written stipulation continuing case to specified dates following trial of another similar case held not to continue trial indefinitely.

Where written stipulations made over 14 years ago provided that the trial of a case

should be continued to specified dates and follow the trial of another similar case, the case was not continued indefinitely to follow the similar case so as to prevent dismissal for delay.

7. Mandamus § 43—Appellate court determines whether facts are legally sufficient for denying motion to dismiss action.

In mandamus proceedings to compel dismissal of a case, the appellate court determines whether the facts previously passed upon by the trial court, in denying motion to dismiss under Code Civ. Proc. § 583, are legally sufficient for denying the motion, it not being within the discretion of the trial court arbitrarily to determine what extraneous circumstances will excuse a compliance with the statute.

8. Dismissal and nonsuit § 60(7)—Case held not "brought to trial" when trial postponed by consent.

Though plaintiff was ready to proceed to trial on a day agreed upon between the parties by written stipulation under Code Civ. Proc. § 583, authorizing a dismissal if not tried within 5 years from the filing of the answer, such case was not "brought to trial" on that date, where the trial was postponed by consent of parties.

9. Dismissal and nonsuit § 60(1)—Motion to amend cross-complaint held not equivalent to written stipulation to extend statutory period during which case must be tried.

Motion to amend cross-complaint held not in effect a written stipulation to extend statutory period within which Code Civ. Proc. § 583, provides that actions must be brought to trial to prevent dismissal, unless otherwise stipulated in writing.

In Bank.

Two applications for writs of mandate by Miller & Lux, Inc., and a similar application by Las Animas & San Joaquin Land Company, Inc., against the Superior Court of California, in and for the county of Merced, and Hon. William M. Finch, as Judge pro tempore thereof. Writs granted.

Edward F. Treadwell, of San Francisco, for petitioner.

James F. Peck, George J. Hatfield, and McWilliams & Hatfield, all of San Francisco, for respondents.

LENNON, J. Application is made to this court for a writ of mandate, directing the superior court, in and for the county of Merced, to dismiss three several actions, entitled James J. Stevinson, a corporation, v. Las Animas & San Joaquin Land Company, Incorporated, a corporation, et al. (No. 2102); James J. Stevinson, a corporation, v. Miller & Lux, Incorporated, a corporation, et al. (No. 2103), and East Side Canal & Irrigation Co., a corporation, v. Miller & Lux, Incorporated, a corporation, et al. (No. 2261). A dismissal is sought in each case, pursuant to the provisions of section 583 of the Code of Civil Procedure, upon the ground that the actions

were not brought to trial within 5 years, after the filing of answers.

Succinctly stated, the facts upon which petitioners base their application are these: The first two actions were commenced by the filing of complaints on the 22d day of August, 1905, and the third action on April 16, 1908. Answers of all the defendants were filed in the two former cases on February 16, 1907, and the answer of one of the defendants, who was the last to file his answer in the third case, was filed on October 13, 1909. The two former cases have therefore been at issue for over 16 years, and the third for over 14 years without being brought to trial. The cases were, however, set for trial shortly after the filing of the several answers last above referred to, and thereafter successive written stipulations were entered into between the parties continuing the trial of the cases from time to time. Among these stipulations were several made in 1907 and 1908, which, after continuing the trial of one of the cases sought to be dismissed to a definite date, further provided that the trial of that case should "follow immediately after the trial of the case of Elizabeth Turner, Administratrix, etc., et al. v. East Side Canal & Irrigation Company (No. 2179)." The latter case, hereinafter referred to as the "Turner Case," had been commenced on the 26th day of September, 1906; had been tried and prosecuted to judgment, and, after an appeal taken by both parties to this court, the judgment was reversed in part, and the case remanded for a new trial upon certain issues. In August, 1919, the last written stipulation was entered into, which continued the trials of all of the cases until March 24, 1920. On that date all of the parties appeared in court, and the plaintiffs, in the three cases now sought to be dismissed, were ready with witnesses to proceed to trial. There was on the calendar at that time for trial, in addition to these three cases, the Turner Case, which was then ready for a second trial. The attorney for the plaintiff in the Turner Case, who was attorney for the defendants in the three actions herein named, insisted at that time that the Turner Case should first be tried, and during the course of the argument said that the other cases could and should follow the Turner Case, because of the fact that this was the second trial of that case. After a hearing of the matter of the setting the causes for trial, the court below made an order reciting that "after some argument in the matter of time of trial of said cause [the four cases], it is upon stipulation of respective counsel ordered that time for trial of all cases be postponed to April 19, 1920, at 10 o'clock a. m." On April 19, 1920, the Turner Case was continued to May 15, 1920, and an order was made in each of the three cases that they be placed on the calendar for July 6, 1920, to be set for trial. On that

date, upon request of counsel for the defendants in the three cases, who was, as before noted, counsel for the plaintiff in the Turner Case, the Turner Case was set for trial for September 21, 1920, and the trial of the other three cases was set for September 28, 1920. On September 28, 1920, the trial of the Turner case was in progress, and because of this and the fact that counsel for the respective parties was the same in all of the cases, the trial of any one, or all, of the cases, save the Turner Case, was at that time impracticable. However, no order was made on that date with regard to the trial of the three cases other than the Turner Case, nor was any stipulation then or thereafter entered into for the continuance of the trial of those three cases beyond the date last mentioned. On the 14th of October, 1920, the attorney for the defendant in the three cases verbally notified the attorneys for the plaintiffs that he intended to move to dismiss the actions for want of prosecution. On the following day the plaintiffs served on the defendants a notice of a motion to set the actions for trial. On October 19, 1920, the court of its own motion and without any stipulation ordered that the time of the trial be postponed to November 15, 1920. On November 10, 1920, the defendants in the three cases gave notice of a motion to dismiss the actions. This motion was denied by the court on the ground that the request of counsel for the defendants in the three cases to try the Turner Case first, and the setting of the other cases on defendants' motion for September 28, 1920, "constituted, in effect, a continuance at the defendants' request," and that the failure to make an order of continuance on September 28, 1920, was immaterial, as the court was then engaged in the trial of the Turner Case.

That portion of section 583 of the Code of Civil Procedure pertinent to the facts of the particular case is as follows:

"Any action * * * shall be dismissed by the court * * * unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

The defendants rest their demand for a dismissal upon the plain provisions of the section last quoted, and insist that, inasmuch as the last-written stipulation only extended the time to March 24, 1920, and as the last consent or stipulation in open court only extended the time to September 28, 1920, the cases not having been brought to trial on that date, the lower court had no discretion but to grant the motion for a dismissal.

[1-3] It is, of course, well settled that any stipulation of the defendants extending the statutory period did not operate as a waiver for all future time of the right of defendants to a dismissal after the expiration of the ex-

tended period. *Los Angeles v. Superior Court*, 185 Cal. 405, 197 Pac. 79. Neither did any of the written stipulations entered into within the 5-year period continuing the trials from time to time within the statutory period have the effect of extending the time beyond the 5-year period. *Larkin v. Superior Court*, 171 Cal. 719, 154 Pac. 841, Ann. Cas. 1917D, 670; *Rio Vista Mining Co. v. Superior Court*, 187 Cal. 1, 200 Pac. 616. A written stipulation, however, expressly waiving the benefit of the section, or postponing the case to a time beyond the statutory period, would have the effect of extending the statutory period to the date to which the trial was postponed. *Larkin v. Superior Court*, supra.

An examination of the cases construing section 583, supra, discloses that no case decided by this court has held that anything short of a written stipulation extending in express terms the time of trial to a date beyond the 5-year period, or expressly waiving the right to a dismissal under that section, will suffice to toll the running of the statutory time. On the contrary, the cases uniformly hold that the provisions of section 583 are mandatory, and that, in the absence of a written stipulation, any action not brought to trial within the statutory period must be dismissed. *Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002; *Larkin v. Superior Court*, supra; *Los Angeles v. Superior Court*, supra; *Boyd v. Southern Pacific*, 185 Cal. 344, 197 Pac. 58; *Rio Vista Mining Co. v. Superior Court*, supra; *Ravn v. Planz*, 37 Cal. App. 735, 174 Pac. 690; *Andersen v. Superior Court*, 187 Cal. 95, 200 Pac. 963. Thus it has been held that the death of the attorney for the plaintiff, with the result that for over 4 years there was no acting attorney of record, or even the death of the plaintiff himself, cannot affect in any way the defendant's right to a dismissal of an action falling within the provisions of section 583. *Larkin v. Superior Court*, supra; *Andersen v. Superior Court*, supra. And while the actual trial of the case will retain in the court jurisdiction to enter judgment, a mere acquiescence by the defendant in plaintiff's motion to set a case for trial, as distinguished from an actual trial of the case will not suffice. *Rio Vista Mining Co. v. Superior Court*, supra; *Boyd v. Southern Pacific*, supra. Nor will a provision in a written stipulation extending the time within which the action might be brought to trial that at least 90 days' notice of the time set for trial should be given by the moving party operate to extend the 5-year period. *Los Angeles v. Superior Court*, supra. Indeed, in *Ravn v. Planz*, 37 Cal. App. 735, 174 Pac. 690, it was held that, despite the fact that plaintiff was present in court with witnesses ready to proceed to trial on a date set prior to the expiration of the 5-year period, and the case was thereupon postponed at the request of the defendant and over the

objection of the plaintiff, nevertheless the provisions of section 583 being mandatory, the trial court had no discretion but to grant the motion to dismiss, made by the defendants upon the expiration of the 5-year period. And the case of *Mazitelli v. Crane*, 35 Cal. App. 264, 169 Pac. 721, which had attempted to relax the rigor of the rule that a dismissal is mandatory, upon the ground that the "plaintiff has fully performed his duty * * * when he * * * caused it [the case] to be set for trial and is in court and ready to proceed to trial * * *" was expressly overruled. *Ravn v. Planz*, supra.

[4, 5] The language of the Code section under consideration is simple and direct, and expressly provides the means whereby litigants may extend the statutory period. It is argued by plaintiffs that despite the apparently plain import of the language used, specifically providing that an action must be dismissed unless the time for trial be extended by written stipulation of the parties, nevertheless such time may be otherwise extended—that is to say, by words and conduct on the part of the defendants constituting a waiver of their right to dismiss. And in this behalf it is insisted that the request of the attorney for the defendants in the three actions that the *Turner Case*, in which he represented the plaintiff, be tried prior to the three actions in which he represented the defendants and his insistence that this case precede the others was conduct sufficient to constitute such an estoppel. While there is language in several of the cases construing section 583 which seems to recognize the possibility of a waiver by estoppel, it is to be noted that without exception these cases hold that a written stipulation is required. *Rio Vista Mining Co. v. Superior Court*, supra; *Los Angeles v. Superior Court*, supra; *Boyd v. Southern Pacific Co.*, supra; *Larkin v. Superior Court*, supra; *Andersen v. Superior Court*, supra.

The statute provides that the time for trial may be extended by written stipulation. It does not provide that it may be extended by a written stipulation "or its equivalent." And in *Larkin v. Superior Court*, supra, it was said that whether or not an oral stipulation in open court entered upon the minutes of the court is the same as a written stipulation and would toll the running of the statute is a "serious question." Obviously, the primary purpose of this section is to prevent the unlimited postponement of trials. The statute, however, is not altogether arbitrary and inflexible, for it provides that the parties may extend the time by proceeding in a certain definite way.

The provision that a written stipulation be entered into was intended to preclude all disputes, with their attendant charges and counter charges of overreaching and unethical conduct, by a requirement that clear and uncontrovertible evidence be presented to the

court that the statutory time was deliberately intended to be extended by both parties.

If it be a "serious question" whether an oral stipulation in open court entered upon the minutes of the court in terms extending the statutory period and thereby expressly recognizing the fact of defendant's right to a dismissal and a waiver of such right would suffice to satisfy the requirements of this section, surely it cannot be said that the mere insistence of the counsel for the defendants that the Turner Case precede the other three actions did satisfy the requirements of the section. Such an insistence falls far short of attaining the dignity of an oral stipulation in open court, and certainly does not come within the category of written stipulations. The waiver of defendants' right to dismiss and a consent to an indefinite continuance can only be implied or inferred from such conduct. To hold that this inferential consent is the same as a written stipulation would be to give to this section a strained construction, which, while it might relieve the harshness of the result in these particular cases, would be to render futile the salutary provisions of this section intended to secure preciseness of practice and procedure. The very harshness of the rule would seem to be intended to put the plaintiff on the *qui vive* to secure irrefutable evidence of the defendant's consent to an extension of the statutory time.

[6] It cannot be successfully maintained that the original stipulations, which provided that one of the cases should follow the Turner Case, have the continuing effect claimed for them by the plaintiffs. These stipulations entered into in 1907 and 1908 provided that the trial should be continued to definitely specified dates to follow the Turner Case, and no suggestion is made that the case was continued indefinitely to follow the Turner Case. Indeed, the conduct of the attorney for the plaintiff in opposing the action of the attorney for the defendants when he sought to have the Turner Case tried first necessarily shows that plaintiffs did not seriously consider the stipulations to have such effect.

[7] One of the chief objections made by the plaintiffs to the issuance of a writ of mandate from this court directing the judge of the court below to enter an order of dismissal is that the question of waiver is a question of fact, and that a finding by the lower court that defendants had waived their right to a dismissal is conclusive in this proceeding. The correct rule on this subject is laid down in *Anderson v. Superior Court*, 187 Cal. 95, 200 Pac. 963, as follows:

"The question to be first presented to this court under a mandamus proceeding would be one of law, as to whether the facts pleaded and passed upon by the trial court constituted a sufficient ground for denying the motion to dismiss. It cannot be claimed that it is a matter

within the discretion of the trial court to arbitrarily determine what extraneous circumstances will excuse a compliance with the statute."

[8] Plaintiffs also insist that by being present in court, ready to proceed to trial on March 24, 1920, the cases were "brought to trial" on that date. The situation in the instant case cannot be distinguished from the situation shown in the case of *Ravn v. Planz*, supra. In that case, also, the plaintiff was in court with witnesses ready to proceed to trial, but it was, nevertheless, held that the action having been postponed beyond the 5-year period it was mandatory upon the court to order a dismissal.

It should be noted that in the *Ravn v. Planz* Case the court suggested "if the plaintiff, at the time of the last postponement of the trial, had called the court's attention to the consequence which would flow from it, he could readily have secured an earlier date for the trial, or possibly a stipulation from opposing counsel waiving the benefit of the statute." And in the case of *Boyd v. Southern Pacific Co.*, supra, it was said:

"The situation in this respect was not called to the court's attention when the plaintiff's motion to set the cause was heard, and it may well have been that, if it had been, an earlier date would have been fixed. The responsibility for calling to the court's attention the necessity for an early date for trial was on the plaintiff, and, since he did not do so, he must be taken to have acquiesced in the date set."

So thus it would appear that all the *Ravn v. Planz* Case decides is that, even though a party litigant may be in court with his witnesses and ready for trial, and even though he object to a continuance, he must, in order to be relieved from any arbitrary action of the trial court, call the court's attention to the fact that the statutory time for the trial of the case is running against him.

Not only was that not done in the instant case, but it appears that the postponement of the trial of the cases from the date upon which they were set for trial, to wit, March 24, 1920, was had without objection from the plaintiffs. That this is so is made evident by the fact that the record shows an oral stipulation of all of the parties consenting to the continuance. Doubtless if objection had been made and the trial court's attention called to the fact that a further continuance would have the effect of putting the case beyond the bar of the statute, the trial court would have ordered that the cases proceed to trial or else have exacted a written stipulation from the defendants extending the time of the trial. It may be suggested that if counsel had desired to avoid the bar of the statute it would have been a very simple matter, after calling the court's attention to the situation, to have requested

that one witness be sworn in the cases and then the hearing of the cases continued until a time which would be convenient for the court and the parties to the action.

In the situation presented by the record before us in the instant cases we are not called upon to determine whether a mere calling of the cases for trial on the day originally set for that purpose would be tantamount to bringing the cases to trial, nor need we decide what the rule should be in a situation where it was shown that within a reasonable time before the running of the statutory time plaintiff in good faith endeavored to have the cause brought to trial, and was denied that right by the trial court, in the face of the fact that the court's attention was called to the necessity for an immediate trial of the case. *Boyd v Southern Pacific Co.*, supra.

[9] Finally it is urged that the motion to amend the cross-complaint of the defendant filed in one of the cases was in effect a written stipulation to extend the statutory time. Such a motion has none of the indicia of a stipulation, and, as before pointed out, it is not sufficient that a motion be "in effect" a stipulation. Furthermore, it was held in *Larkin v. Superior Court*, supra, that the actual filing of a cross-complaint by the defendant in an action to quiet title, as is the nature of the action in the instant case, did not operate to extend the statutory period, but that the time commenced to run from the filing of the answer. It can scarcely be said, therefore, that a motion to amend a cross-complaint can so operate.

Let the writ issue as prayed for.

We concur: WASTE, J.; KERRIGAN, J.;
LAWLOR, J.; SEAWELL, J.; MYERS, J.

(63 Cal. App. 683)

OBERKOTTER v. SPRECKELS et al.
(Civ. 4211.)

(District Court of Appeal, Second District, Division 2, California. Sept. 18, 1923.)

Appeal and error — 640—Dismissal of appeal not warranted by merely incomplete transcript.

Failure of the record, on appeal from a judgment of dismissal, to identify all the evidence considered on the motion to dismiss, held not to warrant dismissal of the appeal, in view of a supplemental transcript showing the dates of the filing of the complaint, amended complaint, and answer; the proper practice, where there is merely an incomplete transcript, being to dispose of the question on consideration of the merits.

Action by Lewis M. Oberkotter against John D. Spreckels and another, copartners doing business as the Tribune Company, a partnership. From a judgment of dismissal,

plaintiff appeals. On motion to dismiss appeal. Motion denied.

W. S. Staley and Marcus W. Robbins, both of San Diego, for appellant.

Read G. Dilworth, of Coronado, and Titus & Macomber and V. F. Bennett, all of San Diego, for respondents.

WORKS, J. This is an appeal by plaintiff from a judgment in favor of defendants. The cause is now before us on a motion to dismiss the appeal. The judgment was one dismissing the action for lack of prosecution, and in contending for a reversal appellant makes the point that the judgment resulted from an abuse of the discretion reposed by law in the trial judge. The motion to dismiss the appeal is presented on the ground that the evidence upon which the cause was dismissed is not before us, and that, therefore, there is nothing upon which we may base a consideration of the question made by appellant. The appeal is not prosecuted under the so-called alternative method, and the printed "record" which has been furnished us contains no bill of exceptions. There is a printed "transcript on appeal" which sets forth only a notice of motion to dismiss the action, an affidavit, an order dismissing case, a notice of appeal, and a certificate of the clerk of the trial court that the other papers mentioned are copies of papers on file in his office. We are also presented with a printed "supplemental transcript" containing the pleadings and minute orders making disposition of demurrers. It is contended that in the absence of a bill of exceptions or other legal means of identifying the papers used upon the motion to dismiss we are shown no record upon which we may review the judgment for dismissal entered pursuant to the motion, and that under such circumstances we can do nothing but dismiss the appeal. Granting, for the sake of argument, however, that all of the evidence considered on the motion to dismiss the action is not identified in the printed matter before us, certainly some of that evidence is sufficiently pointed out to us. The supplemental transcript, which is properly certified by the clerk of the trial court, shows the dates of the filing of the complaint, the amended complaint, and the answer to the amended complaint, thus fixing the time when the action was commenced and the date upon which it was at issue. These dates were necessarily material in aiding the trial court to determine whether the action should be dismissed for want of a diligent prosecution. We are not, therefore, confronted by a case in which no transcript has been filed, but by one in which there is merely an incomplete transcript. Such a case does not present grounds for the dismissal of an appeal. *Waymire v. California Trona Co.*, 176 Cal. 395, 168 Pac. 563.

The proper practice is to dispose of such a question upon a consideration of the merits of the appeal itself. *Waymire v. California Trona Co.*, supra. See, also, *Espinosa v. Gould*, 47 Cal. App. 316, 190 Pac. 481; *Leasure v. Hutton*, 52 Cal. App. 711, 199 Pac. 549; *Estate of Broome*, 169 Cal. 604, 147 Pac. 270.

Motion denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

63 Cal. App. 652

SOUTHERN PAC. CO. v. CITY OF MADERA. (Civ. 2626, Sac. 3433.)

(District Court of Appeal, Third District, California. Sept. 7, 1923. Hearing Denied by Supreme Court Nov. 6, 1923.)

Municipal corporations §523(5) — **Pleading and proof held not to warrant recovery of street improvement assessment paid.**

Where a railroad company compelled to pay a street improvement assessment sued to recover the amount paid, on the ground that it was not liable to assessment for improvement of the block in which its tracks were situated, but admitted its liability for the improvement of street intersections, failure to prove that the entire amount paid was for the improvement of such block or to allege or prove what lesser amount was paid on account thereof defeated recovery.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by the Southern Pacific Company against the City of Madera to recover money paid to redeem street improvement bonds. From a judgment for defendant, plaintiff appeals. Affirmed.

H. W. Hobbs, of San Francisco, for appellant.

Sherwood Green, of Madera, for respondent.

JONES, Justice pro tem. The plaintiff sought to recover a judgment against the defendant for certain money paid by plaintiff to redeem street improvement bonds secured by a lien upon its property in the city of Madera. A general demurrer to the complaint was interposed by defendant, but was overruled, and by its answer the defendant admitted all of the allegations of the complaint, excepting the allegation that the claim of plaintiff was due, owing, and unpaid. The case coming on for trial was submitted to the court upon the allegations in the complaint, as admitted by defendant in its answer. Judgment was rendered for the defendant, and the plaintiff has appealed.

On the oral argument of the appeal counsel for respondent urged the point that the complaint fails to state a cause of action. It appears from the complaint that in 1913,

following the presentation of an application by the city of Madera for permission to extend Sixth street at grade between E and F streets, across the right of way of the Central Pacific Railway Company in that city, the railroad commission granted the applicant permission as prayed for, and by its order provided that the cost of constructing the crossings across the tracks and right of way should be borne by the city, and that the cost of maintaining thereafter the crossings and approaches to the crossings should be borne by the city and the company in the following proportions, to wit, the cost of maintaining the crossings over and between the tracks and to a distance of two feet outside the outer rails of the two tracks of the company should be borne by the company, and the cost of maintaining the remainder of the crossings and the approaches to be borne by the city. Sixth street was then constructed and extended across the right of way of the company. Thereafter the board of trustees of the city, proceeding under the "Improvement Act of 1911 (St. 1911, p. 730)" and the "Improvement Bond Act of 1915 (St. 1915, p. 1441)" ordered the improvement of Sixth street between C street and H street, including the extension of Sixth street across the right of way of the Central Pacific Railway Company between E street and F street, excepting, however, such portions as were required by law to be kept in order and repair by any person or company having any railroad tracks thereon; and the cost of said work was made chargeable upon a district, which included a part of the right of way of said company. A contract was entered into between the superintendent of streets and one Crummev for the improvement of the street, and the superintendent made and returned to the board of trustees an assessment of the cost and expenses of the improvement upon the property within the district and "in and by said assessment and warrant there was charged to property of said Central Pacific Railway Company, on account of said improvement, the sum of \$2,751.41," which sum, it is specifically alleged, "did not include any part of the cost of improving the crossings of Sixth street over and between the tracks of Central Pacific Railway Company and within a distance of two feet outside the outer rails of the outer tracks on the east and west sides of said right of way, but was wholly for and on account of expenses of the improvement of the intersections of said Sixth and E street and said Sixth street and F street." The assessment and warrant were protested by plaintiff, and a copy of the protest is attached to the complaint, and made a part thereof. At the hearing held by the board of trustees on said protest, the plaintiff "protested against said assessment, in so far as the

same included any portion of the expense of improvement of that part of the extension of Sixth street across the right of way of Central Pacific Railway Company, which defendant, under the order of the Railroad Commission of the state of California hereinbefore referred to, was obligated to construct and maintain, and did tender and offer to pay whatever amount of said assessment said board of trustees or the superintendent of streets should find to be properly chargeable on account of the improvement of said intersections of Sixth street and E street and Sixth street and F street." The board confirmed the assessment and warrant as returned by the superintendent of streets; the company was compelled to expend the sum of \$3,811.88 to release its property from the lien created by the issuance of bonds under the acts referred to, and it then presented to the defendant its verified claim in writing for refund of said \$3,811.88, which claim was rejected. Plaintiff then brought an action to recover from the defendant the full amount so paid by it to redeem the bonds.

Appellant's theory of its case may be set forth by quoting the closing paragraph of its opening brief on this appeal:

"In conclusion, appellant earnestly contends that respondent is obligated to pay for the maintenance of that portion of Sixth street between E street and F street lying outside of and beyond two feet outside the outer rails of the outer railroad tracks of appellant, and having failed in its obligation to do so, that appellant is entitled to a judgment for the money which it was compelled to expend for that purpose. * * *

In view of the fact that plaintiff's right to recover is based upon the payment by it of an amount assessed against its property on account of work done within the block between E and F streets, the specific allegation that the charge was wholly for and on account of work done without the block, which allegation limits and qualifies the previous averment as to the assessment, creates a fatal defect, and renders the complaint subject to the objection that it does not state a cause of action.

However, if we assume, notwithstanding the existence of this specific averment, that the complaint sufficiently shows, as is contended by appellant, that the assessment did include, not only the cost of the improvements of the intersections, but also the cost of the work within the block, we are then

confronted with the situation that, while the appellant admits the liability of its property for such portion of the assessment as was chargeable for the improvement of the intersections, if failed to allege or prove either such portion or the portion charged on account of the work done within the block. To recover the full amount paid, it was incumbent upon the plaintiff to prove that the assessment was wholly on account of the improvement within the block, but the contention of plaintiff just referred to excludes any claim that the assessment was thus limited. To recover a lesser sum it was then necessary for plaintiff to prove the specific amount it was compelled to pay because of the inclusion of the expense of that particular part of the improvement in the total cost, but the complaint contains no allegation either specifying such an amount or giving data from which it could be determined, and, on the trial, no attempt was made to make such proof.

A judgment then for the entire amount paid by plaintiff under the assessment would clearly have been erroneous, and plaintiff, having failed to prove what lesser sum, if any, it was entitled to, the court, for that reason alone, if none other, was compelled to render judgment against it.

It being necessary to affirm the judgment for the reasons stated, a discussion of other questions raised in the briefs becomes unnecessary.

The judgment is affirmed.

We concur: FINCH, P. J.; HART J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying the petition for a transfer to this court after decision by the District Court of Appeal, we withhold approval from that portion of the opinion holding that the complaint does not state a cause of action. The complaint does not allege and no evidence was introduced to show the amount which the plaintiff was entitled to recover from the city, if it be assumed that the agreement between the city and the appellant, confirmed by the order of the Railroad Commission, was valid and binding upon the parties, and entitled the plaintiff to recover some amount from the city under the circumstances alleged in the complaint. Consequently the judgment must be affirmed.

63 Cal. App. 679

ARROW GARAGE CO. v. KIKUGAWA.
(Civ. 4610.)

(District Court of Appeal, First District, Division 2, California. Sept. 18, 1923. Hearing Denied by Supreme Court Nov. 15, 1923.)

1. Parent and child — Finding of agency in contracting for automobile repairs held justified.

In an action for labor and material used in repairing defendant's automobile, evidence held to justify an implied finding of the agency of defendant's son in contracting for the repairs.

2. Parent and child — Evidence of acceptance of benefits of contract held significant on issue of ratification.

In an action for labor and material used in repairing defendant's automobile, evidence showing that defendant accepted, for a considerable time, without protest or objection, and was still enjoying the benefit of the contract made on his behalf by his son, held significant on the issue of ratification of the son's act.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Arrow Garage Company against J. Kikugawa. Judgment for plaintiff, and defendant appeals. Affirmed.

D. A. Knapp, of San Francisco, for appellant.

H. H. Linney, of San Francisco, for respondent.

LANGDON, P. J. This appeal is by the defendant from a judgment against him for \$300, in an action to recover for labor and material used in the repair of defendant's automobile at the special instance and request of defendant. The contract for the repairs was made with the plaintiff by the son of the defendant, and the court has found that the labor and materials were of the actual and reasonable value of \$300. The only question presented is as to the agency of the defendant's son; appellant contending that the facts appearing in the record fail to establish either an actual or ostensible agency or to show a ratification of an unauthorized act.

It appears that defendant's son, Charles, was intrusted with the entire use, management, operation, and control of the automobile in question; that he was authorized to engage storage for it and to purchase gasoline and oil, all of which he did at the garage of the plaintiff. For several months defendant paid the bills for these items, as contracted for by Charles, without objection. During this period Charles had windshields placed upon the car by the plaintiff, and it was understood that they were to be removed without charge if the defendant did not

like them. The defendant visited the garage and approved of the windshields and paid the bill for them. Some time before November 11, 1921, plaintiff had called Charles' attention to the fact that the engine in the automobile required repairing. With reference to this matter Mr. Brown, secretary of the plaintiff company, testified:

"On the night of November 10th, the son, Charles Kikugawa, came in with a pronounced knock in his motor, which from the outside matter I analyzed as being the connecting rod bearings, and was instructed by him to repair it. That work would have amounted to about \$20. The next morning our mechanic started in on it; removed the crank pan which was probably an hour and a half's work and made an internal examination of the motor and saw that the main bearing system was completely gone. I called up Charles Kikugawa, brought him over, got him on his back under the car, and showed him the condition. I told him that the work would go from \$200 up—would probably be between \$250 and \$300. I advised him he could probably get it cheaper at the Cleveland agency than he could with us and asked him, told him before we would do any more work on the car, for him to ask his father what we should do. About two or three hours afterwards he rang up and said: 'My father says to go ahead.'"

The defendant testified that he did not go to the garage to make the arrangements for the repair of the car—

"because in the case, in the instance of the windshield I could see it and I could understand, but the repairing of the engine—why I would be absolutely in the dark, and there was no use of my going, and I took the word of Charlie what the garage people told Charlie."

The difficulty arises because, according to the testimony, Charles did not correctly report to his father the estimated cost of the work. Upon this matter the father testified:

"As Charlie told me that the Arrow Garage people said if it was repaired now it would cost only thirty or forty dollars but if he ran it without repairing it now the repair bill would amount to over \$100, and I thought it would be best to repair it now while the charge is small. So I told him it would be all right if it would cost only thirty to forty dollars. Q. Did Charlie say anything more to you about it after that? A. I don't remember whether it was immediately or not, but anyway some time after Charlie told me the price quoted by the Arrow Garage was thirty or forty dollars up to eighty dollars. Q. What did you say about that? A. I said it was all right, since they have started repairing it, it was all right."

[1] The decision of the only question involved upon this appeal does not require a lengthy discussion. The facts hereinbefore recited justify the implied finding of the agency of Charles to contract for the defendant in this matter. If he misinformed the defendant it is the defendant alone who is

responsible for intrusting to him the matter of contracting for the repair of the automobile.

[2] Although this conclusion disposes of the appeal, it is relevant in arriving at the merits of the action, to consider also the facts with relation to ratification. It appears from the record that after the work upon the automobile was completed the plaintiff furnished to Charles a bill for its services. Charles testified that he took the bill home to his father; that the father said he would not pay it, but this fact was not communicated to plaintiff. On the contrary, Mr. Brown, plaintiff's representative, called at the home of defendant, who was absent, and was told by Charles that the father would probably send a check for the amount. The statement of account was rendered on December 22d. On that date Charles, as the agent of the defendant, took the automobile out of the garage and later brought it back. About December 27th he again took the automobile out and later returned it to the garage. The car was accepted without any criticism of the charge for repairs and was run for two weeks by Charles. On January 6th defendant had the automobile removed from the garage of plaintiff and after such removal refused to pay the bill for the repair work. These facts are not without legal significance. The defendant accepted for a considerable time, without protest or objection, the benefit of the contract made on his behalf by his son, and he is at present enjoying those benefits while refusing to pay therefor.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

63 Cal. App. 682

In re STEVENS. (Civ. 4315.)

(District Court of Appeal, Second District, Division 1, California. Sept. 18, 1923.)

Attorney and client ⇨61—Second application for reinstatement and supporting letters and affidavits held insufficient to warrant different decision.

A second application for reinstatement as an attorney and supporting letters and affidavits, no different, except as to form and date, from those presented with the former application, which was denied by another division of the court, held insufficient to warrant reinstatement.

Application by Walter H. Stevens for reinstatement as an attorney at law. Petition denied.

See 210 Pac. 442.

Gates & Randles, of Los Angeles, for petitioner.

Oscar Lawler, of Los Angeles, for respondent Los Angeles Bar Association.

CONREY, P. J. The petitioner was disbarred by order of this court on the 14th day of June, 1917, because of his conviction of a crime involving moral turpitude and dishonesty. On the 8th day of March, 1922, he filed a petition for reinstatement. That application was denied by order of Division 2 of this court on the 30th day of September, 1922. The opinion of the court as delivered at that time contains a thorough review of the case. In re Stevens, 210 Pac. 442.

Having carefully examined the present application and the numerous letters and affidavits offered in support thereof, we find that they are not materially different from those presented with the former application. The only difference, except as to form, consists in the fact that this application filed May 11, 1923, is about a year later in date, and that the letters and affidavits signed by the same persons and some others are of a correspondingly later date.

Assuming as we must (and there is nothing in the record which moves our minds to the contrary), that the court in Division 2 was justified in its decision at that time, we think that, notwithstanding the additional lapse of time, the record as we find it does not show facts sufficient to warrant us in granting the present application.

The petition is denied.

We concur: HOUSER, J.; CURTIS, J.

63 Cal. App. 643

GALLAGHER v. BARSTOW.
(Civ. 4604.)

(District Court of Appeal, First District, Division Two, California. Sept. 7, 1923. Hearing Denied by Supreme Court Nov. 6, 1923.)

1. **Constitutional law** ⇨45—Court not disposed to question the constitutionality of a section where its views would not be final.

The District Court of Appeal is not disposed to question the constitutionality of a statute that has been followed in innumerable cases involving the rights of property, where its determination would not be treated as final.

2. **Appeal and error** ⇨1040(10)—Order overruling defendant's demurrer to pleading ordinance by title not prejudicial where ordinance was in evidence and free from objection.

Where plaintiff pleaded an ordinance by reference to the title, as authorized by Code Civ. Proc. § 459, and the court in overruling defendant's demurrer that the section was unconstitutional for not declaring that judicial no-

tice should be taken of an ordinance pleaded in this manner, thereby denied defendant due process of law, did not prejudice defendant where the ordinance was admitted in evidence, and, if pleaded in *hæc verba*, the court's action would have been the same as far as the attack on the ordinance was concerned.

3. Appeal and error ⚡1026—Court not justified in reversing a case where action did not prejudice defendant.

The court is not justified in reversing a case, where the action complained of did not prejudice defendant, though the proceedings were in some respects academically wrong.

4. Municipal corporations ⚡312—Ordinance held not repealed by amendment to charter.

The enactment of an ordinance providing a method of procedure for street improvements, being a valid exercise of the power conferred on the supervisors by the charter, which was adopted by the municipality under express authority of Const. art. 11, § 8, such ordinance is not repealed by amendment of the section of charter under which the ordinance was enacted, where it is consistent with the amendment.

5. Municipal corporations ⚡312—Immaterial that ordinance may have authorized procedure inconsistent with charter amendment, where proceedings are consistent therewith.

The fact that the ordinance may have authorized a procedure that was inconsistent with the charter amendment is immaterial, where it authorized a correct procedure, and the proceedings under consideration were consistent with the amendment.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by E. J. Gallagher against Mary Barstow, executrix of the last will and testament of Augustus L. Rhodes, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles W. Cobb, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for appellant.

Oscar Samuels and J. Samuels, both of San Francisco, for respondent.

NOURSE, J. Plaintiff sued on a complaint setting forth two separate causes of action, each for the recovery of \$104.78, representing separate assessments for street improvements upon two separate lots belonging to the defendant. Judgment was rendered in favor of plaintiff upon both causes of action, and from this judgment the defendant appeals.

[1-3] The street improvement proceedings were conducted under provisions of the ordinance of the city and county of San Francisco enacted by the board of supervisors and approved by the mayor on September 4, 1913. The ordinance was enacted under the specific grant of power contained in section 33, chapter 2, of article 6 of the San Francisco char-

ter, and has been before the Supreme Court in a number of other cases. Federal Construction Co. v. Wolfson, 186 Cal. 267, 199 Pac. 512, and cases there cited. The plaintiff pleaded the ordinance merely by reference to its title and to the time of its passage, the method authorized by section 459 of the Code of Civil Procedure, and approved in *Church v. Grady*, 40 Cal. App. 194, 195, 196, 180 Pac. 548, and *Federal Construction Co. v. Wolfson*, 186 Cal. 267, 283, 284, 199 Pac. 512. Appellant insists that, since the section does not declare that the court shall take judicial notice of an ordinance pleaded in this manner, the section is unconstitutional, in that it denies a defendant on demurrer due process of law and an equal protection of the law. The argument is that the section provides a special mode of pleading in reference to private statutes and ordinances, and thereby directs the court to hold as sufficient a complaint pleaded in the manner authorized by the statute. We are not disposed to question the constitutionality of the section at this time, as it has been in force (so far as it relates to the pleading of private statutes) since 1872, and has been followed in innumerable cases involving the rights of property in this state. If at this late date the section of the Code is to be declared unconstitutional, we prefer to have that done by the Supreme Court, inasmuch as the views of this court would not be treated as a final determination of the questions involved. The objection urged by the appellant is extremely technical, and is based upon the assumption that a defendant has a right to demur in all cases, and that such right cannot be abridged or denied. If the argument is sound in general, there was no error here, because the ordinance, which was properly admitted in evidence during the course of the trial, is free from any legal objection, and has been sustained in a number of cases by both the Supreme and Appellate Courts, and, if therefore it had been pleaded in *hæc verba*, the court must necessarily have held the complaint sufficient, in so far as any attack upon the ordinance itself was concerned.

We cannot see, therefore, how the appellant has been prejudiced in any manner by the action of the trial court in overruling the demurrer to the complaint, or how he would have been in any better position if the complaint had pleaded the ordinance in full. If the action complained of did not prejudice the appellant's right to a fair and impartial hearing and trial of the issues, we, of course, would not be justified in reversing the case merely because the proceedings were in some respects academically wrong.

The appellant attacks the provisions of the ordinance specifying the form of bond to be given, if the assessment is not paid as required, on the ground that the interest is made payable semiannually, and that both princi-

pal and interest are made payable in gold coin. It is unnecessary to discuss these points in view of the holding of the Supreme Court in *Federal Construction Co. v. Wolfson*, 186 Cal. 267, 282, 199 Pac. 512, 518, where the court concluded a lengthy discussion upon the same subject with the statement that "there was ample power on the part of the board of supervisors to fix the terms and conditions of payment, * * * limited only in the two particulars with reference to the amount of the several installments and the rate of interest." The same case (p. 283 of 186 Cal., p. 512 of 199 Pac.) also disposes of appellant's contention that the supervisors were without power to authorize suit for the full assessment, if the property owner refused to execute the prescribed bond.

[4, 5] Appellant attacks the entire proceedings under the ordinance on the ground that it was repealed or abrogated by the amendment of section 33, chapter 2, of article 6, of the charter, approved January 18, 1917. The argument is that, as this amendment changed in certain particulars the section of the charter under which the street improvement ordinance was adopted, the ordinance must be deemed to have been repealed or abrogated in its entirety. The changes to which reference is made are that the right to adopt a general law of the state prescribing a procedure for street improvements was omitted from the amended section; that under the amended section the ordinance adopted by the supervisors might provide for annual payments in semiannual or quarterly installments, whereas under the original section it was necessary to provide for annual installments; and that under the amendment no installment could exceed 25 per cent. of the assessed valuation of the property, where the entire assessment exceeds 50 per cent. of such value, whereas under the original section there was apparently no limit on the amount of each installment.

We do not find that the point has been raised before, and the cases cited in the briefs are of little assistance. In general they refer to rights arising under statutes which have been amended or repealed, but none of them cover the peculiar situation which arises under charter provisions such as are here under consideration. The ordinance provides a method of procedure for street improvements similar to the Vrooman Act and other general state laws relating to street improvements. It was adopted under the authority of section 33, chapter 2, of article 6, of the charter, and has been before the Supreme Court in *Bienfield v. Van Ness*, 176 Cal. 585, 169 Pac. 225; *Federal Construction Co. v.*

Wolfson, 186 Cal. 267, 199 Pac. 512, and many other cases. The authority for the section of the charter is in the direct grant of power found in section 8 of article 11 of the Constitution. Thus, when the ordinance of 1913 was enacted, it was a valid exercise of the power conferred upon the supervisors by the charter section, which, in turn, was adopted by the municipality under express authority of the Constitution. This charter section, by reason of the constitutional grant of power, stands in the place of a Constitution of the municipality in relation to the powers of the board of supervisors. It is a specific grant of power to the supervisors to legislate upon the subject of street improvement procedure. This being so, the ordinance adopted under the original section is like any statute enacted by the state Legislature under constitutional authority, which, by reason of some later amendments to the Constitution, has become inoperative in part. The ordinance, like the statute, is not repealed or abrogated by the later amendment, unless it is wholly inconsistent with the amendment. Thus, where the amendment merely imposes minor restrictions upon the exercise of the power conferred in the original section, and does not withdraw the power theretofore conferred, and the statute or ordinance enacted under the prior grant is wholly consistent and in harmony with the later amendment, and there is nothing in the amendment either directly or indirectly repealing the prior enactment, it remains in full force. On the other hand, if any section or portion of the statute or ordinance is inconsistent with the later amendment to the Constitution or charter, then the question would arise whether the inconsistency is of such importance to the entire statute as would require the whole act to fall, or whether the inconsistent portion may be segregated from the whole, and that portion alone declared inoperative. But this question does not arise here, as the proceedings which were taken under the ordinance are fully consistent with the amendments to section 33, chapter 2 of article 6 of the charter. Even though the ordinance may have provided a procedure which was inconsistent with the charter amendment, the fact that it also authorized a method of procedure which was consistent with that amendment, and that the proceedings here under consideration were had under that authorization, and thus in full harmony with the charter amendment, is a sufficient answer to the point on this appeal.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

63 Cal. App. 643

GALLAGHER v. FOERST. (Civ. 4603.)

(District Court of Appeal, First District, Division 2, California. Sept. 7, 1923. Hearing Denied by Supreme Court Nov. 6, 1923.)

Appeal and error ⇨169—Judgment may be reversed on point first raised on appeal.

The court may reverse a judgment solely on a ground raised on appeal for the first time.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by E. J. Gallagher against Wilhelmine Foerst. Judgment for plaintiff, and defendant appeals. Affirmed.

F. J. Castelhun, of San Francisco (R. M. F. Soto, of San Francisco, of counsel), for appellant.

Oscar Samuels and J. Samuels, both of San Francisco, for respondent.

NOURSE, J. This is an appeal from a judgment in favor of plaintiff foreclosing a lien for street improvements made under the street improvement ordinance of San Francisco approved September 4, 1913. With one exception the questions involved in this appeal are the same as those considered in *Gallagher v. Barstow*, 219 Pac. 1014 (No. 4604), this day decided, and therefore the reasons there given are adopted as the reasons for the judgment in this case.

In addition to the points urged in the Barstow Case the appellant herein asks for a reversal of the judgment upon the ground that the demand for payment and the return of the warrant were not made within 30 days from the date of the warrant. Appellant states that the warrant was recorded on August 19, 1917, and that demand for payment was made on September 19, 1917, and that the warrant was returned on September 20, 1917. It is conceded that, if these facts are true, the demand and return were not made within the time prescribed by section 20 of the street improvement ordinance, and the lien would therefore be lost.

Respondent argues that the point should not be considered by this court because it is raised on this appeal for the first time, and he cites cases from both the Supreme and Appellate Courts to sustain his position. This, however, is no longer the rule of our Supreme Court. See *City Street Imp. Co. v. Quigley* (Cal.) 215 Pac. 390, where the judgment was reversed solely upon a ground first raised on appeal.

Respondent further points out that the date of recordation of the warrant given by appellant is incorrect; that it was in fact recorded on August 24, 1917, instead of August 19th, and that the demand and return were

thus within the period of 30 days. In this he is fully supported by the record, which shows that the warrant with the recording date appearing thereon was received in evidence, and that the date of recordation was August 24, 1917. Such being the case, we are at a loss to understand why appellant should raise the point.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

63 Cal. App. 737

ANDERSON v. ARONSOHN et al.
(Civ. 4597.)

(District Court of Appeal, First District, Division 1, California. Sept. 21, 1923.)

1. Appeal and error ⇨1099(7)—Testimony as to taking of acknowledgment held not at material variance with that considered on a previous appeal.

Testimony of a notary, in an action for negligence in taking acknowledgments, held not at material variance with that adduced at a former trial so as to warrant a different conclusion than that reached on a former appeal that the notary was not justified in certifying that he had personal knowledge of party's identity.

2. Acknowledgment ⇨22—Certificate should be made on oath of credible witness, and not on personal knowledge, where notary has no actual knowledge.

Where a person appearing before a notary is not personally known to him, the notary should issue his certificate upon the oath of a credible witness, instead of upon personal knowledge, and, failing to do so, he takes the acknowledgment at his own risk, and mere introduction of another is insufficient to constitute personal knowledge.

3. Appeal and error ⇨1097(1), 1195(1)—Rulings on former appeal law of case.

A rule or principle of law necessary to a decision stated by an appellate court becomes the law of the case and must be followed and observed throughout subsequent progress of the case both in the lower court and upon subsequent appeals.

4. Appeal and error ⇨1216—Failure to treat ruling on a former appeal as the law of the case in giving instructions held reversible error.

Failure of a trial court after a previous appeal of the case to treat rulings made on that appeal as the law of the case and to give instructions in accordance therewith held reversible error.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Steven Anderson against Martin Aronsohn and others. From a judgment for defendants, plaintiff appeals. Reversed.

Carl W. Mueller and Alfred Fuhman, both of San Francisco, for appellant.

McCutchen, Olney, Mannon & Greene, of San Francisco, amici curiæ.

R. H. Morrow and Marshall B. Woodworth, both of San Francisco, for respondents.

TYLER, P. J. Action against a notary and the sureties upon his official bond for damages resulting from the alleged negligence of the notary in taking certain acknowledgments.

The original complaint was filed in August, 1916. The controversy has resulted in three trials. The first was without a jury and judgment went in favor of defendants, but it was reversed by the Supreme Court. 181 Cal. 294, 184 Pac. 12, 10 A. L. R. 866. The second was had by jury and resulted in a disagreement. Upon the third trial a jury found a verdict in favor of defendants, and from the judgment entered thereon plaintiff has taken this appeal.

The facts are succinctly stated by Mr. Justice Lennon in the former appeal to be as follows:

"A few days prior to April 19, 1916, one Ambrose, a real estate agent and loan broker, through whom plaintiff had previously loaned money, called upon the plaintiff to secure a loan of nine hundred dollars upon certain real estate in the city and county of San Francisco owned by Louetta A. Pilliken, for whom Ambrose purported to act. The plaintiff having decided to make the loan, a note and deed of trust were given to Ambrose for execution by Mrs. Pilliken and her husband. Ambrose returned the document signed and acknowledged in proper form before the defendant Aronsohn, a notary public, and, upon presentation of an order purporting to be signed by the Pillikens, Ambrose received the amount of the loan in currency. At no time during the transaction did plaintiff deal with anyone save Ambrose. In May of the same year, through a similar transaction, plaintiff advanced to Ambrose the sum of seven hundred dollars upon property owned by one Mary French. Plaintiff subsequently discovered that the owners of the properties in question, the Pillikens and Mary French, had never signed the notes or deeds of trust or received the money, and that confederates of Ambrose had impersonated these parties before the defendant notary. The certificates of acknowledgment of both deeds of trust were each to the effect that the subscribing parties were 'known' to the notary to be the persons whose names are subscribed to the instruments. The question presented upon this appeal is whether or not Aronsohn was legally justified in stating in the certificate of acknowledgment that the persons who appeared before him to acknowledge the instruments were known to him.

"It appears that on September 8, 1915, the persons who represented themselves to be the Pillikens were introduced to Aronsohn by Ambrose on the occasion of their assignment of an interest in a mining claim. Aronsohn acknowledged the instrument and certified to the identity of the parties under the oath of Am-

brose, who was personally known to him. He made a record of this transaction in his books. We shall here quote the evidence concerning the further acquaintance of Aronsohn with these parties:

"Q. Now, did you after this transaction have occasion to meet these two Pillikens again? A. Yes.

"Q. Frequently or otherwise? A. Yes, five or six times.

"Q. And where? A. Met them the following day at the Fair, 1915, Native Sons of the Golden West Day, Admission Day, also at cafeteria, on streets, also was at my office.

"Q. When were they at your office? A. Shortly before April 19, 1916.

"Q. For what purpose? A. Mr. P. called at my office and asked me where he can get a loan on a note, and I suggested him to wait until Morris Plan bank open business, as they were advertising loans at 6 per cent., etc."

"It also appears that on March 2, 1915, the person who represented herself to be Mary French was introduced to Aronsohn by his former teacher, Henry Frank. He took an acknowledgment of the signature of this woman, Frank acting as identifying witness. Aronsohn also made a record of this transaction in his books. The following is the evidence of his further acquaintance with this Mary French:

"Q. When did you again see Mrs. Mary French, if at all, previous to May 6, 1916? A. December 2, 1915.

"Q. What was the occasion of your meeting Mary French on December 2, 1915? A. She was at my office with Mr. Ambrose, who requested me to acknowledge a document.

"The Court: Did Mr. Ambrose request you to acknowledge a document, or Mrs. French request you to acknowledge a document? A. Mrs. French."

And following this statement of facts the opinion proceeds:

"Basing its conclusion upon these facts, the trial court has decided that Aronsohn was legally justified in stating in the certificates of acknowledgment that the persons who appeared before him to acknowledge the instruments in question were known to him. With this conclusion we are unable to agree."

The court then held that under such facts the notary was not authorized to certify that he had personal knowledge of the identity of the parties, as a mere introduction followed by the casual meetings narrated did not justify such a certificate; that the degree of acquaintance which would authorize a notary to certify that he had personal knowledge involves something more than mere casual meetings, and must be based upon a chain of circumstances surrounding the person tending to show that he is the party he purports to be. It was further held that personal knowledge by a notary of a person making an acknowledgment is not acquired by his introduction under oath; and that if the notary certifies that he has personal knowledge of the identity of a person whom he merely knows through the introduction of another he does so at his own risk. It is

pointed out in the decision that if a notary takes all due precaution and fully complies with the statute by requiring the oath of a credible witness in a case where he has not sufficient knowledge of the identity of the person making the acknowledgment, he will not be held liable, although he has been deceived; but, on the other hand, a certificate declaring that he has personal knowledge will not relieve him, as by it he is made a guarantor of the genuineness of the instrument in this respect.

Upon the rendition of this decision respondents filed an amended answer setting up two alleged additional new affirmative defenses which they claim were not made upon the first trial. They recite thereunder that appellant by his own acts and course of conduct had constituted Ambrose his agent to place loans for him with persons who desired to borrow money on their real estate, and to see that the loan papers and securities were properly executed. They also allege that appellant through his own negligence and that of his attorney failed to make a proper and accurate search of the title or ownership of the real estate on which the loans were made by appellant through Ambrose, and that such negligence contributed proximately to the losses sustained by him.

They here claim that under the first defense relied upon at the former trial, namely, that the notary exercised due precaution and fully complied with the statute in establishing the identity of the Pillikens and Mary French, whose acknowledgments he took, the testimony of the notary on the last trial and from which the present appeal is pending is more fully and satisfactorily developed, and that many details are gone into with reference to the intimacy of his acquaintanceship with these persons which were omitted from the first trial, and that his testimony was substantially corroborated by the testimony of new witnesses, the effect of which is to bring such acquaintanceship fairly within the decision of the Supreme Court in the first appeal.

Upon the second defense, involving the subject of agency, and the third, relating to negligence, it is argued that as to those defenses the evidence fully and sufficiently sustains the verdict of the jury.

It is the claim of appellant and of counsel amici curiæ that the evidence upon this appeal is in all substantial respects identical with that contained in the record upon the former one.

[1] We are of a like opinion. The new evidence given in support of the first defense goes to the impersonators of Pillikens and French. It consists of the changing by Aronsohn of his testimony concerning the number of times he had seen and met the parties outside of his office. He also testified that the identity of the impostors was known to

many other people whom he named, the majority of whom, it appears, were dead at the time of the trial.

Assuming this testimony to be true, it in no manner shows any substantial or material variation which would exonerate him for the making of the certificate in question. The same may be said with reference to the evidence introduced under the so-called new defenses. Although not specially pleaded upon the first trial, the same defenses were there interposed, and evidence received upon these questions which was fully presented before the Supreme Court upon the former appeal. No useful purpose would be subserved by a detailed recital of the claimed new evidence upon the subject, as it is in all material respects the same as was given upon the former trial. Upon the question of agency it may be stated, however, that evidence was introduced to the effect that Ambrose had acted as the agent of the plaintiff in making various other loans. This evidence was disputed; but assuming it to be true, these transactions were wholly unconnected with the present controversy and it was in no manner affected thereby.

At the conclusion of the taking of evidence the trial court, with the facts as related before it, failed to embody in its instructions to the jury the principles established by the Supreme Court upon the former appeal, and other and different instructions were given with reference to the liability of notaries. Upon the question as to whether or not Aronsohn was justified in stating in his certificate that the imposters were personally known to him the jury was instructed as follows:

"V. You are hereby instructed that the plaintiff does not claim in the complaint that the notary Aronsohn was guilty of any fraud in executing the deeds of trust, and you cannot render a verdict against the notary and his bondsmen simply because Ambrose committed frauds upon the plaintiff. It is simply alleged in the complaint, in two causes of action against the notary and his bondsmen, that he did not exercise the care required by law in executing the two deeds of trust, and your inquiry will be confined in this case to the question whether the plaintiff established to your satisfaction by a preponderance of evidence that the notary was not legally justified in stating in the certificates of acknowledgment that the persons who appeared before him to acknowledge the instruments in question were known to him; if he has made the proof he is entitled to recover, otherwise not. If you find that the notary exercised the care and precaution required by the laws of this state in establishing the identity of the Pillikens who appeared before him and of Mary French who appeared before him, then it will be your duty to return a verdict in favor of the defendants."

It was also further instructed upon the subject as follows:

"IX. Section 1185 of the Civil Code of the state provides what the notary shall do in taking an acknowledgment. It prescribes as follows: 'The acknowledgment of an instrument must not be taken, unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument.'"

These were the only instructions given relating to the subject of the personal knowledge required by a notary which would authorize him to make the certificates in question.

[2] The former decision was chiefly based upon the legal principles controlling these questions. It was there held that if a person who appears before a notary is not personally known to him, it is the notary's duty to issue a certificate upon the oath of a credible witness instead of one upon personal knowledge, failing in which the notary takes the acknowledgment at his own risk; and further that personal knowledge is not acquired merely through the introduction of another.

[3, 4] Where the appellate court has in its former opinion stated a rule or principle of law necessary to a decision, that rule or principle, under the doctrine of the law of the case, must be followed and observed throughout the subsequent progress of the case both in the lower court and upon subsequent appeals. *Kahn v. Royal Indemnity Co.* (Cal. App.) 218 Pac. 444. As no new testimony upon the present trial in relation to the subject of personal knowledge was had which in any substantial manner altered or changed the situation, it was the duty of the trial court to have advised the jury that the legal requisites of personal knowledge were as defined and laid down in the former appeal. Under the instructions given the jury was left to itself to determine the question without the aid of the court.

The same may be said with reference to the question of agency. Upon this subject the jury was instructed as follows:

"VIII. If you find from the evidence, either that the plaintiff, or the plaintiff through his attorney Carl W. Mueller, intrusted to Ambrose the deeds of trust and other loan papers to be properly executed, and in doing so said Ambrose committed a fraud, then I instruct you that said Ambrose was the agent of the plaintiff in seeing that the loan papers and securities were properly executed, and the loss must fall upon the plaintiff and not upon the notary and his bondsmen."

In the former opinion the court expressly held that the intrusting of the documents to Ambrose to be executed did not constitute him the agent of the plaintiff. The instruction given upon this subject completely ignored the law of the case as established in

the former decision, and it was tantamount to an instructed verdict for defendants.

We do not deem further discussion of the case necessary. The record in the instant case is in all substantial respects the same as that presented upon the former one. The trial court erred in failing to instruct the jury in conformity with the law as there laid down, and the error justifies a reversal. The judgment is accordingly reversed.

We concur: RICHARDS, J.; ST. SURE, J.

63 Cal. App. 724

PEOPLE v. THORNTON. (Cr. 972.)

(District Court of Appeal, Second District, Division 1, California. Sept. 20, 1923.)

1. Insurrection and sedition ⚡2—Evidence insufficient to sustain conviction of becoming member of I. W. W.

In a prosecution under St. 1919, p. 281, § 2, subd. 4, defining criminal syndicalism and sabotage, based upon defendant's alleged membership in the I. W. W., evidence failing to show the time when or place where defendant became a member of such society held insufficient to sustain a conviction.

2. Insurrection and sedition ⚡2—Crime of assisting in organizing society not committed by bringing in member.

Defendant was not guilty of organizing or assisting in organizing the Industrial Workers of the World, where the society had been organized long before defendant became a member thereof and his only act was to bring another member into the organization.

3. Insurrection and sedition ⚡2—Charge of "remaining" a member of society sustained by evidence of membership.

An indictment for criminal syndicalism charging defendant with knowingly becoming and "remaining" a member of the Industrial Workers of the World held sustained by evidence that defendant was at the time charged a member of such society, as defined in St. 1919, p. 281.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Remaining.]

4. Insurrection and sedition ⚡2—Evidence to show absence of criminality in society of which defendant was accused of being a member held improperly excluded.

In a prosecution for criminal syndicalism wherein it was charged that defendant was a member of the I. W. W. and counsel for the state had introduced evidence that such society favored acts of violence, it was error to exclude evidence by defendant to prove the absence of criminality in the doctrines, teachings, and methods of action of the organization.

5. Criminal law ⚡413(1)—Evidence as to discussions at meetings of organization of which defendant was charged with being a member held not inadmissible as self-serving.

In a prosecution for criminal syndicalism wherein it was charged that defendant was a

member of the I. W. W., testimony of members as to discussions at meetings, prior to the time of defendant's alleged membership, tending to show the absence of criminality in the doctrines, teachings, and methods of action of the organization, was not inadmissible as self-serving statements.

6. Insurrection and sedition — Evidence in prosecution for criminal syndicalism as to affiliations of I. W. W. with revolutionary societies held properly excluded.

In a prosecution for being a member of the I. W. W., it was not error to exclude evidence that the I. W. W. was not affiliated with the so-called Red International of Moscow or the Red International Trades Union; there being no evidence on the part of the prosecution tending to establish such affiliations, though there was evidence of sympathy with doctrines of Russian revolutionists.

7. Criminal law — 1134(2)—On fact issues, Supreme Court is confined to particular record before it.

In considering an issue of fact, the Supreme Court is confined to the record of the particular case before it.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Felix Thornton was convicted of criminal syndicalism, and he appeals. Reversed.

R. W. Henderson, of San Francisco, and L. B. Schlingheyde, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HOUSER, J. Under the provisions of subdivision 4 of section 2 of the act defining the crime of criminal syndicalism and sabotage and providing penalties and punishment therefor (Stats. 1919, p. 281), defendant was charged by an indictment returned by the grand jury of Kern county with having committed the following offense, to wit: The said Felix Thornton, on or about the 3d day of June, 1922, at Delano, in the said county of Kern, state of California, did then and there willfully, unlawfully, knowingly, and feloniously become and remain a member of an organization known and designated as the "Industrial Workers of the World," and sometimes known and designated and referred to as the "I. W. W.," and sometimes known and designated and referred to as the "One Big Union," and did then and there willfully, unlawfully, knowingly, and feloniously organize and assist in organizing said organization known and designated as the "Industrial Workers of the World," and sometimes known and designated and referred to as the "I. W. W.," and sometimes known and referred to as the "One Big Union," and which said organization, society, group, and assemblage of persons was then and there organized to advocate, teach,

aid, and abet the commission of criminal syndicalism as a means of accomplishing a change in industrial ownership and control and effecting political changes in the government of the United States.

Defendant was found guilty as charged in the indictment, and he appeals to this court from the judgment, as well as from the order denying his motion for a new trial.

In substance defendant was charged with willfully, unlawfully, knowingly, and feloniously becoming and remaining a member of and with assisting in organizing a group of persons whose purpose was to teach, aid, and abet the commission of criminal syndicalism and to use force and violence as a means of bringing about a change in industrial ownership or control and political changes in the government. It is admitted that defendant was a member of the organization known as the Industrial Workers of the World.

[1] Since there is no evidence of the time when or the place where the defendant became a member of the I. W. W., the evidence is not sufficient to sustain the conviction of defendant for the crime of becoming a member of that organization in the county of Kern.

[2] Also, the evidence is not sufficient to justify the conviction of defendant of the crime of willfully or at all organizing or assisting in organizing the said I. W. W. The only act shown to have been committed by the defendant under the claim that he assisted in the organization of the society was the act of procuring and bringing into the organization a certain person as a member thereof. The society was completely organized and in existence at and prior to that time. In *People v. Thurman*, 216 Pac. 394, decided by division two of this district, it was pointed out that to organize is a very different thing from extending the limits of the organization or adding to or increasing its size; that to organize a certain territory into a municipal corporation is a very different thing from the act of extending the limits of an organized city over new territory. So the court held that the words "assists in organizing," in their ordinary import, imply that organization has been effected and that the accused assisted in accomplishing it. In that case, the evidence was limited to the fact that the defendant assisted in the distribution of printed propaganda of this same organization known as the Industrial Workers of the World. The court said:

"Even if the publication and distribution of the printed propaganda had resulted in adding one or more members, such increment of membership would not have amounted to 'organizing' the Industrial Workers of the World. Such increase of membership would not alone have sufficed to furnish the body of men known as the Industrial Workers of the World with

organs—a president, secretary, treasurer, etc.—whereby it would be endowed with the capacity to function, particularly if it were already endowed with such functioning organ or media through which its purposes might be accomplished and its acts performed.”

[3] Attention is directed to the language of the indictment herein in that in effect it charges defendant with knowingly becoming and remaining a member of the Industrial Workers of the World—the criticism being that the statute does not in terms cover the situation of one “remaining” a member, but in that connection provides as against one who “is” a member. Our interpretation of the matter in question is that one who “becomes” and “remains” a member of the organization “is” a member within the intent and meaning of the statute, and that an allegation such as is contained within the indictment against this defendant is a sufficient compliance with the rules of pleading in such cases made and provided.

The evidence establishes the fact that on the 3d day of June, 1922, in the county of Kern, the defendant was a member of said society. This is sufficient to sustain his conviction under that part of the indictment which charged that defendant at that time and place “remained” a member of the organization, if the evidence is also sufficient to prove that said organization was then and there organized “to advocate, teach, aid, and abet the commission of criminal syndicalism as a means of effecting a change in industrial ownership and control and effecting political changes in the government of the United States.” By the statute, criminal syndicalism is defined to be “any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.”

On behalf of the people and as tending to prove the truth of the charge, much evidence was introduced concerning the nature and the character of the organization by showing literature, including songs, membership cards, and various pamphlets authorized and distributed by the Industrial Workers of the World; by certain conversations among members of the organization in various meetings thereof, as well as by specific acts of criminal syndicalism and sabotage as defined by the statute—all of which was rebutted by a large volume of somewhat similar opposing evidence on the part of defendant.

As a part of the evidence the prosecution was permitted to introduce the testimony of witnesses who had been members of the society wherein they said that they had been present at meetings of particular unions or

local organizations existing within the general society or organization known as the Industrial Workers of the World, at which meetings the use of violent means and destruction of property had been favorably discussed, and that, as a result of those discussions, sundry acts of violence, including arson, had been committed. None of these acts occurred on June 3, 1922, or within two years prior to that time. In order to meet this and other evidence relating to the same issue, the defendant called as a witness in his behalf one William Newton, who testified that after he joined the I. W. W. in 1917, he had attended meetings of the organization and had worked in places where other members were employed. Counsel for defendant then asked:

“During your association with members of the Industrial Workers of the World, during your membership, have you heard any discussion of violence and destruction of property as a means of accomplishing the ends of that organization?”

The district attorney objected to the question as incompetent, irrelevant, and immaterial, and as calling for negative testimony. This objection was sustained. The attorney for defendant stated at that time that he proposed or had intended to ask this question of each witness who had been in membership in that organization, and refrained from doing so because of rulings of the court, which had theretofore indicated that the objection would be sustained. The court instructed counsel that, “after the court has once ruled, you are not to follow it up.”

If the foregoing question had been allowed, it might be presumed that the witness would or might have stated that he had heard discussions of the stated subject during meetings of the society, and might have repeated the statements constituting said discussions, and it might have appeared from the testimony that everything that was said on the subject at said meeting or meetings was adverse to the use of any violence or destruction of property whatever as a means of accomplishing the ends of the organization or at all. The plain intention of the defendant was to produce evidence of that character. Counsel for defendant in his opening statement to the jury had said that he proposed to show that while the Industrial Workers of the World were somewhat loose in their methods prior to the year 1918, if the organization permitted certain publications and certain utterances which were of a questionable character, that it had discarded all of those utterances; that its old literature had been burned, destroyed, and withdrawn, and that in its place new literature had been substituted which preaches, advocates, and teaches the doctrine of industrial unionism completely within the law; that the organization has gone on record as repudiating acts of violence.

[4] When the defendant by the evidence offered attempted to make good these promises of his counsel, he surely had the right to produce all legally admissible evidence tending to prove the absence of criminality in the doctrines, teachings, and methods of action of the organization.

On behalf of the prosecution it is claimed that testimony, such as that above mentioned to which objections were sustained, was inadmissible because the question was too general and did not meet the issue raised by the prosecution. We are rather inclined to believe that the court excluded the testimony under the impression that it was of the nature of self-serving statements made by a coconspirator, and attempted to be used, as the Attorney General says, to "whitewash" the adverse testimony with such generalities.

[5] We do not think that the testimony was inadmissible as calling for self-serving statements. Like much of the prosecution's evidence, it related to transactions which, so far as the evidence shows, occurred prior to the time of the defendant's membership in the organization. If at the time of those transactions an unlawful conspiracy existed, the evidence does not prove that the defendant was then a member of it. If afterwards he became a member of the organization, and if it then was of the criminal character described in the indictment, then he was guilty of the crime charged. But in order to establish his guilt it was necessary for the state to prove the guilty character of the organization. For that purpose, evidence of its character prior to his membership was admissible, and if accompanied by evidence that during his membership it continued to be an organization of that character, then such evidence would be sufficient to establish his guilt in being a member of the society. *People v. Steelik*, 187 Cal. 361, at pages 376, 377, 203 Pac. 78. The character of the organization itself as being one of a criminal or else of a noncriminal nature was a fact to be determined, a fact extraneous to any act of the defendant, but which was necessary to a determination of the guilt or innocence of the defendant in permitting himself to be a member of the organization. If it was competent for the prosecution to prove the criminal character of a general society like the I. W. W. by evidence of discussions occurring at meetings of one or more of its branch organizations, then it seems entirely reasonable and equally competent for the defendant to prove the innocent character of the society by evidence of discussions occurring at and during meetings of such organizations.

[6] The defendant claims that the court erred in sustaining objections to his offer of certain evidence tending to prove that the I. W. W. was not affiliated with the so-called Red International of Moscow or the Red International Trades Union. If the evidence

for the prosecution tended to prove the existence of such affiliation, then this evidence on the part of appellant should have been admitted. But we have not yet discovered in the record any evidence on the part of the prosecution tending to establish such affiliation. It does not occur in those portions of the record referred to by counsel. There is evidence referring to the Bolsheviks or the Russian Soviets, and there is evidence in the form of publications issued by the I. W. W. tending to prove the sympathy of that organization with some of the doctrines of the Russian revolutionists or of some one or more of the various organizations of the Russian revolutionists. But that alone in such general form is not a sufficient basis to have entitled appellant to introduce the particular evidence here in question.

On the part of the prosecution it was shown that the I. W. W. some years prior to 1922 published and circulated numerous pamphlets, some of which contained and taught the doctrine of sabotage and advocated violent destruction of property as a means of furthering the purposes of the organization. On the other hand, the defendant introduced in evidence a resolution, adopted and published in the year 1919 by the general executive board or central organization of the I. W. W., declaring that the organization "does not now and never has believed in or advocated either destruction or violence as a means of accomplishing industrial reform." Defendant further introduced evidence tending to prove that the publications which most clearly and definitely incited to violence and the use of sabotage, and which prior to the year 1919 had been circulated by or within the organization, had been withdrawn and had been ordered to be burned, and in certain instances quantities of them had been burned. In view of this evidence and other evidence contained in the record it must be admitted that there was a strong conflict in the evidence concerning the real character of the organization in question (at any time while defendant was a member thereof) as related to the subject of its teachings, doctrines, and precepts relating to the means of accomplishing changes in industrial ownership or control or effecting any political change.

[7] We cannot say that the evidence so fully and completely establishes the fact adversely to defendant that the error of the court in excluding further evidence in support of his contentions about that matter was without prejudice to his substantial rights. And our opinion of this matter cannot be affected by the fact that the decisions of the Supreme Court of the state in some others of these syndicalism cases indicate that in those cases the evidence did establish the criminal character of the said I. W. W. organization. Upon an issue of fact we are confined to the record in the particular case

before us for decision. The defendant is entitled to acquittal unless it be first shown by competent evidence in his own particular case, not only that he was a member of the organization, but that its doctrines and teachings were those denounced by the statute.

For the foregoing reasons the judgment and the order denying the motion for new trial are reversed.

We concur: CONREY, P. J.; CURTIS, J.

(63 Cal. App. 662)

PEOPLE v. ORTIZ. (Cr. 686.)

(District Court of Appeal, Third District, California. Sept. 12, 1923. Hearing Denied by Supreme Court Nov. 8, 1923.)

1. Criminal law $\S$ 617—No error can be predicated on failure to give sufficient time to prepare for trial where counsel announced himself ready for trial.

In a murder prosecution, defendant could not be heard to complain that he was not given sufficient time to prepare for trial, where his counsel at the beginning of the trial had announced that he was ready.

2. Homicide $\S$ 341—Refusal to instruct as to first and second degree murder held not prejudicial error where conviction was of manslaughter.

Where one accused of murder was convicted of manslaughter only, refusal to give instructions relating to definitions of and distinctions between murders of the first and second degrees are not prejudicial error.

3. Criminal law $\S$ 814(17)—Refusal to instruct as to circumstantial evidence not error where evidence is positive.

In a murder prosecution, it was not error to refuse to give an instruction on circumstantial evidence, the evidence being not circumstantial but that of eyewitnesses, and the court having instructed fully as to burden of proof and reasonable doubt.

4. Criminal law $\S$ 814(13)—No error to refuse to instruct as to presumption from inferior evidence where no such evidence introduced.

In a prosecution for murder, it was not error to refuse an instruction stating the presumption arising from the production of inferior evidence, where no such evidence was introduced.

5. Criminal law $\S$ 822(15)—No error to refuse to instruct as to manner of weighing defendant's testimony where rules for credibility of all witnesses given.

In a prosecution for murder, it was not error to refuse to instruct as to manner of weighing defendant's testimony, where the court instructed fully as to rules determining the credibility of all witnesses.

6. Criminal law $\S$ 786(2)—Jury not without right to discredit defendant's testimony because he is defendant.

A requested instruction in a murder case that the jury had no right to discredit or discount defendant's testimony, merely by reason of the fact that he was the defendant, was not a correct statement of the law.

7. Criminal law $\S$ 814(13)—No error to refuse to instruct as to suppression of evidence where no evidence suppressed.

In a prosecution for murder, it was not error to refuse to instruct as to the suppression of evidence, where it did not appear that any evidence was suppressed.

8. Criminal law $\S$ 768(2)—Refusal to instruct that defendant was entitled to independent judgment of every juror held not error.

It was not error in a prosecution for murder to refuse to instruct that defendant was entitled to the independent judgment of every juror, as jurors will not be presumed ignorant of their duty in that respect.

9. Criminal law $\S$ 759(2)—Instruction as to inference of malice held properly refused as invading province of jury.

In a prosecution for a homicide committed in a hotel dining room, it was not error to refuse to instruct that a guest had the right to the use of a public dining room, and need not surrender such right because of the boisterous or threatening conduct of any other guest, and that no presumption of malice or premeditation would lie from the mere fact that defendant returned to the dining room after having been forced to retire therefrom because of the threatening manner of deceased, since the question, whether defendant's return, armed with a pistol, justified an inference of malice or premeditation, was solely for the jury.

10. Criminal law $\S$ 761(4)—Instruction held properly refused as assuming facts.

In a prosecution for a homicide committed in a hotel dining room, an instruction as to the right of defendant to be in the dining room, and that no presumption of malice or premeditation would arise from the fact that he returned to the dining room after being forced to retire therefrom, held properly refused as invading the province of the jury in assuming that defendant was forced to retire from the dining room.

11. Criminal law $\S$ 761(6)—Instruction assuming facts properly refused.

In a prosecution for murder, an instruction assuming as a fact that defendant's only part in the difficulty consisted in efforts to preserve the peace was properly refused.

12. Homicide $\S$ 116(4)—One believing another's life in danger does not necessarily have right to give him a weapon.

It is not the law that one who believes another's life to be in danger from an attack by a third person has a right to procure a weapon for the other with which to protect him from such an attack, since to justify killing in self-defense it must appear that defendant had a reasonable cause to believe that he or another

was in imminent danger, and believed it was necessary to kill.

13. Criminal law ⇨829(20)—Instructions as to conviction as accessory held properly refused in view of other instructions given.

In a prosecution for murder, refusal to instruct that to convict defendant as an accessory the jury must believe that a common design existed between defendant and the person who actually committed the crime, and that it was such common design which rendered the accessory criminally liable, and that defendant could not be convicted where the commission of the crime was the independent resolution of the principal, formed by him acting alone and without agreement with the accessory, held not error, other instructions clearly stating the law applicable to the case having been given.

14. Criminal law ⇨73—What necessary to emancipate accessory from acts of principal stated.

The responsibility of an accessory does not cease simply because he changes his mind, and tries, when too late, to stop the criminal act; for to emancipate him from the consequences, he must not only have acted in time, and done everything practicable to prevent the consummation, but the consummation, if it takes place, must be imputable to some independent cause.

15. Criminal law ⇨959—Affidavit for continuance held insufficient when merely based on belief and not information.

In a prosecution for murder, it was not error to refuse a continuance to enable defendant to prepare affidavits on motion for new trial, where the affidavit of defendant's counsel on the motion stated that he "believed" that a certain boy, if found, would testify to certain facts, especially where the evidence would have been cumulative.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Antonio Ortiz was convicted of manslaughter, and he appeals. Affirmed.

Russell P. Tyler, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was charged with the murder of one Felix Rolden, and was convicted of manslaughter. This appeal is from the judgment and the order denying defendant's motion for a new trial. The facts hereinafter stated, except as otherwise indicated, are gathered from the testimony of witnesses for the prosecution.

The homicide occurred at the Terminal Hotel, situated a mile south of Oroville, on the 22d day of October, 1922. About a month prior thereto the defendant, his wife, and a man named Bilboa went to this hotel together, the defendant and his wife staying there for two days, and Bilboa a few days longer. Bilboa returned October 20th, and on the 22d, at about 7 o'clock in the evening,

the defendant, his wife and a young man whose name is not disclosed by the evidence, who will be called "Doe," arrived at the hotel in an automobile driven by the defendant, he having theretofore engaged a room for himself and wife. During the evening a number of guests, including the defendant, Doe, Bilboa, and Rolden, were in the dining room drinking intoxicating liquors, Bilboa becoming intoxicated. Shortly after 10 o'clock Rolden became incensed at some of the statements made by the drunken man and attacked him, striking a few blows, but apparently causing no injury. The defendant and Doe, with others, separated the two men, whereupon Rolden drew a razor from his pocket, and accused the defendant and Doe of taking Bilboa's part in the affray. Doe told Rolden to put the razor away, but the latter refused, and, stepping towards Doe, threatened to kill him. Doe then approached the defendant and asked, "Where is the gun?" The defendant, either alone or in company with Doe, left the room, and immediately returned with a pistol, and, pointing it at Rolden, said: "Take that razor away or I will kill you." Rolden refused, and made further threats, and, according to one witness, made demonstrations of intent to inflict injury with the razor. Doe then took the pistol, and shot Rolden. One witness testified that when Doe took the pistol he said to Rolden: "Throw the razor away," and that the latter said: "No, I cut your head off," and attempted to cut Doe, and that thereupon Doe fired. Another witness testified that Rolden had turned away from the defendant and Doe before the shot was fired. The bullet entered Rolden's back and passed out at the front of his chest. The evidence is conflicting as to whether the defendant made any effort to prevent Doe from taking the pistol. The defendant and his wife immediately left, taking Doe and Bilboa with them. When they were about to leave, one of the witnesses asked defendant to take the wounded man to a hospital, and the defendant replied that he would "send a taxi up here right away," but he did not do so.

The defendant testified that he never saw either Doe or Bilboa except on the evening of the homicide; that he was not present at the time of the quarrel between Rolden and Bilboa or at the time the shot was fired, and that he did not procure the pistol; that the first he knew of any trouble was when, while he was in his room preparing to retire, he heard the pistol shot, and that, on making inquiry, he was informed that a man had been hurt, and was urged by the proprietor of the hotel to leave immediately; that he and his wife then left in his automobile, and that some man, he did not know who, rode with them as far as Oroville. He denied that Bilboa left with him. No witness testified

as to the subsequent whereabouts of either Doe or Bilboa. The defendant testified that he left with the intention of going to Arizona, where he hoped to secure employment in the mines; that he drove for three days until he reached Brawley, Imperial county, about 23 miles from the Mexican line, stopping a few hours each night to sleep in the automobile; that he remained in Brawley for three days for the purpose of having some necessary repairs made upon his machine, and at the end of that time was placed under arrest and taken back to Oroville; that in going to Brawley he traveled the main highway through Oroville, Marysville, Sacramento, Stockton, Fresno, Bakersfield, and Los Angeles. It is not contended that the evidence is insufficient to justify the verdict, and the foregoing outline is given in order that the points relied on for reversal may the better be understood.

[1] Appellant first contends that he was not given sufficient time to prepare for trial. The preliminary examination was held November 4th, and the information was filed November 20th. On the latter date the defendant was taken before the court for arraignment, but, at his request, the matter was continued to the next day, when it was again continued at his request, on account of the absence of his counsel, to November 27th, the court announcing at that time that the trial would be set for December 11th. On the 27th of November the defendant entered his plea of not guilty, and, over the defendant's objection, the court set the trial for December 11th. The same attorney who appeared for the defendant at the preliminary examination represented him at the trial. At the beginning of the trial counsel for the defendant announced: "We are ready for trial, as well as we can be in the 13 days allotted." The court said: "If you are not ready to go to trial, the court will hear you now for a continuance. You will avail yourself of that, or not complain about it." Counsel replied: "We are ready to go to trial." Appellant cannot be heard to complain of that to which he expressly consented.

[2] The defendant requested the court to give 31 proposed instructions, covering some 40 folios of the transcript. The court refused to give any of them. It is urged that they all should have been given, except one, which it is admitted was substantially given in an instruction prepared by the court. Most of the propositions of law correctly stated in these proposed instructions were substantially given in other instructions. Some relate to the definitions of and distinctions between murders of the first and second degrees, and since the defendant was convicted of manslaughter only, the refusal to give them cannot be considered prejudicial error. Others state mere commonplaces within the knowledge of every intelligent

juryman, or relate to questions concerning which no evidence was introduced. To review all of the proposed instructions would require a lengthy discussion of well-settled principles of law. As to those not specifically mentioned, it is sufficient to say that there is no merit in the contention that it was error to refuse them.

[3] The first proposed instruction is to the effect that, if circumstantial evidence leads to two opposite conclusions, one consistent with guilt and the other with innocence, the jury should acquit. The evidence was not circumstantial, but the positive testimony of eyewitnesses. The court instructed the jury fully on the question of burden of proof and reasonable doubt, and it was not error to refuse the proposed instruction. *People v. Plumeyer*, 54 Cal. App. 786, 202 Pac. 888.

[4-6] The second states the presumption arising from the production of inferior evidence. No such evidence was introduced. The eighth relates to the manner of weighing defendant's testimony. No instruction on the subject was given, but the court instructed the jury fully as to the rules for determining the credibility of all witnesses. This was sufficient. *People v. Washburn*, 54 Cal. App. 124, 201 Pac. 335. The last part of the proposed instruction to the effect that the jury has not the right to "discredit or discount" the defendant's testimony "merely by reason of the fact that he is the defendant," is not a correct statement of the law. *People v. Brown* (Cal. App.) 216 Pac. 411, 414.

[7-9] The ninth deals with the question of the suppression of evidence, but it does not appear that any evidence was suppressed. The twelfth and thirteenth relate to the flight of defendant, but the court fully and fairly instructed the jury upon that question. The fourteenth is to the effect that the defendant was entitled to the independent judgment of every juryman. It is not to be presumed that any juryman was so wanting in intelligence as not to know that his duty was as indicated by the proposed instruction. The refusal to so instruct has been held not to be reversible error. *People v. Perry*, 144 Cal. 748, 78 Pac. 284; *People v. Knight* (Cal. App.) 218 Pac. 79; *People v. Walton*, 53 Cal. App. 35, 199 Pac. 824; *People v. Kiser*, 24 Cal. App. 540, 141 Pac. 1078. The twenty-first is to the effect that a guest has the right to the use of a public dining room, and need not surrender such right because of the "boisterous or threatening conduct of any other tenant or guest therein, * * * and no presumption of malice or premeditation will lie from the mere fact that the defendant returned to said dining room after being forced to retire therefrom because of the aggressive and threatening manner of the deceased." The word "presumption" as used in the instruction was probably intended to mean "inference," and doubtless would have been so understood by the jury. Whether the

defendant's return to the dining room, armed with pistol, justified an inference of malice or premeditation, was a question solely for the jury to determine. The last part of the instruction invades the province of the jury in the assumption that the defendant was forced by Rolden to retire from the dining room.

[10-12] The twenty-fifth is erroneous in assuming as a fact that "the defendant's only part in the difficulty consisted in efforts to preserve the peace." The twenty-sixth states that "one who believes another's life to be in danger from an attack threatened to be made upon him by a third person has a right to procure a weapon for the other with which to protect him against such an attack." To justify the taking of human life on the ground of self-defense, it is not sufficient to show that the one who committed the act believed that his life was in danger from a threatened attack, but it must appear that he had reasonable cause to believe that he was in imminent danger of losing his life or suffering great bodily harm, and that he believed, as a reasonable man, that it was necessary for him then and there to take the life of the deceased to save himself from death or great bodily harm. The same rule must apply in the case of an accused who, being present and knowing the situation of the principals, participates by putting a deadly weapon into the hands of one of them. Tested by this rule, the proposed instruction does not correctly state the law.

[13] The twenty-seventh stated that "in order to convict the defendant upon the theory that he was an accessory to the crime you must believe that a common design existed between the defendant and the person who is alleged to have committed the crime, and that it is this common design which renders the accessory criminally responsible for a homicide committed by the principal, and the defendant cannot be convicted as an accessory where it appears from the evidence that the commission of the crime was the independent resolution of the principal, formed by the principal acting alone and without agreement with the accessory." The instruction is somewhat objectionable in that the jury might understand from it that proof of an express agreement between defendant and Doe to commit the crime was necessary to a conviction, but, aside from this, the court instructed the jury that "for one person to abet another in the commission of a criminal offense, simply means to knowingly and with criminal intent aid, promote, encourage, or instigate by act or counsel or by both act and counsel, the commission of such criminal offense," and that "if you believe from the evidence beyond a reasonable doubt that the crime charged in the information was committed in Butte county at or about the time therein stated, and that the defendant, Antonio Ortiz, did not himself commit the act

constituting that crime, but that the defendant did aid and abet in its commission, or, even though he were not present at its commission, that he did advise and encourage its commission, then you should regard the defendant as a principal in the crime so committed, the same as if he had committed the act constituting the offense." These instructions so clearly state the law applicable to the case that it is not believed that the defendant could have suffered prejudice by failure to give the proposed instruction. Where the court has clearly stated the elements necessary to constitute the crime charged, the jury must be presumed to have understood that in the absence of sufficient proof of any one of those elements the defendant was entitled to an acquittal. If the jurors entertained a reasonable doubt whether "the commission of the crime was the independent resolution of" Doe, "formed by" Doe "acting alone and without agreement with" the defendant, it would be attributing to them a want of ordinary intelligence to assume that they would convict, in view of the instruction last quoted, together with those upon the question of reasonable doubt and burden of proof. The twenty-eighth and twenty-ninth were to the effect that the responsibility of an accessory ceases when he "abandons the common purpose and withdraws from any further concert, * * * and it is sufficient to show the resolve of said accessory if he says or does anything to indicate his resolve to so withdraw from said affray," and that "if the accessory repented of and relinquished his purpose of conniving, aiding, and abetting the commission of said crime before the commission thereof, he cannot be convicted of any grade of homicide."

[14] The proposed instructions are manifestly incorrect. Responsibility of an accessory "does not cease simply because, after starting the ball, he changes his mind, and tries, when too late, to stop it. [To emancipate him from the consequences, not only must he have acted in time, and done everything practicable to prevent the consummation, but the consummation, if it takes place, must be imputable to some independent cause." Wharton's Criminal Law (11th Ed.) § 267. It is contended that the court used the words "aid or abet" rather than "aid and abet" in the instruction last quoted as having been given. By reference to page 24 of the clerk's transcript it will be seen that counsel is in error.

[15] It is finally urged that the court erred in refusing a continuance to enable defendant to prepare affidavits on motion for a new trial. In support of the motion for a continuance, counsel for defendant presented his own affidavit, in which he stated that he had been given information concerning a young Mexican boy who, affiant "believed," was the person who rode in defendant's car from the Terminal Hotel on the night of the tragedy,

and that "affiant believes that said Mexican boy, if found, will testify that he did so ride, * * * that he was present on said premises at the time said shot was fired, and that he knows of his own knowledge that said shot was not fired by the defendant Ortiz, nor was the defendant Ortiz present when said shot was fired; * * * that he knows * * * that there was no one else that rode in said car from said premises, * * * except he (said Mexican boy), Mrs. Ortiz, and said defendant." Counsel states in his affidavit that he "believes" the Mexican boy will testify to other enumerated matters inconsistent with some of the testimony given at the trial. He failed to state, however, that he had any information to the effect that the Mexican boy would testify to any of the facts enumerated in the affidavit. Such evidence, if produced, would have been cumulative only. It was not error to deny the motion for a continuance on the showing made.

The judgment and order are affirmed.

I concur: HART, J.

63 Cal. App. 755

PEOPLE v. McNABB. (Cr. 976.)

(District Court of Appeal, Second District, Division 2, California. Sept. 25, 1923. Rehearing Denied Oct. 20, 1923.)

1. Criminal law § 543(2)—Sufficient foundation furnished for introduction of testimony of confessed accomplice given at preliminary hearing.

In a prosecution for robbery, showing held to furnish sufficient foundation for the introduction of testimony of a confessed accomplice given at the preliminary hearing, under Pen. Code, § 686, providing that the deposition of a witness on the preliminary hearing may be read at the trial upon a satisfactory showing that he cannot with due diligence be found within the state.

2. Robbery § 24(1)—Verdict held supported by evidence.

Verdict in prosecution for robbery held abundantly supported by the evidence.

3. Criminal law § 798(1)—Requested instruction that jurors need not be influenced by importunities of other jurors properly refused.

A requested instruction that, if any juror entertained a doubt as to defendant's guilt, they "need not be influenced by importunities or otherwise from other jurors" to change their vote, but were entitled to maintain that doubt throughout, was properly refused, since this would bar discussion among jurors and deter each juror from allowing the fair arguments of the others to weigh in the formation of an opinion as to guilt of accused.

4. Criminal law § 798(1)—Instruction that jury cannot convict if any juror not convinced of defendant's guilt beyond reasonable doubt, proper.

An instruction to the effect that the jury could not convict if any individual juror was not convinced of defendant's guilt beyond a reasonable doubt would have been proper, yet its refusal would not constitute reversible error.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

E. A. McNabb was convicted of robbery, and he appeals. Affirmed.

Lucas F. Smith, of Santa Cruz, for appellant.

The Attorney General and Thomas Lee Woolwine, Dist. Atty., and Buron R. Fitts, Deputy Dist. Atty., both of Los Angeles, for the People.

CRAIG, J. Appellant herein was convicted of robbery, a felony, on January 12, 1923, and from the judgment and order denying his motion for new trial, appeals. He was charged by information with having, on or about the 28th day of April, 1922, robbed, stolen, and driven away from the possession and immediate presence of one G. Pagliano a Peerless automobile, and with having at the same time robbed and stolen from the latter a knife, jewelry, clothing, and money, of a total value of about \$3,000.

Considering appellant's exceptions to the testimony of accomplices, and his evidence tending to establish an alibi, it may be said that the principal ground upon which he seeks a reversal is an asserted insufficiency of evidence to connect him with the offense. A concise statement of the salient features of the evidence will best serve to fairly present the issues and a proper application of the law.

On the 28th day of April, 1922, at about midnight, one Pagliano and his wife were driving toward their home in Los Angeles in a gray Peerless automobile having engine No. 17834, when, at the intersection of Eighth and Bronson streets, three masked men drove up beside them in another automobile and ordered them to stop; one of the men boarded the Peerless on each side, pointed guns at the occupants, ordered them to throw up their hands, and compelled them to alight; the other of the strangers remained in the bandit's car. Pagliano and wife were searched. A watch, chain, gun, and \$50 in money were taken from the former, and a handbag, string of pearls, and fur neckpiece from the latter, whereupon one of the men drove away Pagliano's car; the other two disappearing in the strange machine. Upon the trial each of the victims identified articles produced as being the property taken

from them at the time in question, and testified that they had since seen their Peerless automobile, but that it had been repainted black, or some dark color. Another witness testified that in the latter part of April, 1922, appellant and two other men had rented her garage, in which they subsequently placed a gray machine; that a few days later the same men drove it away; and that it had been repainted a dark color, almost black. A witness from Hollywood identified McNabb, and stated that she had known him for a period of about four years; that she had employed him as her chauffeur, and had seen him off and on practically all of the past year; that one evening during the last of April McNabb visited her home and left the fur and handbag identified by the Paglianos, which she agreed to sell for appellant.

A policeman in San Francisco arrested McNabb and one Cave in that city on July 12th, and seized the Peerless car, which they were driving, at which time appellant stated that a man named Young, whom he had known about two days, had given it to him in Salinas; the manager of the safe deposit department of a San Francisco bank identified appellant, and testified that he had rented a box at that bank on June 16th, and produced signature and entrance cards bearing the latter's signature, with a Los Angeles address which he gave at the time; a sergeant of police from San Francisco stated that appellant told him he had come from Monterey about July 10th, that he had been living at San Diego, and was never in Los Angeles except for three days while passing through, that he had gotten the Peerless car from a man at Salinas; an operator's card bearing the name S. E. Young, dated May 29th, and Pagliano's knife, were taken from the person of appellant.

Mrs. Pagliano identified two keys to a San Francisco safe deposit box, a pencil and notebook, handkerchief, and vanity case, which she testified were in her handbag when stolen, and she testified that she had received these articles from the San Francisco bank shortly after the holdup; a Los Angeles police detective testified that appellant told him in San Francisco on July 18th that the Peerless car had been given him at Salinas two days prior to his arrest; when reminded that the arrest had been made on the 12th of July, and the date of the operator's card was mentioned, McNabb then stated that he had received the machine two days before leaving Los Angeles, and that he personally obtained the card and signed the name S. E. Young thereto; that he rented the deposit box in the name of Young to correspond with the card.

One Cecil Coons, a boy, had previously been arrested for this same offense, had testified at the preliminary examination, pleaded guilty in superior court, and was sent to

the George Junior Republic, from which he escaped and disappeared. In his said testimony he identified Pagliano and his wife, and McNabb, and swore that the latter came to his home on the night of April 28th, from whence the witness, his brother, Floyd Coons, and McNabb went to Eighth and Bronson streets in McNabb's light Six Studebaker machine, and held up the Paglianos; he recognized the stolen articles, and stated in minute detail the facts as related by both victims of the robbery, further testifying that McNabb had left some of the loot at the Coons residence over night, and had taken it away in the morning; that he went to the Hollywood address with appellant when the latter delivered a bundle at that place; that he and McNabb rented a garage, where the Peerless was stored, and that they procured and applied black paint to the body.

Floyd Coons also testified at the preliminary to the same details, and upon a plea of guilty in superior court was sentenced to the penitentiary. He was sworn as a witness for the defendant, but flatly contradicted and denounced as false practically every material statement made by him at the preliminary hearing. He had previously stated that no immunity had been promised him, but upon the trial he testified that his incrimination of McNabb had been perpetrated because the state was unable to apprehend Sam Young, who, he said, was the guilty man.

The mother of the Coons boys testified that she knew McNabb, and that he was at her house frequently, particularly on the night of the holdup.

The defendant denied any knowledge of the robbery, or acquaintance with the Coons boys, or their mother, and denied that he had ever visited their home; he admitted having registered at a hotel in Los Angeles under the name of Forrest, which is significant in view of the fact that Floyd Coons testified at the preliminary examination that he knew McNabb as Forrest. Appellant testified that a friend named S. E. Young, from Mexicali, had requested him to dispose of the articles which he had taken to the Hollywood witness; that he drove the Peerless from Los Angeles to San Francisco for Young, on or about May 30th; admitted having told the detectives that he obtained the car at Salinas; that he was frightened when arrested, and thought something was wrong; he denied having previously seen the Paglianos.

Appellant further testified, and produced a witness to prove, that he was at La Boheme Café, in Los Angeles, on the 28th of April, from early in the evening until 12 or 1 o'clock.

It is contended upon this appeal that Cecil Coons, a confessed robber, and accomplice, was the only connecting witness between the appellant and the offense; that his testi-

mony stood alone, without corroboration, and as such should be received with distrust and suspicion, as to which the trial court erred in instructing the jury and in refusing instructions requested. It is further contended that a defendant is entitled to be confronted with witnesses against him, and that there was no sufficient showing of diligence in searching for Cecil Coons to entitle his prior testimony to admission upon the trial.

[1] Upon this latter point, the officer from George Junior Republic testified that Cecil Coons escaped November 14, 1922, and had not since been seen, nor did the witness know where to find him; a police detective had a bulletin issued, bearing his picture and description, and circulated the same, asking any officer to arrest him, and communicated with relatives of Coons, but could not locate him; an investigator for the district attorney attempted to serve a subpoena, consulting various directories, and making inquiries, without success; his brother Floyd testified that Cecil was in Mexico, and that he had received a letter from him written in Mexicali. Section 686 of the Penal Code provides that the deposition of a witness on the preliminary examination may be read at the trial "upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state." The uncontradicted and unqualified statement of the brother justified the trial court in concluding that at the time of the trial the witness Cecil Coons could not with due diligence be found within the state of California. *People v. Buckley*, 143 Cal. 375, 77 Pac. 169.

The jury were very carefully instructed that whether one is an accomplice is a question to be determined by the jury from all the testimony and circumstances, and that even if they should believe the testimony of an accomplice to be true, it would not support a verdict of guilty unless they further believed there was other and corroborating evidence tending to connect the defendant with the offense; that from all of the evidence in the case they must believe the defendant guilty beyond a reasonable doubt before they could convict; the jury were instructed that if they believed the witness had falsified on any material point, they should treat all of his testimony with distrust and suspicion, and reject it all unless convinced that the witness had in other particulars spoken the truth; that a witness is said to have been corroborated when it is shown that his testimony corresponds with representations of some other witness, or comports with some facts otherwise known or established by evidence. It is conceded that Cecil Coons was an accomplice, and defendant requested an instruction to that effect; but the same was refused. However, the defendant's conflicting explanations of

possession of the stolen property, his acts, conduct, and declarations, and other suspicious circumstances, as to each and all of which the jury were fully instructed, may well have satisfied them of the defendant's guilt, regardless of the testimony of Cecil Coons. Furthermore, the same considerations doubtless led them to believe the testimony first given by Floyd Coons, in spite (or perhaps because) of his energetic denials at the time of the trial.

The court was amply justified in concluding from the evidence that all reasonable steps had been taken to procure the apprehension and production of Cecil Coons. This is especially so when shown by Floyd Coons, a witness for the defendant, that Cecil was in Mexico. Apparently state, county, and city officers had searched for the fugitive and exerted extraordinary efforts toward his recapture. They at least displayed a diligence satisfying statutory requirements for the production of ordinary witnesses by subpoena. After personal inquiry and circularization, it appeared that the party sought was not in the United States. We fail to perceive what more could have been done to show the court that Cecil Coons could not with due diligence be found within the state. It furnished sufficient foundation for the introduction of his testimony given at the preliminary hearing.

[2] We think the verdict was abundantly supported by the evidence.

[3] Appellant next complains of the trial court's refusal to give the following instruction requested by him:

"The court instructs you that, if any one of you entertain a doubt as to the defendant's guilt, you are entitled to maintain that doubt throughout all the deliberations of the jury, and need not be influenced by importunities, or otherwise, from other jurors during the deliberations of the jury in this case, to change your vote. You are entitled to hold out for an acquittal during all deliberations."

[4] It will be noted particularly that the instruction here involved would impress upon each juror that he "need not be influenced by importunities, or otherwise, from other jurors," which is not the law in this state, and we fail to find any authority elsewhere going so far. This instruction would bar discussion among jurors and deter each juror from allowing the fair arguments of his fellow jurors to weigh in the formation of an opinion as to the guilt or innocence of the accused. If the requested instruction had been in the form often given, to the effect that the jury could not convict if any individual juror was not convinced of the defendant's guilt beyond a reasonable doubt, it would have been proper; yet its refusal would not have constituted reversible error. *People v. Walton*, 53 Cal. App. 35, 199 Pac. 824; *People v. Svendsen*, 25 Cal. App. 1, 142

Pac. 861; *People v. Singh*, 20 Cal. App. 146, 128 Pac. 420.

The other requested instructions contended for were covered by those which had been given, and we think we have already passed upon any remaining points made by the appellant.

The judgment and order denying a new trial are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

63 Cal. App. 732

PEOPLE v. McNABB et al. (Cr. 977.)

(District Court of Appeal, Second District, Division 2, California. Sept. 20, 1923. Rehearing Denied Oct. 20, 1923.)

1. Criminal law — 543(2)—Sufficient showing of diligence made to admit testimony of confessed accomplice given at preliminary examination.

In a prosecution for robbery, showing held sufficient to admit testimony of confessed accomplice given upon preliminary hearing, under Pen. Code, § 686, providing that the deposition of a witness on preliminary examination may be read at the trial upon satisfactory showing that he cannot with due diligence be found in the state.

2. Robbery — 24(1)—Verdict held not unwarranted.

Verdict in prosecution for robbery, even without testimony of a confessed accomplice given at the preliminary hearing, held not unwarranted.

3. Criminal law — 830—Instruction consisting partially of argument and repetition of other instructions properly refused.

Where, in a prosecution for robbery, an admitted fact that a confessed accomplice had pleaded guilty was in evidence, a requested instruction that the testimony of the accomplice should be received with caution, when a portion of the request consisted of argumentative matter and the repetition of other instructions, did not require the court to separate the sound principles from the others and give a modified instruction, but might refuse it entirely.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

E. A. McNabb and another were convicted of robbery, and they appeal. Affirmed.

Lucas F. Smith, of Santa Cruz, for appellants.

U. S. Webb, Atty. Gen., for the People.

CRAIG, J. The defendants were jointly charged with robbery of one Robert Mahon in Los Angeles county on or about May 21, 1922, and appeal from the judgment based upon a verdict of guilty rendered the 16th

day of January, 1923, and from the order denying their motion for new trial.

The principal grounds of appeal consist of alleged insufficiency of evidence to sustain the verdict, improper admission in evidence of an accomplice's testimony taken at the preliminary examination, and failure to corroborate such testimony; the soundness of the first ground turns upon that of the latter two, and accordingly the judgment must stand or fall with them. If there was not sufficient competent evidence of guilt, a new trial should be granted.

[1] The evidence for the state opens with the testimony of one Cecil Coons, given upon the preliminary examination, wherein he confessed to complicity with these appellants in the commission of the offense. Thereafter and prior to the trial this witness pleaded guilty and was sent to the industrial school at Chino, Cal., from which he escaped. His testimony is prefaced by that of two superintendents of the institution as to his disappearance, of a police detective—the arresting officer—that he published a bulletin to all officers in the state bearing the picture and description of the fugitive, visited all of his known haunts and places where rumors indicated he might be found, asked hundreds of Los Angeles officers to watch for him, and inquired of the county probation officer as to his whereabouts, and the latter enlisted the services of the sheriff and the police department. Each having testified that no trace had been found of the witness' whereabouts, the testimony of Coons was read to the jury.

Appellants contend that this did not constitute sufficient showing that the witness could not be found within the state. It is in great measure a question of fact for the trial court to determine. It appears that a double search was instituted for Coons. He was sought both as a witness and as a fugitive from justice. It is seldom that measures such as here adopted are taken merely to procure a witness in any action, and we cannot say that more diligence was required or contemplated by section 686 of the Penal Code. Again, Floyd Coons, a brother of Cecil Coons, testified that the absent witness was in Mexico. Section 686 of the Penal Code provides that the deposition of a witness on the preliminary examination may be read at the trial "upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state." The uncontradicted and unqualified statement of the brother justified the trial court in concluding that at the time of the trial the witness Cecil Coons could not with due diligence be found within the state of California. *People v. Buckley*, 143 Cal. 375, 77 Pac. 169. We conclude that this point is without merit.

Coons testified that he went to Pasadena

with defendants Cave and McNabb some time about the 29th of May, where they all took part in the holdup; that by prearrangement he met them at Tenth and Figueroa streets in Los Angeles, and the three men started out in a Peerless automobile driven by McNabb; that they drove up beside a car in which were two men and a lady, ordered the men out of the machine, and that the witness held a gun on one man while Cave searched the other; that a watch and \$4 were taken by McNabb from the man held up by the witness; that they returned to Los Angeles and were together until about 1 o'clock next morning, when Cave departed, and McNabb and Coons put the car in a garage, to which each had a key. This witness further related his acquaintance and previous meetings with appellants.

The lady and one of the men who were held up testified to the details of the robbery as stated by Coons, and the man positively identified Cave, especially from the fact that the latter's mask came off during the holdup.

The appellants were subsequently arrested in a Peerless automobile in San Francisco, and returned to Los Angeles.

Each of the appellants denied being present at the scene of the offense, or having any knowledge thereof, and denied having known Coons or his family. McNabb did not remember where he was on the night in question, but Cave testified that he was working as clerk at the Ambassador Hotel from 6 to 11 p. m., and was corroborated in this by another clerk of the same hotel. McNabb admitted that he had at one time registered at a hotel under the name of Forrest.

Floyd Coons was called as a witness for the defendants and testified that he saw the stolen watch in possession of his brother Cecil that night, but did not see either of the appellants with him. He admitted having previously pleaded guilty to burglary, and that he had come from the penitentiary to testify herein. He positively denied having known either of the appellants before his arrest, but admitted having testified upon the preliminary hearing that he and his brother were with McNabb on many occasions; having received him at his home, ridden with him, and known him as Forrest. He further testified at the preliminary examination that all three had taken a Peerless automobile and other property from the owners on the night of April 28th, and that they were arrested and prosecuted therefor. But

all of this testimony he stamps as false, and swears it was given in order to involve McNabb, in consideration of promises of leniency. As to the latter pretext, however, he admitted having made a written statement that no promise of immunity or hope of reward had ever been held out or mentioned to him.

Mrs. Coons and her daughter, the mother and sister of Floyd and Cecil, testified to many visits of McNabb to their home with the boys, and that Cave had also been there; that they knew them all well.

[2] From positive evidence of the robbery and the many contradictions of facts which the jury doubtless concluded could not have been known at the time of the preliminary examination otherwise than from personal observation, sharp issues arose involving the credibility of witnesses, which only the jury could determine. There is more evidence than mere corroborating circumstances from which the inference of guilt might have been deduced. The jury were fully instructed upon the credibility of witnesses, accomplices, and reasonable doubt, and if they then based their verdict upon other evidence, either without or in conjunction with the testimony of the witness Cecil Coons, we cannot say that it was unwarranted or unfounded.

[3] Appellants requested the following instruction, which the trial court refused:

"The court instructs the jury that Cecil Coons has pleaded guilty to participating in this robbery, in the criminal court, and of course the testimony of a person participating in a crime is always to be received with caution. Sometimes when a man gets into trouble himself, he wants to involve others. Such testimony is to be received with suspicion. It must be considered by the jury along with other testimony."

That the witness named had pleaded guilty was an admitted fact in evidence, and the remainder of the request consisted merely of argumentative matter and the repetition of other instructions. The court was not required to separate the sound principles from others and give a modified requested instruction. *People v. Davis*, 135 Cal. 162, 67 Pac. 59. Had it done so, there was no necessity for repeating in different language instructions already given. *People v. Loomis*, 170 Cal. 347, 149 Pac. 581.

The judgment and order denying a new trial are therefore affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

(63 Cal. App. 709)

PEOPLE v. GROVES et al. (Cr. 969.)

(District Court of Appeal, Second District, Division 2, California. Sept. 19, 1923. Hearing Denied by Supreme Court Nov. 15, 1923.)

1. Criminal law §99—Jurisdiction of court to try an offense is not impaired, though defendants were removed from penitentiary for trial.

Where, through mistake of a clerk, an order staying execution of judgment for conviction of larceny against the defendants until the trial of an indictment for robbery was not inserted in the minutes and defendants were then removed to penitentiary, jurisdiction of the court to try the indictment for robbery is not impaired where defendants acquiesce in their removal from the penitentiary for trial.

2. Criminal law §99—Jurisdiction not impaired by the manner in which accused is brought before court.

The jurisdiction of a court in which the individual is found is not impaired by the manner in which the accused is brought before it.

3. Convicts §5—A prisoner may be brought before the court for any lawful purpose.

Under Pen. Code, § 1567, a prisoner may be brought before the court for any lawful purpose whether confined in the state penitentiary or the county jail, and the proceedings against him are regulated by the same statutory provisions that control procedure in other trials upon similar charges.

4. Criminal law §42—District attorney's promise of immunity from other charge for plea of guilty on one charge not binding.

Where defendants pleaded guilty to grand larceny on alleged promises of the district attorney that they would not be prosecuted on other charges, if district attorney made such promises he exceeded his authority, and did not bind either his own office or the court.

5. Criminal law §42—Ethics of a promise of immunity not considered on appeal.

The court is not required to look into the ethics of a promise of immunity, whereby a defendant pleads guilty, on appeal.

6. Criminal law §736(2)—No error in admitting alleged confessions of defendants where court instructs jury that whether confessions were voluntary or not is a question of fact.

Court did not err in permitting alleged confessions in evidence over the objection of defendants that they were not voluntary, being induced by promises of immunity, where the jury was instructed to disregard any expression of the court on the subject and to determine as a question of fact whether defendants did confess, and, if so, whether it was voluntary.

7. Criminal law §822(1)—Instructions to be considered as a whole in determining their sufficiency.

The sufficiency of instructions is not determined by reading them in isolated sections. They must be construed as given. When, as a

whole, they present the issues properly, there is no ground for reversal.

8. Criminal law §822(6)—Instruction if defendants, or either of them, took the property described held sufficient when considered with other instructions.

An instruction that if the defendants, or either of them, actually took from the person named the property described, they would be guilty, directed a conviction only of such defendant as robbed such person, or aided and abetted such robbery, when considered with other instructions defining aiding and abetting, and that if both defendants committed the offense they would be guilty, where the testimony showed that one defendant robbed complainant, while the other defendant stood off the driver, thereby aiding and abetting him.

9. Criminal law §977(1)—Where defendants were serving a sentence for larceny court could also sentence them for robbery.

The fact that defendants were serving a sentence for larceny in the penitentiary did not prevent their being sentenced for robbery for the term prescribed by law under Pen. Code, § 1191, and section 1168, as added by St. 1917, p. 665, making it mandatory on the court to do so.

10. Criminal law §1210—Sentence to imprisonment for the term prescribed by law, though running concurrently with another sentence, is not cumulative.

A sentence adjudging that defendants be imprisoned for the term prescribed by law, though running concurrently with a sentence for larceny which defendants were serving when tried, is not cumulative.

11. Criminal law §1036(1), §1137(5)—Admission of a picture of defendant not prejudicial where no objection taken.

A picture of one of the defendants introduced into evidence is not prejudicial, where no objection is offered when introduced and received, and it further appears that it was introduced at instance of defendant's counsel during cross-examination by the district attorney.

12. Witnesses §319—Foundation must be laid before right to impeach a witness can be granted.

Court did not err in denying defendant a right to impeach state's witness, where no foundation was laid for such impeachment.

13. Criminal law §1186(4)—No reversal where guilt of defendants is clear and no errors occurred which could prejudice the jury.

Under Const. art. 6, § 4½, no reversal is allowed, where it appears that the guilt of each of the defendants is clear and conclusive and no errors occurred which could have prejudicially misled the jury.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

W. E. Groves and Mike A. Sullivan were convicted of robbery, and they appeal. Affirmed.

Fred H. Thompson and Ira L. Brunk, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., for the People.

CRAIG, J. The defendants were convicted on December 26, 1922, of the crime of robbery; the specific charge being that on or about the 19th day of June of that year, in the city of Los Angeles, they took from one G. C. Knight personal property of the value of \$16.65 in gold coin of the United States. For purposes of intelligible reference we may denominate this the oil-station case.

On October 3, 1922, the same defendants pleaded guilty to grand larceny under an information consisting of three counts charging, respectively, grand larceny, robbery, and burglary, in that these defendants and one William Allen stole \$25,000 worth of diamonds and jewelry on or about June 1, 1922, in said city of Los Angeles. This will be referred to as the Rowan case.

Sentences were pronounced in the latter case on October 10th, and execution was stayed until the 17th, at which time defendants moved to dismiss the second and third counts, which motion was denied. The district attorney moved to set the cause for trial on said two counts, which was also denied, and he thereupon stated that the oil-station case was pending and had been set for trial on November 29th, and asked that execution in the Rowan case be stayed until December 1st, and the court so ordered.

Through inadvertence and mistake of the clerk the order staying execution was not inserted in the minutes, and a commitment was issued and delivered to the sheriff, pursuant to which the defendants were removed to the penitentiary. November 25th an order was made directing the sheriff to return the defendants from the penitentiary and produce them in court on the 29th of that month for trial, and the warden was therein directed to deliver them to the sheriff upon the production of said order. Defendants were accordingly brought into court as ordered, and on said 29th day of November, a further order was entered reciting the oversight and directing that the minutes of October 17th be corrected so as to set forth the facts and the order staying execution until November 29, 1922. Defendants thereupon moved for a continuance, which was granted, and on December 1st they prayed for a further continuance on the ground that the court had no jurisdiction, which motion was denied; however they were given until December 20th to prepare for trial. On this latter date the trial commenced, and resulted in a verdict of guilty against both defendants.

From the final judgment of conviction and from an order denying their motion for a new trial, the defendants have appealed to this court.

[1] The first ground upon which the defendants seek to reverse the judgment is that the trial court exceeded its jurisdiction in ordering and removing them from the custody of the warden of the state penitentiary, and forcing them to trial.

The minutes of the trial court show several continuances granted at defendants' request, and that on August 25th they consented to November 29th as the date of trial; when they appeared and pleaded guilty in the Rowan case, on October 3d, the district attorney's motion for stay of execution appears to have been granted. That both defendants were therefore fully cognizant of the status of their case, and were at least constrained to anticipate the probability of a trial, they cannot consistently gainsay. The record does not warrant the inference, nor do the defendants contend, that they otherwise than silently submitted to removal to the penitentiary and return therefrom. The authority of the sheriff, or of the warden, was at no time questioned, and, after such acquiescence in the execution by those officers of the court's orders, they were too late to attack the validity of the removal proceedings or the jurisdiction of the court. In *Ex parte Clark*, 85 Cal. 203, 24 Pac. 726, it was determined that the court had jurisdiction to try the petitioner for murder, although to be so tried he was brought from the prison at Folsom, where he was serving a sentence upon conviction of felony. In passing upon the question the court used the following language:

"No matter whether the superior court of San Francisco had the right to order the petitioner out of the custody of the warden of the state prison or not, he was produced. An information charging him with an offense within the jurisdiction of that court was filed, and the court thereby became and was vested with the power and jurisdiction to try him, and its judgment is valid and binding. Therefore he cannot be heard at this late day to claim, in a proceeding of this kind, that the sheriff has no right to hold him under such judgment. Conceding that the warden of the state prison might have asserted his right to hold the petitioner under the commitment from the superior court of San Diego County, it is clear to us that the petitioner cannot escape the consequences of a valid judgment rendered against him, by showing that another valid judgment had previously been rendered which had not been fully executed."

[2, 3] "The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it." *Mahon v. Justice*, 127 U. S. 708, 8 Sup. Ct. 1208, 32 L. Ed. 283. "The defendant being before the proper court, which had jurisdiction of his offense, it matters not how he may have entered into the presence of the court, it was its duty to try him." *People v. Pratt*, 78 Cal. 345,

349, 20 Pac. 731, 733. Section 1567 of the Penal Code, as construed in *Ex parte McGuire*, 135 Cal. 339, 67 Pac. 327, 87 Am. St. Rep. 105, gave the court full jurisdiction to set the case and try it. We quote from the case just mentioned, and which is cited by appellants as follows:

"A prisoner, whether confined in the state prison or in the county jail, may be brought before a court for any lawful purpose (Pen. Code, § 1567), and, among other purposes, in order that he may be tried for a criminal offense, as this prisoner was. In such case the proceedings against him are regulated by the same statutory provisions that control the procedure in other trials upon similar charges."

Section 1567 of the Penal Code provides:

"When it is necessary to have a person imprisoned in the state prison brought before any court, or a person imprisoned in a county jail brought before a court sitting in another county, an order for that purpose may be made by the court and executed by the sheriff of the county where it is made."

[4, 5] Defendants next contended that they were induced to plead guilty to grand larceny, and to make statements, in connection with the Rowan case, by promises that they would not be prosecuted on any other charges, and that this constituted a bar to prosecution in the oil-station case. If the district attorney made such representations, he clearly exceeded his authority in so far as binding his own office or the court was concerned. Defendants cite no authorities holding that a promise of leniency given by a prosecuting officer under such circumstances has ever been held to prevent prosecution for crime, and in determining this appeal we are not required to inquire into the ethics of the transaction, if, indeed, one took place of the character alleged.

[6] There is no merit in the assignment as error of the admission in evidence of purported confessions. This point is so closely allied with the contention last discussed that under the testimony of the defendants themselves it is unavailing. Certain officers testified that each of the defendants freely and voluntarily admitted his guilt in the instant case, and detailed the conversations over objections of counsel that they were not free and voluntary, but were induced by promises of immunity. Defendants' counsel vigorously demanded that the question be submitted to the jury for their determination as to whether or not such alleged confessions were voluntary. Each defendant testified positively that he made no statement of the facts in this case to any one, and that he did not confess, as testified by witnesses for the prosecution. The court concluded that the statements, if made, were voluntary, but instructed the jury to disregard any expression of the court on the subject, and to determine as a question of fact, in accordance

with counsel's request, whether either of the defendants confessed to his implication in the commission of this offense, and, if so, whether or not he did so freely and voluntarily.

Defendants complain of an instruction to the jury that if they believed from the evidence beyond a reasonable doubt that the defendants or either of them feloniously took from the person or the immediate presence of G. C. Knight the property described, or any part thereof, as charged in the information, or aided, abetted, and assisted any other person or persons to so feloniously take from the person or the immediate presence of the said G. C. Knight, by means of force or fear and against the will and consent of Knight, the property mentioned, as charged in the information, then they should find the defendants guilty. It is contended that the court combined the cases of both defendants, in consequence of which a conviction of one would establish the guilt of the other.

[7, 8] Standing alone, this language is ambiguous and susceptible of the construction placed upon it by defendants, but instructions are not to be read in isolated sections; they must be construed as given, and, when as a whole they present the issues properly, there is no ground for reversal. *People v. Hecker*, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; *People v. Glover*, 141 Cal. 233, 74 Pac. 745; *People v. Besold*, 154 Cal. 363, 97 Pac. 871; *People v. Cleveland*, 49 Cal. 578; *People v. Kennedy*, 55 Cal. 201; *People v. Wallace*, 109 Cal. 611, 42 Pac. 159. The trial court merely instructed that if the defendants, or either of them, actually took from the person or immediate presence of Knight the property described, the jury should convict; but this, of course, was intended in conjunction with other instructions comprehensively applying the law to the evidence in the case. The testimony of eyewitnesses tended to show that Sullivan held up Knight at the point of a gun and robbed him, while Groves stood off the driver outside, also with a gun, thus aiding and abetting. Further instructions defined robbery, accomplices, and aiding and abetting, and the jury were told that if Sullivan and Groves committed the offense they would be guilty. If both defendants did the actual robbing, or if one robbed Knight and the other aided and abetted, both would be guilty. *People v. Fredoni*, 12 Cal. App. 685, 108 Pac. 663. When read in connection with these other instructions, we think the jury could not have failed to understand by the instruction of which complaint is made that the court intended to direct a conviction only of such individual defendant as might be found to have robbed the complaining witness, or aided, abetted, and assisted some other person to do so.

[9] The only remaining assignment of consequence challenges the power of the court to sentence the defendants upon conviction in this case, while serving time in the penitentiary for larceny of the Rowan jewelry. Were such dilemma possible, the hands of courts would be paralyzed. Defendants rely upon *Ex parte Morton*, 132 Cal. 346, 64 Pac. 469, and *Ex parte McGuire*, 135 Cal. 339, 67 Pac. 327, 87 Am. St. Rep. 105. The first-cited authority simply holds that the trial court is not authorized to expressly pronounce cumulative sentences except as provided by the statute, and the latter holds that one serving in a county jail under sentence from police court, tried, convicted, and sentenced in the superior court for felony, should be delivered to the warden of the penitentiary, and that the sheriff holding a certified copy of the judgment was without discretion. It is also said that this is so, even of persons removed from the penitentiary for trial, which was presumably complied with in this case. Here the trial court merely adjudged that defendants be confined in the state prison for the term prescribed by law, which, under sections 1191 and 1168 of the Penal Code and *People v. Gonzales*, 36 Cal. App. 782, 173 Pac. 407, was its plain duty. It is difficult to conceive of a situation wherein the trial court would be authorized to bring before it from the penitentiary persons charged with felony, for trial, and yet be prohibited from passing sentence, when section 1191 of the Penal Code expressly makes it mandatory upon the court to pronounce sentence not less than two nor more than five days after verdict, unless the time be extended for the purposes therein specified. Under the judgment of the trial court, defendants were merely returned to the custody of the warden with no specified penalty.

[10] We are informed that the sentences were cumulative, and authorities are cited to show that therefore the court exceeded its

jurisdiction. But the sentences were not cumulative. They were in the ordinary form. The one dealing with the defendant Groves reads in part as follows:

"It is therefore ordered, adjudged, and decreed that the said W. E. Groves be punished by imprisonment in the state prison of the state of California at San Quentin for the term prescribed by law."

The sentence of Sullivan is identical in form. Such sentences run concurrently with those which the defendants were serving when tried in the present case. *Ex parte Casey*, 160 Cal. 357, 116 Pac. 1104.

[11] Two rulings of which appellants complain require but brief mention. A picture of the defendant Sullivan was introduced in evidence, and it is insisted that this was prejudicial to his rights. However, it does not appear that any objection was made at the time the picture was offered and received. In fact, it was introduced at the instance of defendants' counsel during the cross-examination of appellant Sullivan by the district attorney, upon his positive testimony that it was his picture.

[12] It is also claimed that the court erred in denying the defendants the right to impeach W. Maxwell Burke, a witness for the prosecution, but no foundation was laid for such impeachment.

[13] From a reading of the entire transcript it appears that the evidence of the guilt of each of the defendants is clear and conclusive, and that no errors occurred in trial of such a character as could have prejudicially misled the jury. Under such circumstances, section 4½ of article 6 of the Constitution of California precludes a reversal.

The judgment is affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

(63 Cal. App. 700)

**HAMMONS et al. v. SUPERIOR COURT OF
LOS ANGELES COUNTY et al.**
(Civ. 4491.)

(District Court of Appeal, Second District, Division 1, California. Sept. 19, 1923.)

- 1. Process** ⚡126—Evidence held to show that party's presence within the state was solely caused by and connected with the trial of another case.

Evidence held to sustain the claim that the presence within the state of the party, on whom service of summons was had, was solely caused by and connected with the trial of another case, and that it was his intention, as soon as the circumstances of the trial no longer required his presence, to leave the state.

- 2. Prohibition** ⚡3(2)—Lies to prevent court from assuming jurisdiction where defendant would be put to great expense.

A writ of prohibition is the appropriate remedy to prevent a court from assuming jurisdiction and proceeding with a trial, where the office and principal place of business of defendant is in another state, and defendant would be put to great expense transporting witnesses, and an appeal of the case would involve considerable expense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Prohibition (Writ of).]

- 3. Process** ⚡120—Service of summons invalid when made on a party solely within the state to testify in another proceeding.

A service of summons made on a party who has come into a state solely to attend and to testify at another trial is invalid, such party being privileged from service of summons while in attendance upon another trial.

- 4. Process** ⚡125—Immunity from service of summons not lost by transacting other business, but lost by remaining in jurisdiction more than a reasonable time after termination of trial.

The immunity granted to a witness from service of summons while attending a trial is not lost by transacting other business, but is lost by voluntarily remaining in the state more than a reasonable time for departure after the end of the trial.

- 5. Process** ⚡120—Whether presence within court's jurisdiction is solely to attend court business is a question of fact.

Whether presence within the court's jurisdiction is solely to attend to court business is a question of fact in determining whether witness is entitled to immunity from service of summons while on such business.

- 6. Corporations** ⚡507(5), 668(7)—Service on a corporation insufficient, where made on nonresident officer in the state to attend trial.

A service of summons is insufficient to confer jurisdiction over either a foreign or a domestic corporation, where the only service had is made on a nonresident officer in the state to attend a trial, and not engaged in attending to any other business of the corporation.

Application for writ of prohibition by E. W. Hammons and others, prayed to be directed to the Superior Court of Los Angeles County, restraining the rendition of judgment by default against petitioner in an action for libel. Writ granted.

Loewenthal, Collins & Loewenthal, of Los Angeles, for petitioners.

Lyle W. Rucker, of Hollywood, for respondents.

Edward T. Bishop, Co. Counsel, of Los Angeles, for respondent Lampton.

CONREY, P. J. In this proceeding the petitioners claim that they are entitled to a writ of prohibition, restraining respondent court from rendering judgment by default against petitioners in an action brought against them in said court.

On the 6th day of July, 1923, an action to recover damages for an alleged libel was commenced in the superior court of Los Angeles county by Lyle W. Rucker against the above-named petitioners. The complaint was filed and summons issued on that day. Petitioner Hammons is a citizen and actual resident of the state of New York. He is vice president of Educational Films Exchange of Southern California, a California corporation, and is president of the other petitioners herein, which are New York corporations.

At all times herein mentioned there was pending in said superior court an action entitled "Educational Films Corporation of America, a corporation, et al. v. S. M. Herzig et al." That action was on the trial calendar for June 20, 1923, at which time by order of court the date of trial was postponed to July 5, 1923. The case was called for trial on July 5, 1923, and proceeded on that day and on the 6th and 7th days of July, when the trial was completed.

Petitioners allege that Hammons came from the state of New York, arriving in the city of Los Angeles on July 2, 1923, solely for the purpose of attending and testifying as a witness at the trial of the Herzig Case, and for no other purpose. While Hammons was attending said trial in the courtroom of the superior court on July 6th there were delivered to him four copies of summons and complaint in the Rucker Case, as a service thereof upon him individually and as an officer of the other petitioners herein and each of them. Thereafter petitioners appeared specially, and moved said court to quash said purported service of summons in said action, upon the ground that the same was invalid and void—by reason of the facts specifically stated relating to the nonresidence of Hammons, and the casual and temporary character of his presence in this state for the sole purpose of being present at the trial of the Herzig Case. The motion was based upon

the files, etc., in both actions and the affidavits of E. W. Hammons and Paul Loewenthal. The motion was heard upon those records and affidavits and the counteraffidavits of Rucker and of H. R. Duval. The said motion, having been duly presented and submitted, was denied by order entered on the 1st day of August, 1923.

Petitioners allege that unless prohibited and restrained from so doing, the superior court will enter the default of the defendants in the Rucker Case, and will proceed further in said action; that petitioners have no plain, speedy, or adequate remedy in the ordinary course of law.

An alternative writ having been issued in this proceeding, respondents have filed a demurrer to the petition, upon the ground that the petition does not state facts sufficient to entitle petitioners to a writ of prohibition, and upon the further ground that the petitioners have a plain, speedy, and adequate remedy in the ordinary course of law. They have also filed an answer, which denies that Hammons came from the state of New York, solely for the purposes stated in the petition; alleging that the service of summons was not merely a "purported" service, but that it was an actual and legal service of the summons and complaint; alleging that the motion to quash summons was heard, not only upon the records and file referred to in the petition and the affidavits of Hammons and Loewenthal, but also upon the affidavits of Rucker and Duval, which last-named affidavits were not referred to in the petition herein, but are set forth in said answer; deny that petitioners have no plain, speedy, or adequate remedy in the ordinary course of law, and deny that respondents have no jurisdiction over petitioners. Otherwise the answer raises no issues of fact.

This matter came on for hearing in response to the alternative writ. After oral argument, petitioners were granted until August 30th to file further memorandum of authorities, the cause then to stand submitted. On August 30th a stipulation was made allowing petitioners to file an amendment to petition, together with a supplemental affidavit of Loewenthal; providing that respondents may file answer to said amendment, and may file counteraffidavits. Respondents having filed no further answer or counteraffidavits, we assume that none is intended to be filed, except that an additional brief has been filed. The amendment to petition includes in the petition an additional paragraph 8, which reads as follows:

"That in order for petitioners to maintain a proper defense in any trial of that certain action commenced in the superior court of the county of Los Angeles, state of California, entitled Lyle W. Rucker, Plaintiff, v. Educational Films Corporation et al., Defendants, being file No. 124994, in the records of said court, petitioners will almost exclusively rely upon, and

it will be necessary that petitioners transport many witnesses from without the state of California, to wit, the state of New York, and obtain their attendance upon the trial of said action; that by reason thereof, trial of said action would involve heavy expense upon the part of petitioners, the greater part of which expense could not be recovered as legal costs in said action; that the trial of said action will be protracted, and it will be necessary that your petitioners produce a great number of witnesses; and that, by reason of the nature of said testimony and the length of said trial, a transcript of the evidence and proceedings of said trial would be voluminous, and would subject your petitioners to great expense, in the event that an appeal from any judgment finally rendered in said action should become necessary."

The affidavit of Loewenthal shows that as attorney for petitioners he is familiar with the issues which will necessarily be raised on any trial of the Rucker Case, and with the evidence necessary to maintain a proper defense thereof, and states further facts identical with the allegations of said additional paragraph 8.

The Rucker affidavit states, among other things, that the corporations which are petitioners herein have been and are engaged in the business of releasing, booking, and disposing of motion picture films to various theaters throughout the United States and the world, and have been actually engaged in so disposing of motion picture films to numerous and sundry theaters within the state of California. Sundry details of fact are stated in support of said general statement, tending to prove that said business was being conducted within the state of California by the respondents, not only until and on the 6th day of July, 1923, but that on July 10th, as shown by the Duval affidavit, Hammons was served with a subpoena for the taking of his deposition in the city of Los Angeles on the 16th day of July, 1923, in the Rucker Case.

The Rucker affidavit further stated that, subsequent to the arrival of Hammons in Los Angeles on the 2d day of July, and at the time of the service of summons and complaint upon him on the 6th day of July, and thereafter until his departure from the city of Los Angeles on the 11th day of July, Hammons was actually engaged in doing business in the state of California for and on behalf of the Educational Film Exchanges, Inc., and for and on behalf of himself personally, in this respect, that he was actually attending a board of directors' meeting of defendant Educational Films Exchange of Southern California on the 10th day of July, 1923, at the hour of 1 p. m. on said day, at its office in the city of Los Angeles; and on various other days from the 7th day of July, 1923, to the 11th day of July, 1923, was actually engaged in discussions with various individuals relative to the business of de-

fendants (naming the corporations petitioners herein). This affidavit further says that the trial of the Herzig Case, wherein Hammons appeared as a witness for the defendants, ended on Saturday, July 7, 1923, at 12:20 p. m.; that the presence of Hammons was not necessary or required after that time in connection with said action; that, in so far as said action was concerned, Hammons could have departed from the city of Los Angeles, Cal., for his residence in the city of New York, but that, instead, the said Hammons did not leave said city of Los Angeles until four days later, to wit, on the 11th day of July, 1923, after said subpoena had been served upon him; that the only reason Hammons remained in said city was to transact business connected with the defendants, and in no way connected with the trial of said Herzig Case; that during the time from July 7th to July 11th, the said Hammons was not physically or in any other way hindered or prevented from leaving said city of Los Angeles and state of California; that on the 6th day of July, while the trial of the Herzig Case was actually in progress, said Hammons informed affiant Rucker that he would be very pleased when the trial of said action was completed, because of the fact that he had not had an opportunity of attending to any of the other business he had to transact while in Los Angeles; that he would be kept busy in the trial of said action; that he desired to spend at least 10 days after the said trial in visiting the various studios and companies engaged in producing pictures which were to be released by said Hammons; that he desired to see what progress said companies were making; that he would spend at least 4 days in seeing the country after he had visited the studios, and that he would be around here for some time after the trial was completed.

[1] We are of the opinion that the evidence contained in the affidavits is sufficient to and does sustain the claim of petitioners that the presence of Hammons within the state of California, at the time of service of summons and complaint upon him upon the 6th day of July, was solely caused by and solely connected with the trial of the Herzig Case, and that he was here for no other purpose; that is to say, he came into the state solely for the purposes of said action, and it was his intention to leave the state as soon as the circumstances of the trial of said action no longer required his presence within this state. Over against the affidavit of Mr. Rucker, wherein he refers to certain statements made to him by Mr. Hammons on the 6th day of July, there is other evidence strongly tending to prove that Hammons intended to return to New York immediately upon the conclusion of the trial of the Herzig Case. The affidavits of Mr. Loewenthal attached to the petition for writ of prohibition, together with

the telegrams, of which copies are contained in said affidavits, show that it was only after earnest insistence of Mr. Loewenthal that Hammons came to California to testify at the trial of the Herzig Case; that immediately upon the arrival of Hammons at Los Angeles on the 3d day of July he informed Loewenthal that he had come to Los Angeles in compliance with the directions contained in said telegrams from Loewenthal, and for no other purpose, and that he did not intend to transact any other business while in Los Angeles, and that he intended to return to New York immediately upon the completion of the trial of the Herzig Case, so that he might attend to an important business engagement that he had made in New York for the middle of July, with persons coming from England for the special purpose of conferring with him; that immediately upon the completion of said trial Hammons procured transportation to return to New York from Los Angeles on July 11, 1923, which was the earliest possible date at which he was able to obtain a reservation for transportation to New York. We conclude, therefore, that the facts upon which this proceeding must be determined are the facts stated in the petition herein, including said paragraph 8 added to the petition by amendment. This, of course, does not include the allegation that the petitioners have no plain, speedy, or adequate remedy in the ordinary course of law. That question we will now separately consider.

[2] In a recent decision by the Supreme Court it was held that prohibition is the appropriate remedy to prevent a superior court from wrongfully assuming jurisdiction and proceeding with the trial of an action in one county, where it appeared that the office and principal place of business of the defendant corporation was in another county, more than 50 miles distant from the city wherein the trial would occur, and that the defendant would be put to the cost of transporting its witnesses to that county; and further appeared that an appeal of such case would involve "considerable expense." Under those circumstances the court determined that the appeal is not a plain, speedy, and adequate remedy. Consolidated Adjustment Co. v. Superior Court, 207 Pac. 552. If prohibition was the appropriate remedy in that case, there can be no doubt that the same is true here, since the facts of the present case, as related to this question, are at least equally as much in favor of petitioners as they were in the case cited.

[3] Petitioners contend that the purported service upon Hammons, in view of the fact that he had come into the state of California for the sole purpose of attending the trial of an action in this state and testifying therein, was of no effect. Counsel have not cited and we have not discovered any California decision directly settling the question of law in-

volved in this contention. Page v. Randall, 6 Cal. 32, is not in point. In *Hand v. Superior Court*, 42 Cal. App. 168, 183 Pac. 456, this court, after citing the two lines of decisions bearing upon the question, conceded, for the purposes of that case, that in furtherance of justice parties to actions and their witnesses should be privileged from service of summons while in attendance upon the trial of a cause. But we did not really decide the question. Assuming the rule to be as stated, we held that it had no application to the facts of that case, wherein it appeared that the petitioner had shown nothing more than that at the time of service of summons upon him, in an action in this state, he was a resident of another state, who had come into this state to attend at the taking of a deposition to be used in an action pending in the state of his residence, he being a party to that action. On those facts we held that he was not privileged or protected from service of summons in an action brought against him in this state.

[4, 5] Many of the leading authorities upon this question are cited in *Burroughs v. Cocke*, 56 Okl. 627, 156 Pac. 196, L. R. A. 1916E, 1170; and in the decision written by Judge Van Fleet, in *Filer v. McCornick* (D. C.) 260 Fed. 309. It appears that the great weight of authority is in favor of the immunity here claimed. The Supreme Court of Oklahoma in the cited case pointed out that the right is derived from the common law, and in a few states has been extended by statute law.

"The reason for granting this immunity to suitors is varied, some placing it as a personal privilege to the suitor, and others as good public policy that courts should not be hampered by having those in attendance upon it pounced upon by other litigants."

Bearing upon the contention that any immunity which Hammons may have had was lost because he attended to some other business while here, we find in *Burroughs v. Cocke*, supra, the following:

"However, it appears to us that the more reasonable rule and proper test in such cases should be that if the main and controlling reason that occasioned the party's being in the

jurisdiction of the court was to attend upon court business, then merely because he elected to transact other business not connected with the court that he should not thereby forfeit his immunity; but if it should be determined that his claim of being within the jurisdiction for the purpose of attending upon court business was not bona fide but was being used by him as a mere subterfuge, and that he was in fact there to transact other business not connected with the trial, and but for the desire to transact said other business he would not have come within the jurisdiction of the court, then he is not entitled to immunity. It thus becomes a question of fact, and each particular case must be decided on its own merits."

We concur with the rule as stated, with the reservation, that such immunity would be lost by voluntarily remaining within this state, after the trial beyond a reasonable time allowed for departure. At the time of the service here in question the trial of the *Herzig Case* had not been completed.

[6] Not only was the service of summons on Hammons individually a void service, but the same must be true concerning the service of summons as attempted to be made, upon the other petitioners as corporations of which Hammons was an officer. As to the two foreign corporations, the circumstances are very similar to those shown in *Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 369, at page 424, 41 Pac. 308, where it was held that the service was insufficient to confer jurisdiction over a corporation, when the only service of summons was made on the superintendent of its mill in Nevada, who was at the time of service in attendance upon the trial of an action in this state, but not engaged in attending to any business of the corporation in this state. We are further of the opinion that although petitioner, Educational Films Exchange of Southern California, is a California corporation, of which Hammons is a vice president, service could not be made upon it by means of a delivery of summons and complaint to such vice president while he was within the state of California for the sole purposes and only under the circumstances shown in this proceeding.

Let the peremptory writ issue.

We concur: HOUSER, J.; CURTIS, J.

63 Cal. App. 751

PEOPLE v. DEMPSEY. (Cr. 706.)

(District Court of Appeal, Third District, California. Sept. 25, 1923.)

1. Larceny $\Leftrightarrow$ 61—Evidence held to support conviction.

Evidence held sufficient to warrant jury in concluding that accused took money from the person of prosecuting witness, in violation of Pen. Code, § 487, subd. 2.

2. Criminal law $\Leftrightarrow$ 407(2)—Failure to protest against money settlement by accused's companion held admissible as evidence of consciousness of guilt.

Evidence that when prosecuting witness accused defendant of having taken from him his wallet, accused's companion offered witness \$20 in settlement, and accused remained silent, was admissible; her failure to protest the settlement being evidence of consciousness of guilt.

Appeal from Superior Court, Sacramento County; George H. Thompson, Judge.

Nellie Dempsey was convicted of grand larceny, and she appeals. Affirmed.

Gaddis & Johnson, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. Convicted by a jury under an information filed in the superior court of Sacramento county, charging her with the crime of grand larceny, the defendant prosecutes an appeal from the judgment of conviction and the order denying her motion for a new trial, and specifies as the grounds upon which she is entitled to a reversal that the evidence is insufficient to support the verdict, and that the court erred in admitting certain testimony.

[1] The specific charge was that the defendant took from the person of one Edwin McKay a wallet containing \$16 in currency, consisting of a \$10, a \$5, and a \$1 bill. Section 487, subd. 2, Pen. Code.

The story, as told upon the witness stand by said McKay, is in substance as follows: That on the evening of January 5, 1923, about the hour of 9 o'clock, he started from the residence of a friend on Tenth street between G and H, in the city of Sacramento, and proceeded toward the residence of his cousin at 816 Eleventh street in said city. He was walking on the south side of H street, between Tenth and Eleventh, when he saw two colored women, one of whom was the defendant, coming down the steps of a house near Eleventh and H streets. He proceeded, walking on the outside of the sidewalk, and when about to pass the women the defendant addressed him, saying, "Hello." Thinking that it was some acquaintance who had thus ad-

ressed him, he turned and looked toward the women, and the defendant immediately stepped in front of him and said, "Come and go with me," and at the same time grabbed him by the lapel of the coat. He replied that he would not accompany her, and asked her "to let go of him." He extricated himself from her grasp and resumed his way to his cousin's house. On arriving there he told of the circumstance of having been thus accosted by the defendant, and it was then either suggested to him or occurred to his mind without suggestion that he might have been robbed. He thereupon examined the right pocket of his coat in which he carried his wallet and found that that article was missing. Immediately he started out to find the colored women whom he had met on the street, but first called to his assistance a friend by the name of Mr. Palm, and together they proceeded over to I street through a plaza between Ninth and Tenth and I and J streets towards the Pythian Castle, which is located on the northwest corner of Ninth and I streets. Just before starting across the street he espied the two women going toward the Pythian Castle from the direction of Eighth street, and he declared to his friend that they were the women whom he had met on Eleventh street. McKay and Palm crossed over and intercepted the women, and the former accused the defendant of having robbed him of his wallet and the money therein contained. She positively declared that she had never seen him before, and denied knowing anything about his wallet or money. A controversy ensued, whereupon the companion of the defendant, whose name was subsequently learned to be Ruby Roberts, offered to give McKay a \$20 bill which she had in her hand. He stated that he did not want the \$20 bill; that all he wanted was the return of his wallet and the \$16 that were therein at the time the wallet was taken. Finally, however, McKay accepted the \$20 bill and in the meantime, the police department having been notified of the alleged larceny, two police officers appeared at the corner where the parties were engaged in the controversy and arrested the defendant, her companion having previously fled from that locality. McKay testified that, when Ruby Roberts offered him the \$20 bill, the defendant said: "Maybe I can make it up all right." The defendant was taken to the police station by the officers and was there searched, but the wallet was not found in her possession. On the next day, however, about 11 o'clock in the forenoon, the janitor of the Pythian Castle, who then resided in the basement of said building, accompanied by another gentleman, went out upon the sidewalk and looked about to ascertain if the wallet of McKay or any other article had been dropped or left there by either the defendant or

her companion. Growing alongside of the Pythian Castle are a large number of geraniums, and after considerable searching the janitor found underneath one of the geraniums an empty wallet, which was identified by McKay as the one he had in his possession the night that he met the defendant and her companion, and which contained at that time the \$16 in currency. McKay positively testified that he remembered having placed the wallet in his coat pocket about an hour previously to meeting the women; he having changed his clothes and taken all the articles in those discarded and placed them in the pockets of those he put on.

The testimony of McKay was corroborated in many vital particulars by Mr. Palm and other witnesses.

The defendant's companion, Ruby Roberts, it seems, was not arrested, nor was she present in court at the time of the trial. The defendant, although admitting that she and Ruby Roberts met McKay at the time mentioned by him, positively testified that she did not place her hand upon his person and did not take his money or any other personal property from him. She did state, however, that Ruby Roberts had a conversation with McKay, and also stated that McKay was the first to open up a conversation with them. She testified that she had no knowledge of any property or article having been taken from McKay at that time by anybody.

It is clear that the circumstances developed by the testimony were of sufficient probative significance and force to warrant the jury in concluding that the defendant did take the money from the person of McKay. In other words, we think the case was one for the jury, and that consequently it is not for this court to say that the jury's conclusion, as evidenced by its verdict, was founded upon an erroneous interpretation or conception of the circumstances. The effect of the testimony of the defendant was only to raise a conflict in the evidence. It was for

the jury to determine whether her story was or was not true. We may add that from all the circumstances the jury could well have concluded that the defendant and Ruby Roberts were jointly concerned in the taking of the money. The fact that the defendant took hold of the lapel of the coat of McKay as described by him, the fact that Ruby Roberts immediately offered to reimburse McKay after the latter had charged the defendant with taking his money, and the fact that his wallet was found near the place where the women were intercepted by McKay and Palm, are all strong incriminating circumstances.

The case of *People v. Silva*, 48 Cal. App. 728, 192 Pac. 330, cited by the defendant, is much different in the facts from the present case. We will not review that case herein. It is sufficient to say that there was in said case but one real circumstance upon which the people could rely for a conviction, and that was the fact that the defendant had an opportunity to commit the crime. This we held was wholly insufficient to support a verdict of guilty, particularly in view of the fact that there was another party having equal opportunity to commit the offense.

[2] The objection is made that the court erred in permitting testimony of the offer by Ruby Roberts to reimburse McKay for his loss. There is no legitimate ground for objection to this testimony. The offer was made in the presence of defendant, and her silence or failure to protest against the giving of the money to McKay constituted a circumstance from which the jury could reasonably have drawn the inference that she acquiesced in the act of thus settling the matter. In other words, her failure to make any protest against the settlement of the trouble by Ruby Roberts constituted some evidence of a consciousness of guilt.

The judgment and the order appealed from are affirmed.

I concur: FINCH, P. J.

63 Cal. App. 762

PEOPLE v. ROSE. (Cr. 703.)

(District Court of Appeal, Third District, California. Sept. 26, 1923.)

1. Criminal law ☞94—Superior court cannot be clothed with jurisdiction of ordinary misdemeanors by the consolidation of charges in counts of indictment.

The superior court cannot be clothed with jurisdiction of ordinary misdemeanors, such as possession of liquor, on different dates, of which the justice's court has jurisdiction under Pen. Code, § 1425, subd. 3, by consolidating them in the form of counts in an indictment or information so that the aggregate of penalties will exceed the maximum penalty which the justice's court is competent to impose.

2. Indictment and information ☞130—Offenses must be separately charged, unless statute expressly authorizes joinder in same accusatory pleading.

One committing two or more different offenses of the same or different classes, connected or not in their commission, must be proceeded against separately in the absence of express authority for the joining of such charges in the same accusatory pleading, such as is contained in Pen. Code, § 954, relating to a charge of two or more felonies.

3. Criminal law ☞94—Indictment charging possession on two dates in two counts held not to bring offenses within jurisdiction of superior court.

For the superior court, by reason of an increased penalty for a second or subsequent offense, to acquire jurisdiction of a petty offense, there must have been a first conviction and a judgment imposing a penalty therefor which must be set out in the indictment or information, and an indictment which merely charged the unlawful possession of liquor on two different dates in two counts was insufficient to charge a first and second offense so as to give the superior court jurisdiction.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

H. J. Rose was convicted of unlawfully possessing intoxicating liquor, and he appeals. Reversed, with directions to dismiss.

George E. Gardner, of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was informed against by the district attorney of Butte county for the crime of violating "An act adopted by the people of the state of California, November 7, 1922, to wit, the state prohibition act." The information is in two counts, the first of which charges that the defendant did on or about the 17th day of February, 1923, in the county of Butte, wrongfully, willfully, and unlawfully "have in his possession, and did possess, certain in-

toxicating liquor, said intoxicating liquor then and there containing more than one-half of 1 per cent. of alcohol by volume, and said intoxicating liquor being then and there fit for use for beverage purposes," etc. The second count charges that the defendant had like possession of the same character of liquors on the 19th day of March, 1923. The jury found the defendant guilty on both counts, and the court sentenced him to pay a fine of \$500 on each of the two counts. Before sentence was imposed, however, the defendant made a motion in arrest of judgment on the ground that the court "has no jurisdiction over the subject of the information, and has no jurisdiction whatever over the trial of the subject-matter of said information, or to pass judgment on the said defendant on the said verdict of conviction." The motion was denied, and the defendant appeals from the judgment. The sole question presented for determination, as is necessarily implied from the nature of the ground upon which the motion in arrest of judgment was based, is whether the superior court had jurisdiction of the offenses of which the defendant was convicted. Section 29 of the Volstead Act (41 Stat. 316, tit. 2), which, at the general election held in California in the month of November, 1922, was adopted by the people under the referendum, and is, therefore, the law of this state (Stats. 1921, p. 79), provides that the penalty for any offense denounced in said act for which a special penalty is not elsewhere therein prescribed shall be fined, for the first offense, not more than \$500, for a second offense not less than \$100 nor more than \$1,000, or be imprisoned not more than 90 days, and "for any subsequent offense shall be fined not less than \$500 and be imprisoned not less than three months nor more than two years." For the offense of having possession of intoxicating liquors there is no special penalty prescribed by the act, and therefore the penalty to be imposed for such an offense comes within the provision of the act just referred to. It is clear that where a person is charged for the first time with the offense of having possession of intoxicating liquor the jurisdiction to try such person for such offense is exclusively in the justices' courts. Section 1425, subd. 3, Pen. Code. As shown, the information here charges the defendant in one count with having possession of intoxicating liquor on the 17th day of February, 1923, and with a like offense alleged to have been committed on the 19th day of March, 1923, and the specific question to be determined here is whether the commission of the offense charged in the first count was or is a "first offense" within the meaning or contemplation of section 29 of title 2 of the Volstead or the Wright Act.

[1, 2] The theory and the reasoning of the trial judge as to the question of jurisdiction, as we gather them from his remarks in passing upon and denying the motion in arrest of judgment, seem to be that, since there is no express provision of law authorizing the charging of two or more offenses of which the justice's court has jurisdiction which were "connected together in their commission" or of the same class of offenses or crimes, and since an information or an indictment may charge in different counts felonies so connected in their commission or of the same class, the superior court may acquire jurisdiction of two or more misdemeanors of which the justice's court has jurisdiction, where, by bunching them together and so charging them in an information or an indictment, the aggregate penalties of all will exceed the maximum penalty which it is within the competence of the justice's court to impose under the law fixing the criminal jurisdiction of such court. Obviously, both the theory and the reasoning are fallacious. As well may it be said that the superior court may be vested with jurisdiction to try the crime of simple assault, of which justices' courts have sole jurisdiction, where the same party has committed such offense two or more times on the same person or where committed by one person on different persons at the same time, by charging the several assaults in different counts in an information or indictment; the penalties, when taken in the aggregate, being in excess of the maximum penalty which a justice's court has the authority to impose. Manifestly, where a person commits two or more different offenses, whether they are of the same or a different class or were or were not committed in connection with each other, the offender must be proceeded against in three different and independent proceedings, unless the law authorizes the several offenses so committed to be charged in the same accusatory pleading and so tried together. As to two or more felonies connected together in their commission or which belong to the same class of crimes, there is authority for such procedure. Pen. Code, § 954. We have, however, found no express authority for the charging of two or more misdemeanors of which justices' courts have jurisdiction and committed by the same person in separate counts in the same complaint. But this consideration is not pertinent to the inquiry here.

[3] It is only the statement of an obviously sound proposition when it is said that the superior court cannot, under our system, acquire or be clothed with jurisdiction of ordinary or so-called low-grade misdemeanors by the mere act of consolidating them in the form of counts in an information or an indictment. There are, it is true, certain in-

stances in which the superior court is given jurisdiction of petty offenses (those of which, when taken singly, the justices' courts have jurisdiction), and these are: (1) Where the same party has suffered a conviction of petit larceny and judgment of sentence has been pronounced against him, and subsequently to such conviction he again commits a like offense, he then may be proceeded against by the people as for the commission of a felony (*People v. Delany*, 49 Cal. 395) or a crime to which is annexed, by reason of a former conviction of an offense similar to the one subsequently charged, a penalty which a justice's court has no authority to impose, to wit, imprisonment in the state penitentiary for a term not to exceed five years (Pen. Code, § 666, subd. 3). (2) Where, as in this and other somewhat cognate cases (see Stats. 1913, p. 692), the penalty for the second or third offense is so increased as necessarily to remove the offense from the jurisdiction of the justices' courts to that of the superior courts. In all such cases, though, there must have been a first conviction, and the same, in addition to the charge of the commission of the second offense, must be set out in the information, and the jury must specifically find upon the question whether the accused had suffered the previous conviction, unless he has upon his arraignment admitted that he has suffered such prior conviction (Pen. Code, § 1158; *People v. Eppinger*, 109 Cal. 294, 41 Pac. 1037; *People v. Dueber*, 34 Cal. App. 686, 168 Pac. 578; *People v. Franklin*, 36 Cal. App. 23, 171 Pac. 441), and, to render the first offense available as in aggravation of the punishment for a subsequent offense of the same character, there obviously must not only have been a conviction of the accused of the first offense, but there must also have been a judgment imposing a penalty therefor; the theory upon which an increased penalty for the commission of the same misdemeanor a second time is authorized being, as is pointed out by the presiding justice of this court in *Ex parte Tung Fong*, 211 Pac. 32, that, deterrent consequences having evidently not followed from the punishment inflicted for the commission of the first offense, a more drastic punishment should be imposed for the second as a corrective of the manifest predilection of the accused for committing such infractions of public law. In *State v. Savage*, 86 W. Va. 655, 104 S. E. 153, cited in *Ex parte Tung Fong*, supra, it is said that "a defendant cannot be guilty of a second offense until it has been judicially determined that he has sinned once before," and in *Commonwealth v. McDermott*, 224 Pa. 363, 73 Atl. 427, 24 L. R. A. (N. S.) 431, also cited in *Ex parte Tung Fong*, the court declared:

"The severer penalty is imposed by the Legislature because that imposed for the first

* * * was ineffectual. The second offense, carrying with it severer penalties is * * * therefore, not committed in law until there has been judgment for the first."

See, also, other cases cited in *Ex parte Tung Fong*, supra.

In the present case, the defendant could have been acquitted on both counts, and thus, if the case had been within the jurisdiction of the superior court, a further or future prosecution of the accused for either offense would be barred. On the other hand, if the first offense charged had been a prior conviction, and so charged, as far as the jury could have gone as to such conviction would be to find whether or not the defendant had suffered such conviction. And in such case the jury could have found, if the accused had not admitted the fact, that he had suffered such prior conviction and at the same time found him not guilty of the alleged subsequent offense, in which case the prior conviction would still be available to be set up by the people as in aggravation of the punishment in the event that, subsequently to such acquittal, the defendant committed a similar offense, and in that case the superior court would have jurisdiction of the offense. At all events, as we think we have clearly pointed out, the very consideration or motive actuating the Legislature in prescribing such an increased penalty for the commission, for the second time, of misdemeanors which are ordinarily exclusively cognizable by justices' courts as to vest jurisdiction in such cases in the superior courts, is absent in the instant case, and the verdict and the judgment against the defendant are, therefore, *coram non iudice* and void.

The judgment is reversed, with directions to the trial court to dismiss the information and all proceedings in connection therewith.

I concur: FINCH, P. J.

63 Cal. App. 747

PEOPLE v. DEMARTINI. (Cr. 708.)

(District Court of Appeal, Third District, California. Sept. 24, 1923. Rehearing Denied Oct. 26, 1923. Hearing Denied by Supreme Court Nov. 22, 1923.)

I. Criminal law § 814(10)—Refusal of instruction on effect of drunkenness held not prejudicial to defendant.

In a prosecution for assault to commit rape, where the jury was instructed that evidence of drunkenness could be considered on the question of intent, and defendant's testimony showed that he was not so drunk as to be incapable of forming the specific intent necessary, he was not prejudiced by refusal to instruct that, if he was so drunk as to be incapable of forming such intent, he would not be guilty.

2. Rape § 16(5)—Proof of resolution to use all necessary force, if resisted, unnecessary to convict of assault to rape one under age of consent.

To convict of assault to commit rape on one under the age of consent, proof that defendant was resolved to use all necessary force if prosecutrix resisted is unnecessary.

3. Rape § 43(2)—Testimony as to prosecutrix's condition and appearance shortly after assault held admissible.

In a prosecution for assault to commit rape, a neighbor's testimony as to prosecutrix's condition and appearance when she reached his place immediately after the alleged crime, and her parents' testimony as to her condition and appearance when brought home by the neighbor immediately afterward, held not inadmissible as relating facts too remote.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

John Baptiste Demartini was convicted of assault to commit rape, and he appeals. Affirmed.

Virgil M. Airola, of San Andreas, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of assault with intent to commit rape, and has appealed from the judgment of conviction and the order denying his motion for a new trial.

At the time of the alleged offense the defendant was of the age of sixty-six years and the prosecutrix fourteen. The prosecutrix testified that she was on her way to school in a cart when she came to a gate which the defendant proposed to open for her; that he then stepped to the rear of the cart, threw his arm around her, committed acts of undue familiarity and said he was going to have sexual intercourse with her; that she "hollered" and struggled to get away from him, whereupon he placed his hand over her mouth and threatened to tie her with a chain which he was carrying; that she then slapped him in the face, and, as he stepped back, jumped out of the cart and ran; that after running for some distance she looked back and saw that the defendant was following her; that she then threw off her hat and coat, which were later picked up by other witnesses, and ran on to a neighbor's place about a mile from the scene of the attack and that the neighbor took her home. This neighbor testified that she came to his place running and crying hysterically. It is not claimed that the evidence is insufficient to support the conviction.

[1] It is contended that the court erred in refusing to instruct the jury that if the defendant, "at the time of the alleged as-

sault, was in such a state of drunkenness or intoxication that he was incapable of forming an intent to ravish the said —, then defendant would not be guilty of assault with intent to commit rape." The court instructed the jury that—

"The intent to commit the rape is the vital element in this case, * * * and before you can convict the defendant it must appear that he intended to commit the act of sexual intercourse," and that "the burden is on the prosecution to prove * * * that the act was done with the requisite, specific intent."

At defendant's request the court instructed the jury as follows:

"Whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act. Evidence of drunkenness is only admitted for this purpose, and may be considered by the jury as a fact bearing upon the question of the intent with which the act was done."

While the proposed instruction, being a specific application of the law to the facts attempted to be established by the defendant, might well have been given, it states no proposition of law not covered generally by the instructions quoted. From the defendant's own testimony, however, it appears that he was not so drunk as to render him incapable of forming the specific intent necessary to constitute the crime charged. He testified in detail as to what occurred between himself and the prosecutrix at the time of the alleged offense, admitting the truth of parts of her testimony and denying other portions. While he testified that he was drunk at that time, he further stated on the witness stand:

"I got most drunk after the girl jumped out. * * * I been drunk for a week, but I was not so crazy drunk when I was looking around the trap, but I kept drinking * * * after the girl left, then the liquor commenced getting

worse and worse. * * * After the girl left, when I got this bottle and I commenced to drink, and it wasn't more than two hours after that I don't remember nothing."

Under all the circumstances it cannot be said that the defendant suffered prejudice from the refusal to give the proposed instruction.

[2] The court refused to instruct the jury that if the "prosecuting witness resisted the acts or advances of the defendant in any manner * * * and would have resisted any attempt to outrage her person and that the defendant knew or had reason to know this, then * * * before the defendant can be found guilty * * * you must be satisfied * * * that the defendant was resolved to use all force necessary to carry out his designs." In view of the fact that the girl was under the age of consent, the proposed instruction is so manifestly erroneous that it is deemed sufficient to cite *People v. Roach*, 129 Cal. 33, 61 Pac. 574, and *People v. Babcock*, 160 Cal. 537, 117 Pac. 549.

[3] Appellant contends that it was error to permit the neighbor hereinbefore mentioned to testify as to the physical condition of the prosecutrix when she reached his place immediately after the alleged commission of the crime. This neighbor testified:

"She was crying in a kind of hysterical way. She had her hat and coat off. * * * Her face was dirty. * * * She was running in there when she came out to where I was."

The witness immediately took her home, and her parents were permitted to give similar testimony as to her condition and appearance when she reached home. Appellant does not contend that such evidence was inadmissible except upon the ground that the facts related were too remote. There is no merit in the contention. *People v. Benc*, 130 Cal. 159, 62 Pac. 404.

The judgment and order are affirmed.

I concur: HART, J.

63 Cal. App. 745

BURBANK v. HAMILTON et al. (Civ. 4699.)

(District Court of Appeal, First District, Division 1, California. Sept. 22, 1923. Hearing Denied by Supreme Court Nov. 19, 1923.)

Mandamus 3(6) — Not proper remedy to compel county board to pay rejected claim

A police officer is not entitled to a writ of mandate to compel the county board to pay a claim rejected by it; the remedy by suit as provided in Pol. Code, § 4078, being equally convenient and effective.

Application by George D. Burbank for writ of mandate against William J. Hamilton and others, as members of the Board of Supervisors of the County of Alameda, and against the Board of Supervisors of that county. Writ denied.

Leon E. Gray, City Atty., and Robert M. Ford, Asst. City Atty., both of Oakland, for petitioner.

Ezra W. Decoto, Dist. Atty., Earl Warren, Chief Deputy Dist. Atty., and Ralph E. Hoyt, Deputy Dist. Atty., all of Oakland, for respondents.

ST. SURE, J. Mandate. Petitioner is a police officer of the city of Oakland, who was sent by his superior, the chief of police, to San Diego for the purpose of executing a felony warrant of arrest issued out of the police court of the city of Oakland. Subsequently he filed with the board of supervisors of Alameda county a claim against said county in the sum of \$105.12 for his personal expenses incurred and paid in executing the warrant of arrest. The board of supervisors rejected the claim, and petitioner seeks to compel its payment by this proceeding.

Respective counsel for petitioner and respondents have ably briefed the points presented upon this application. Our interest has been aroused and we are impressed with the force of the argument advanced by the district attorney in behalf of the respondents. It is urged that the issuance of the writ would be violative of section 13 of article 11 and section 31 of article 4 of the state Constitution, and in this connection it is suggested that "the Legislature [never] intended to provide a scheme of government whereby any police officer in this state, without consulting the county authorities, has the power to spend the money of the county in any manner he sees fit while performing his duties as a police officer of some municipality under its charter," and, further, that "the Legislature [never] intended to make the county of Alameda liable for the person-

al expenses of a police officer of the city of Oakland incurred in the performance of his duties as a municipal officer." It also appears that the police court of the city of Oakland is organized under an act of the Legislature of 1901 (Stats. 1901, p. 576) giving the police court exclusive jurisdiction over all misdemeanors, and providing that all fines collected be paid into the city treasury. Ever since the organization of the police court under the act of 1901, an administrative construction of it has obtained whereby the municipality executed the process of its police court at its own expense. But, impelling and interesting as these questions are, it is not necessary for us to either discuss or decide them here, because it is clear that petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. The remedy is provided by section 4078 of the Political Code, which is as follows:

"If the board refuse or neglect to allow or reject a claim or demand for ninety days after the same has been filed with the clerk, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a final action and rejection on the ninetieth day, and a claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board, but not afterward, and if, in such action, judgment is recovered for more than the board allowed, on presentation of a certified copy of the judgment, the board must allow and pay the same, together with the costs adjudged; but if no more is recovered than the board allowed, the board must pay no more than was originally allowed."

Counsel for petitioner insists that he should not be relegated to the remedy provided by the section above quoted, as it is not "equally convenient, beneficial, and effectual." *Duffton v. Daniels* (Cal. Sup.) 213 Pac. 949, and cases cited therein. Applying this test and paraphrasing the language used in *Duffton v. Daniels*, we find that the remedy afforded by section 4078 is manifestly equally convenient, because the action therein provided for may be tried in the county of Alameda where the venue for all parties is laid. It is equally beneficial and effective, because the plaintiff yet has ample time in which to commence suit, and, should he commence action and recover, section 4078 provides for payment of the judgment and costs. Furthermore, should judgment be obtained its payment may be enforced.

The writ is denied.

We concur: TYLER, P. J.; RICHARDS, J.

63 Cal. App. 671

PEOPLE v. DE FERRARI. (Cr. 701.)

(District Court of Appeal, Third District, California. Sept. 12, 1923. Hearing Denied by Supreme Court Nov. 10, 1923.)

1. Intoxicating liquors ⇨132—Conviction under county ordinance superseded by state law cannot be sustained.

Where a prosecution was instituted under a county ordinance forbidding the sale of intoxicating liquor and the ordinance was superseded by a state law adopting the provisions of the Volstead Act which contained identical provisions, and which went into effect after the filing of the information but before trial, the ordinance became ineffective and a conviction thereunder could not be sustained; there being no saving clause in the superseding act.

2. Municipal corporations ⇨120—Repeal of municipal ordinance bar to prosecution.

Pol. Code, § 329, providing that the repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed, unless such intention is expressly declared, does not apply to the repeal of a municipal ordinance.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Giacomo De Ferrari was convicted of selling intoxicating liquor, and he appeals. Reversed, with directions to dismiss.

Hearing denied by Supreme Court; WASTE and MYERS, JJ., dissenting.

L. J. Schino and Frank E. Murphy, both of Stockton, C. H. Grayson, of Sonora, and J. O. Stemmler, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the offense of selling intoxicating liquor contrary to the provisions of an ordinance of Tuolumne county adopted March 15, 1921. This appeal is from the judgment of conviction and the order denying defendant's motion for a new trial.

The offense is alleged to have been committed on or about the 15th day of September, 1922. The information was filed November 10, 1922. The trial was commenced March 13, 1923. After the filing of the information and prior to the trial, the Wright Act (St. 1921, p. 79), adopting the penal provisions of the Volstead Act (41 Stat. 305), went into effect. Section 2 of the ordinance defining the crime of which defendant was convicted is in the identical language of sec-

tion 3 of title 2 of the Volstead Act in so far as material to this case.

"A county ordinance punishing exactly the same act denounced by a state law is in conflict therewith, and therefore, to that extent, void." Ex parte Mingo (Cal. Sup.) 214 Pac. 850, and cases therein cited. It is clear that section 2 of the ordinance has been superseded by the state law. Had the Wright Act become effective prior to the commission of the offense, the prosecution of the defendant might be treated as having been conducted under the provisions of that act, notwithstanding the alleged violation of the county ordinance. Ex parte Mingo, supra. It is plain, however, that no prosecution can be had under that law for an act therein denounced which was committed prior to the adoption of the law.

[1] Those provisions of the ordinance which are in conflict with the state law are as ineffective as if they had been repealed. The repeal of a penal statute without a saving clause or statute puts an end to all prosecutions thereunder.

"The proceeding is arrested at the very point where it is at the date of the repeal; if before indictment no indictment can be found; if after indictment, and before trial, no conviction can be had; if after conviction and before judgment, no judgment can be rendered. If the judgment is appealed from, and its enforcement is suspended until the determination of the appeal, the power to enforce the judgment falls with the repeal of the statute, and the appellate court will direct a dismissal of the proceedings." *Spears v. County of Modoc*, 101 Cal. 303, 305, 35 Pac. 869, 870.

Section 329 of the Political Code provides:

"The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act."

[2] This section "is limited in its application to the repeal of a 'law,' and does not extend to the repeal of a municipal ordinance." *Spears v. County of Modoc*, supra. The instant case is very similar, both in the facts and the questions of law involved, to that of *Pleasant Grove City v. Lindsay*, 41 Utah, 154, 125 Pac. 389, where the judgment of conviction therein was reversed.

The judgment and order are reversed, and the trial court is directed to dismiss the action.

I concur: **HART, J.**

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63 Cal. App. 717

NELSON v. DUTTON et al. (Civ. 4633.)

(District Court of Appeal, First District, Division 2, California. Sept. 30, 1923. Hearing Denied by Supreme Court Nov. 19, 1923.)

1. Waters and water courses ☞158(2)—Dumping of few loads of dirt held not construction of dam for which payment was to be made.

Under a contract to pay \$3,500 in case of exercise of the privilege of constructing and maintaining a dam for reclamation and irrigation purposes, the dumping of a few loads of dirt into stream, with a view to constructing a dam, *held* not to impose liability as to construction of contracts, where the purpose to construct the dam was abandoned, in view of Civ. Code, §§ 1641, 1647, and Code Civ. Proc. § 1860.

2. Contracts ☞154—Will be construed in reasonable manner, if possible.

Contracts will be construed in a reasonable manner, if possible.

3. Waters and water courses ☞158(2)—Duty of court to construe contract giving right to build dam to carry out expressed purpose.

Where a contract conferring privilege on defendants to construct and maintain a dam contained no particular description of the dam to be constructed, it was the duty of the trial court to construe it in such a way as to render it effectual to carry out the purpose of the parties as expressed in the contract.

4. Appeal and error ☞1071(5)—Immaterial finding not in accord with evidence held not prejudicial.

A finding that no dam of any kind was constructed by defendant, although not in accord with the evidence, *held* not prejudicial, where the rights of the parties were concluded by the supported finding that no such dam as was contemplated by the parties was constructed.

5. Waters and water courses ☞158(2)—Contract conferring right to build dam held not to require payment of consideration before work commenced.

Contract conferring right to construct a dam *held* not to obligate builder to pay consideration before work was started, and hence not to impose liability, where no such dam as was contemplated was ever constructed.

6. Contracts ☞154—Contracts susceptible of more equitable construction will not be construed to work hardship and injustice.

Courts of justice will not construe a contract in a manner that will work hardship and injustice, where it is susceptible of a more equitable construction.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by G. Nelson against J. Warren Dutton and another. Judgment for defendants, and plaintiff appeals. Affirmed.

W. S. Andrews and Hadsell, Sweet & Ingalls, all of San Francisco, for appellant.

Gregory & Goodell, D. D. Sales, and Clarence Coonan, all of San Francisco, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him in an action brought to recover \$3,500 from the defendants alleged to have been due under the terms of a written contract between defendants and plaintiff's assignors, F. N. Chaplin and Mittie M. Chaplin, his wife.*

Mr. and Mrs. Chaplin and the defendants were owners of real property bordering on "Roaring river," a slough separating Hammond and Van Sickle Islands, Solano county, Cal. The testimony disclosed that this slough is located near the place where the Sacramento and San Joaquin rivers empty into Suisun bay, and is filled with fresh water when the water in the Sacramento and San Joaquin rivers is high and with salt water during the time that the water in said rivers is low. The original parties to the contract involved upon this appeal conceived the idea of creating a fresh water reservoir in said "Roaring river" by placing dams at either end thereof. To effect this purpose they executed a contract of which the following portions are significant upon this appeal:

"That whereas the parties hereto (F. N. Chaplin and Mittie M. Chaplin, Bay Farms Co., Inc., and J. Warren Dutton) are owners and in possession of marshlands situated in the southerly portion of the county of Solano, in the state of California, in which it is desired for the benefit thereof to construct, erect and maintain certain works for reclamation and irrigation; and

"Whereas there is a slough known as 'Roaring river' between Van Sickle and Hammond Island, and another water course by the name of 'Wreck slough' between Van Sickle Island and Wheeler Island, and it is desired for the purposes hereinbefore mentioned to construct such dams at or near the mouth or outer extremities of said sloughs.

"Now therefore, for and in consideration of the sum of ten dollars (\$10) in gold coin in hand paid to the said parties of the second part (Mr. and Mrs. Chaplin) by the party of the first part (Bay Farms Co., Inc.) and party of the third part (J. Warren Dutton), the receipt whereof is hereby acknowledged, and in further consideration of the covenants hereinafter set forth and the benefits which accrue to said respective lands, it is hereby stipulated and agreed as follows:

"That such dam may be constructed and maintained by any or all of the parties hereto, within a period of three years from the date hereof, and that when so constructed, the parties of the second part shall have the right to use water from said Roaring river and Wreck slough in such quantities and at such times as they may desire, without charge therefor on the part of the party of the first part and party of the third part.

"That no part of the construction, cost of maintenance shall be charged against said par-

ty of the second part by either the party of the first part or the party of the third part;

"That before such dam in said Roaring river shall be constructed there shall be paid by or on behalf of the parties of the first and third part to the party of the second part, the further sum of three thousand five hundred dollars (\$3,500) in gold coin of the United States."

The plaintiff set out in his complaint the contract between his assignors and the defendants, and alleged:

"That after the execution of said contract as aforesaid, the defendants built and constructed in the slough known as 'Roaring river' * * * a dam such as was contemplated by the parties in the aforesaid agreement."

It is also alleged that before and after said dam was built and constructed, the plaintiff's assignors made demand upon the defendants for the payment to them of the sum of \$3,500 as provided in said agreement; that the defendant refused and still refuses to pay the same, etc.

The answer denied that after the execution of the contract the defendants or either of them constructed a dam such as was contemplated by the parties in said agreement or any other dam.

[1, 2] Upon the trial the contested issue was whether or not the work done by the defendants resulted in the creation of a dam contemplated by the parties. The trial court found:

"That it is not true that after the execution of said contract the defendants or either of them built or constructed in the slough known as Roaring river a dam such as was contemplated by the parties * * * or any dam of any kind, character or description."

The latter portion of this finding to the effect that no dam of any kind, character, or description was constructed by defendants is challenged by the appellant. In his position upon this question, appellant is undoubtedly correct. The evidence discloses, as tacitly admitted by the respondents, that some sort of a dam was actually constructed and, later, almost entirely destroyed by the defendants. The error in this portion of the finding is not prejudicial to the appellant, however, if the position of respondents is well taken that the vital issue at the trial was whether or not a dam contemplated by the parties had been constructed, and that the evidence amply supports the finding that such a dam was not constructed. Let us discuss this contention of respondents.

In support of the finding that no dam contemplated by the parties was constructed, the record contains evidence to the effect that to accomplish the purposes of the contract, as stated therein and as expressed by Mr. Chaplin on the witness stand, it was necessary to erect a dam which would be permanent in character and which would contain floodgates. These gates were essential for

maintaining a "fresh water reservoir" in Roaring river, the purpose of the parties in entering the contract as expressed by Mr. Chaplin. The record shows that the defendants deposited considerable dirt in the entrance to Roaring river, creating an obstacle which temporarily blocked the entrance to the slough; that they, thereupon, discontinued their operations to allow this dirt to settle and form a substantial and permanent base for the dam; that the dirt did settle considerably; and that it would have been necessary to have added a large quantity of dirt to the structure after the settling process was completed and to have built floodgates before the dam could be effective for the purposes contemplated by the parties when they entered into their contract. However, before these things were done, for some reason, it became apparent to the defendants that the object contemplated could not be attained, and the defendant Dutton, thereupon, caused a cut to be made in the dirt which he had caused to be piled in the entrance to Roaring river and the tidewater gradually washed it away until, at the time of the trial, a very small amount thereof was to be seen and this was steadily being washed away by the water.

Now the appellant contends that by the terms of the written contract the only specification for the dam "contemplated by the parties" was a dam erected at the entrance of Roaring river; that any obstruction in a stream is a dam; that when it was shown that an obstruction was created by the defendants at the place mentioned in the contract, the inquiry should have ended and the finding should have been that a dam contemplated by the parties was constructed by the defendants, and a judgment should have been given for the plaintiff.

The trial court took a different view of the situation and evidently concluded that as the contract contained no particular description of the dam to be constructed, its character should be determined by a consideration of the purpose to be served thereby as expressed in the contract. This view is in harmony with the rule of construction requiring contracts to be considered as a whole (section 1641, Civ. Code), and also in harmony with the rule that the circumstances and situation of the parties and the subject-matter of the contract at the time of the making thereof are admissible in evidence as throwing light upon the intention of the parties when any uncertainty exists regarding this matter (section 1647, Civ. Code; section 1860, Code Civ. Proc.). We think the view of the trial court was the proper one. It was the only reasonable view of the contract, and it is always a rule of construction that contracts will be construed in a reasonable manner if possible. 6 Cal. Jur. § 169. In the case of *Stein v. Archibald*, 151 Cal. 220, 90 Pac. 536, it was said:

"It is a well-settled principle applicable to the construction of contracts that where one construction would make the contract unreasonable, unfair, or unusual and extraordinary, and another construction, equally consistent with the language, would make it reasonable, fair, and just, that the latter construction is the one which must be adopted. It is also a principle of construction with respect to ambiguous contracts, that the circumstances surrounding and known to both the parties at the time of the execution of the contract may be taken into consideration in determining the meaning intended to be conveyed."

[3] It would not have been reasonable to construe the contract as an obligation on the part of the defendants to pay \$3,500 to the plaintiff's assignors if said defendants cast a few loads of dirt into the entrance to Roaring river, which in no way accomplished the objects of the parties nor benefited the defendants in any manner. It was the duty of the trial court to construe the contract in such a way as to render it effectual to carry out the purpose of the parties as expressed in the contract. *Callahan v. Stanley*, 57 Cal. 476, 479.

Not only was the view adopted by the trial court the most reasonable view of the contract, but it was also the view adopted by the plaintiff in his pleading, where he expressly invited the issue regarding the character of the structure contemplated by the parties. In the case of *Silvers v. Grossman*, 183 Cal. 696, 192 Pac. 534, it was said:

"On the contrary inasmuch as the instrument is ambiguous and the construction put upon it by the averments of the answer is one of which the instrument is readily susceptible, the pleader is bound by the interpretation adopted by him."

[4] In the light of the views above expressed, it is apparent that the finding that no dam of any kind was constructed, although not in accord with the evidence, is immaterial because the rights of the parties are concluded by the supported finding that no dam as contemplated by the parties was constructed. Therefore the erroneous finding is not prejudicial to appellant.

[5] One other point urged by the appellant requires mention. It is in his position that the character of the dam is immaterial in this action, as the defendants were required by the terms of the contract to pay \$3,500 to plaintiff's assignors before starting upon the construction work. We think the contract presents some uncertainty upon this matter, and the trial court has taken a view opposed to appellant's contention, which view was doubtless greatly influenced by the fact that the breach alleged by plaintiff was in failing to pay the amount after the construction of a dam contemplated by the parties. Upon this phase of the contract the trial court has

also taken the most reasonable and equitable view.

[6] We find no error in the proceedings in the trial court, and the judgment seems to attain substantial justice between the parties. It does not appear that the defendants received any benefit whatsoever from their temporary obstruction of the slough in an attempt to accomplish the avowed object of the contract, nor that the plaintiff's assignors suffered any actual detriment by reason of such unsuccessful attempt upon the part of the defendants, nor that the temporary structure erected by the defendants fulfilled the express purpose of the contract, "to construct, erect and maintain certain works for reclamation and irrigation." It is obvious that a dam without floodgates and in the process of settling could not aid in the work of reclamation and irrigation under the circumstances presented in this case. It is not the policy of courts of justice to construe contracts in a manner that will work hardship and injustice where they are susceptible of a more equitable construction.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

63 Cal. App. 686.

BROWN v. BECK et al. (Civ. 4599,
S. F. 10439.)

(District Court of Appeal, First District, Division 1, California. Sept. 19, 1923. Hearing Denied by Supreme Court Nov. 17, 1923.)

1. Appeal and error ⇐1004(1)—Where no legal measure, assessment of damages for jury.

Where the law furnishes no rule to measure damages, their assessment is peculiarly within the province of the jury, and the court will never interfere merely on the ground of excess, unless the damages are flagrantly outrageous and extravagant.

2. Death ⇐99(4)—\$7,500 damages to widow held not excessive.

Where decedent was 59 years old at the time of the accident, with an expectancy of 16.1 years, and was temporarily employed at \$18.75 per week, a verdict of \$7,500 for his widow held not excessive under Code Civ. Proc. § 657, subd. 5.

3. Appeal and error ⇐999(1)—On all questions of fact submitted, jury's verdict conclusive.

On all questions of fact submitted for determination, the jury's verdict is conclusive.

4. Death ⇐76—Evidence held to show death from pneumonia resulted from accident.

Evidence that decedent, who was convalescing in a hospital from injuries resulting from being struck by a motor truck and from congestive pneumonia resulting from the inaction caused thereby, while demonstrating to his physician his ability to use crutches, fell and

injured himself so that he was forced to lie entirely quiet, which again resulted in congestive pneumonia, from which he died, *held* to warrant a finding that death was a proximate result of the original accident.

5. Death ⚡17—Person causing injury must show death would have resulted without injury.

A person causing injury resulting in death cannot escape full liability without showing that death must have resulted if the injury had not been done.

6. Death ⚡49(1)—Complaint for death not showing there were other heirs held not demurrable.

In an action for death by one suing as widow and as "an heir," a demurrer to the complaint on the ground that plaintiff did not have legal capacity to sue under Code Civ. Proc. § 377, giving heirs or personal representative of a person killed an action for damages, was properly overruled, where it did not appear on the face of the complaint that there were other heirs, especially as defendant was not harmed, since recovery by one heir bars a subsequent action on the same cause.

7. Appeal and error ⚡216(2)—Objection that instruction incomplete held too late on appeal.

Objection that an instruction as to damages for death was incomplete was too late on appeal, where no request for any other instruction was made at trial.

8. Death ⚡104(6)—Instruction to award amount deceased would in "probability" have earned held not erroneous.

An instruction in an action for death, that the jury should estimate the amount decedent "would in all probability have earned," was not erroneous because it omitted the word "reasonable" before the word "probability"; probability importing reasonable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probability.]

9. Death ⚡104(6)—Proposed modification of instruction relating to life expectancy held unnecessary.

An instruction, in an action for death, in relation to determining the probable length of decedent's life, that jury should "consider the mortality or expectancy tables as evidence bearing on the question," *held* not objectionable because it did not add "and as tending to show the ordinary experience in like cases."

10. Trial ⚡296(11)—Instruction as to consideration of mortality tables not erroneous in view of another.

An instruction, in an action for death, relating to decedent's expectancy, was not objectionable as failing to exclude consideration of expectancy tables if death was not proximately caused by defendant's negligence, where the court had previously told the jury that instructions relating to damages for death should be considered only if decedent's death was proximately caused by defendant's negligence.

11. Trial ⚡296(3)—Instruction that decedent had right to cross street held not objectionable as implying absolute right, in view of other instructions.

An instruction, in an action for death, that decedent had the right to cross the street at the intersection where the accident occurred, *held* not objectionable as implying an absolute right irrespective of the rights of others, in view of other instructions as to the rights of vehicles.

Appeal from Superior Court, City and County of San Francisco; Edward I. Butler, Judge.

Action by Minnie H. Brown against Sigmund Beck, doing business under the fictitious name of S. Beck & Co., and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Edgar C. Levey, of San Francisco, for appellants.

Burbank & Spence, A. J. Fritz, and Daniel W. Burbank, all of San Francisco, and Homer R. Spence, of Alameda, for respondent.

ST. SURE, J. Mathew D. Brown, while crossing Montgomery street, in San Francisco, was struck down by a motor truck negligently driven by an employee of the defendant. Mr. Brown sustained serious injuries which resulted in his death. Plaintiff brought this action as the widow and heir at law of her deceased husband. The cause was tried before a jury, which rendered a verdict in favor of plaintiff for the sum of \$7,500. From the judgment entered on the verdict defendant appeals, urging as grounds for reversal: (1) That the verdict is excessive; (2) that the injuries were not the proximate cause of the death of decedent; (3) the plaintiff did not have legal capacity to sue; (4) certain instructions, given by the court to the jury, were erroneous.

Mr. Brown's right hip bone was broken. He was taken to a hospital almost immediately after the accident, where he remained until his death. During his enforced inactivity in the hospital, and in spite of attendants moving him as much as possible to counteract the tendency, he contracted congestive pneumonia, a common danger in cases necessitating a recumbent position and inaction. He rallied from this attack, the pneumonia seemingly disappearing. He improved to such a degree that for a month a nurse and an orderly had supported him in getting him out of bed and attempting to develop the use of his injured leg. From this he went to using crutches. While demonstrating to his physician in his hospital room his ability to move with their aid, he suddenly fell backward, striking the back of his neck on a window sill. He immediately stated to his physician that he was paralyzed; his arms were numb and he was unable to use his legs. An

X-ray showed a bone of the neck broken and the spinal cord injured. Within a few days thereafter, having been forced to lie entirely quiet in bed on account of the severe pain attendant on moving him, he again developed congestive pneumonia, and died. The autopsy surgeon of the coroner's office found death was caused by valvular disease of the heart, coupled with an acute congestion of the lungs.

[1, 2] At the time of the accident, deceased was a man of 57 years of age; he had, according to his attending physicians, a leaking heart, which compensated; hardening of the arteries and signs of a chronic pleurisy; to all of which the physicians attached little importance as affecting his chances of recovery from the accident which necessitated his hospital care, or of living his allotted span. Counsel stipulated that by the American Experience Table of Mortality the expectancy of life of the average man of 57 years is 16.1 years.

The defendant attacks the verdict of \$7,500 upon the ground that it was excessive, the excess appearing to have been given under the influence of passion or prejudice. Code Civ. Proc. § 657, subd. 5. When injured, deceased was temporarily employed and receiving \$18.75 per week. This evidence, as a criterion of his earning capacity, is all the court allowed to be admitted. On this basis the verdict of the jury represented about one-half of what he would have earned had he continued working at the same salary for the period of his expectancy of life. But aside from this, where the law furnishes no rule for the measure of damages, their assessment is peculiarly the province of the jury, and the court will never interfere with the verdict merely on the ground of excess. The amount of the verdict is not suggestive of either passion, prejudice, or corruption. The damages must be flagrantly outrageous and extravagant or the court cannot undertake to draw the line. We are bound to confine our consideration to the record, and the record on its face does not show passion or prejudice. *Anderson v. San Francisco-Oakland Terminal Railways* (Cal. App.) 214 Pac. 289; *Howland v. Oakland Ry. Co.*, 110 Cal. 513, 523, 42 Pac. 983; *Redfield v. Oakland Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063; *Tedford v. Los Angeles Electric Co.*, 134 Cal. 76, 66 Pac. 76, 54 L. R. A. 85; *Hale v. San Bernardino Traction Co.*, 156 Cal. 713, 106 Pac. 83; *Evarts v. Santa Barbara Ry. Co.*, 3 Cal. App. 712, 86 Pac. 830; 13 Cyc. 123; *Blackwell v. American Film Co.* (Cal. Sup.) 209 Pac. 999.

Defendant contends that the injuries were not the proximate cause of death. The study of the origin of the doctrine of proximate cause is alluring. Much of interest has been written upon the subject. Space, time, and requirement of the problem before

us merely permit hasty reference to its derivation and unfoldment. "He that does the first wrong shall answer for all consequential damages," said Lord Holt in *Roswell v. Prior* (12 Mod. 639). In 1773 Chief Justice De Grey said: "Every one who does an unlawful act is considered the doer of all that follows." *Scott v. Shepherd*, 2 W. Bl. 892, 899. Later the courts attempted to limit this responsibility. Lord Kenyon, in *Ashley v. Harrison* (1 Esp. 48 [1793]), pointed out that "the injury complained of was too remote." In 1806 Lord Ellenborough, in *Vicars v. Wilcocks* (8 East, 1), said that "the damages must be the legal and natural consequences of the words spoken." Sergeant Wild, in *Ward v. Weeks* (7 Bing. 211, 212 [1830]), expressed this idea: "A man is liable only for the natural and proximate consequences resulting directly from some intermediate agent." The principle was stated in America in 1848 by Greenleaf (2 Greenl. Ev. [1st Ed.] 258), as follows:

"The damages to be recovered must always be the natural and proximate consequence of the act complained of."

In an early case in this state (*Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291), an action for damages for trespass, we find our Supreme Court making a broad application of the principle. The Supreme Court adopted the definition given by the United States Supreme Court in *Ætna v. Boon*, 95 U. S. 117, 130 (24 L. Ed. 395), as follows: "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation;" made the following quotation from *Brady v. Northwestern Insurance Co.*, 11 Mich. 425: "That which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed;" approved the following language from *Wood v. Currey*, 57 Cal. 208, 210: "Damages which accrue subsequent to the tort, but of which it is the primary cause, are not separate causes of action, but 'are parts of the tort itself for which the cause of action is given,'" and, after summing up the evidence in the case, said:

"The cause which set all the rest in motion was the trespass. The operation of the subsequent agencies of loss was the result of this wrongful injury. Hence they * * * resulted from that trespass. To the first cause, primarily, all the damages resulting are to be attributed, although each item of damage was produced by some separate cause, following the primary cause, and operating more immediately in producing the damages."

The definition of "proximate cause" in modern text-books and recent reports vary

much in expression and sometimes in idea. The most widely quoted definition is the following:

"The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new [and independent] cause, produces that event, and without which that event would not have occurred." *Bosqui v. Sutro Railroad Co.*, 131 Cal. 390, 397, 63 Pac. 682, 684; *Shearman and Redfield on Negligence*, § 26.

It was given by the court to the jury as an instruction in this case.

Illustrative of the application of the rule made by courts of other jurisdictions are the personal injury cases hereinafter mentioned.

Batton, Adm'r, v. Public Service Corporation of New Jersey, 75 N. J. Law, 857, 69 Atl. 164, 18 L. R. A. (N. S.) 640, 127 Am. St. Rep. 855. The facts show that defendant's negligent act had caused an injury from which the plaintiff was still suffering. An act on the part of the plaintiff caused a further injury. The question was presented:

"Can it be said that, assuming that the plaintiff was free from contributory negligence, the original negligence was the proximate cause of the second injury?"

The rule laid down by the court is that the original negligence continued and accomplished the final result and is to be deemed the proximate cause, notwithstanding the fact that some act of the plaintiff aggravates the injury, if that act is in the course of conduct of a reasonably prudent person under all the circumstances.

Hyvonen v. Hector Iron Co., 103 Minn. 331, 115 N. W. 167, 123 Am. St. Rep. 332, a case where, as the result of an accident, the plaintiff's leg was broken, and some weeks afterwards, while walking on crutches, he slipped and fell, breaking his leg in the same place as before. The court held that evidence of the second breaking was admissible in an action to recover damages on the ground that the accident was due to the defendant's negligence. It was further held that it was for the jury to say whether the second breaking was a direct result of the first.

At this juncture it seems pertinent to say that upon reading the instructions given by the court to the jury we note that stereotyped definitions were given of negligence and contributory negligence; and, in this connection, we further observe an instruction was given as follows:

"In determining the proximate cause of the death you are instructed that the intervention of a second injury or the intervention of disease, or both, resulting in death, does not necessarily make such intervening injury or disease the proximate cause of the death. It is for the jury to determine whether such intervening causes, if any, are independent causes, or

whether such intervening causes are dependent upon another cause which is the efficient cause."

Hartnett v. Tripp, 231 Mass. 382, 384, 121 N. E. 17, 18, an action for damages for negligence. Quoting from the decision:

"As a result of the accident the plaintiff received a fracture of the femur of his right leg, and was taken to a hospital, where he remained in bed for about nine weeks; at the end of that time he was able to get up by the use of crutches and sit in a wheel chair; there was evidence that in getting out of the chair one of his crutches slipped and he fell back into the chair, breaking his leg at the place of the original fracture. The evidence relating to this second fracture was admitted by the presiding judge upon the question of damages, subject to the exception of the defendant. It is plain that the evidence was properly admitted. While a wrongdoer cannot be charged with liability for the result of a separate, independent and intervening act for which he is in no way responsible, he is liable for the direct and proximate result of the first injury. The second injury, caused by the slipping of the plaintiff's crutch, could have been found to have had a causal relation to the original injury for which the defendant would be liable. It does not appear that the plaintiff acted carelessly or improperly; he had so far recovered from his first injury that he was permitted to use crutches, although still being treated at the hospital. In attempting to get out of the chair with the aid of his crutches, he was performing a natural and necessary act, which it could not be ruled was negligent or so distinct from his original injury as to be a separate and independent act. The presiding judge clearly and accurately instructed the jury that the plaintiff could not recover for the second fracture as an element of damages unless they were satisfied that it was a natural and proximate result of the original injury."

Ehrgott v. Mayor, etc., 96 N. Y. 264, 48 Am. Rep. 622. The action was for damages for negligence occasioned by reason of a defect in a street. The axle of plaintiff's carriage was broken and he was dragged over the dashboard. He procured another carriage and drove several hours, during which time he was exposed to the cold and rain. The plaintiff gave evidence tending to show that the diseases from which he was suffering were the results of the strain and shock caused by his being dragged over the dashboard; and the defendant's evidence was that the injuries resulted from the subsequent exposure. The jury found that they resulted from both. It was held that a recovery was justified whether the injuries proceeded from the strain and shock or from the subsequent exposure, or both.

In *Smith v. Northern Pacific Ry. Co.*, 79 Wash. 448, 453, 140 Pac. 685, 687, this rule is enunciated:

"If a person receives an injury through the negligent act of another, and the injury is afterwards aggravated, and a recovery retarded,

through some accident not the result of want of ordinary care on the part of the injured person, he may recover for the entire injury sustained, as the law regards the probability of such aggravation as a sequence and natural result likely to flow from the original injury"—cited with approval in *Ross et ux. v. Erickson Construction Co.*, 89 Wash. 634, 155 Pac. 153, 157, L. R. A. 1916F, 319; *Stahl v. So. Michigan Railway Co.*, 211 Mich. 350, 178 N. W. 710, 711.

[3] In the instant case, by its verdict, the jury found that defendant was guilty of negligence which caused the original injury; that the decedent was free from fault; and also found against defendant upon the issue of the proximate cause of death. Upon all questions of fact submitted for determination the jury's verdict is conclusive. *Sacchi v. Bayside Lumber Co.*, 13 Cal. App. 72, 83, 108 Pac. 885.

[4] To briefly recapitulate, the evidence shows that decedent was injured by being struck by defendant's motor truck. The use of crutches by decedent while convalescing was a necessity occasioned by the original injury caused by the defendants' negligence. Decedent, while in his room at the hospital, in the presence of his physician, demonstrating his ability to use his crutches, "tried to back up, lost his balance," and fell. According to the testimony of physicians, patients using crutches while recovering from injuries frequently have falls, such being an ordinary hazard of convalescence. It was not shown, nor was there any evidence from which it might have been inferred by the jury, that decedent did not exercise ordinary care in using his crutches.

[5] Counsel for defendant concedes that decedent "might not have died (when he did) if he had not been injured and required to move about on crutches." But he endeavors to escape responsibility, arguing that "it was not likely, nor was it proved, that death would not have come had he not been injured by the fall and thereby confined to his bed." Such position is untenable. The party causing the injury cannot escape full liability without showing death must have resulted if the injury had not been done. *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30.

We have carefully examined the entire record in this case, and we are of the opinion that the evidence shows a complete case within the doctrine of proximate cause against the defendant, and the jury was fully warranted in so determining.

[6] Defendant's next point is that plaintiff did not have the legal capacity to sue, the objection being made that she sued as the widow and "an heir," or suing as "an" heir, did not join with her other heirs of deceased, either as plaintiffs or defendants, or did not sue for their benefit. Defendant's demurrer was properly overruled on this

ground, because it does not appear on the face of the complaint that there are other heirs; and though he again pleaded the same defense in his answer, there was no evidence introduced respecting any other heirs. In *Groom v. Bangs*, 153 Cal. 456, 458, 96 Pac. 503, 504, a husband sued merely as such for damages for the death of his wife, and the point was raised that he was not described as "heir," nor were the other heirs joined in the suit. In passing upon this point Mr. Justice Shaw said:

"It was not necessary to expressly allege that he was her heir. It is alleged that she was his wife at the time of her death, and as surviving husband, he would, under any ordinary circumstances, be her heir. *Knott v. McGilvray*, 124 Cal. 129."

Certainly, the allegation in that case was not as clear as here. Moreover, it has been held that recovery by one heir for death under the statute bars a subsequent action for the same cause. In the case of *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733, cited by defendant, the allegation in the complaint was that plaintiffs "are daughters of Moses Farmer, deceased." Demurrer and answer were interposed similar to those in this case. These excerpts are from the decision:

"* * * The complaint stated a cause of action upon the theory that plaintiffs were the only heirs of deceased, just as completely as it would have done had it in terms alleged that plaintiffs were the only heirs. * * * We are satisfied that defendant could not be subjected to a second recovery in a subsequent action by some other heir or heirs of whose existence he had no knowledge at the time of this action. * * * Our law allows but a single action in such cases, and in that action the damage to all heirs is recoverable."

The complaint before us also stated a cause of action on the theory that the wife was the only heir, and defendant is not harmed in any event.

[7] The last point made for reversal is that certain instructions given by the trial court were erroneous. The instructions given by the court are, in the main, stock instructions given to juries in the trial of damage cases for personal injuries. All of them are "ancient and honorable" and most of them supported by respectable authority. The assignments of error are hypercritical in the extreme, as illustrated by the first. The following instruction was given:

"If you find that the plaintiff is entitled to recover, you may award her such damages, within the amount claimed, as, in your opinion, will compensate her for the pecuniary damage proved to have been sustained by her and proximately caused by the wrong complained of. If you come to the conclusion that the plaintiff is entitled to a verdict for damages, then in estimating the amount of such damages, I instruct you that the measure of such damages is such sum as will equal the pecuniary loss

that it may be reasonably supposed the plaintiff will have actually suffered by being deprived of the services, earnings, society, comfort and protection of the deceased. But you may not include in such estimate any compensation for the sorrow and distress, if any, which ensued from the death of the deceased, or any pecuniary loss which is remote or conjectural."

The action is one under section 377, Code of Civil Procedure, and the instruction given is based thereon. The last clause of section 377 provides that in every action under it such damages may be given as under the circumstances of the case may be just. The statutory rule is the only measure of damages. It is the only rule to be applied in any action under the section. *Bond v. United Railroads*, 159 Cal. 270, at page 276, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. Complaint is made that the instruction is incomplete in that it fails to incorporate, in addition to the things which are noted in the last sentence as not to be included in the estimate of damage, the pain or anguish suffered by decedent. The instruction clearly stated the law and is supported by these authorities: *Beeson v. Green, etc., Co.*, 57 Cal. 37; *Munro v. Pacific, etc., Co.*, 84 Cal. 525, 24 Pac. 303, 18 Am. St. Rep. 248; *Pepper v. Southern Pacific Co.*, 105 Cal. 402, 38 Pac. 974; *Harrison v. Sutter Co.*, 116 Cal. 169, 47 Pac. 1019; *Dyas v. Southern Pacific Co.*, 140 Cal. 308, 73 Pac. 972; *Quill v. Southern Pacific Co.*, 140 Cal. 273, 73 Pac. 991; *Hale v. San Bernadino, etc., Co.*, 156 Cal. 713, 106 Pac. 83; *Bond v. United Railroads*, 159 Cal. 270, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. We do not think that the court committed error in failing to include a negative element in the instruction. Defendant had opportunity at the trial to request an instruction in accordance with the view he now expresses, and having failed to take advantage of that opportunity, he may not be heard to complain at this time.

[8] It is urged that the court erred in giving the following instruction, designated as number XXIX:

"You should estimate and determine the amount that the deceased would, in all probability, have earned in the years yet remaining to him, and, deducting from this the amount which he would reasonably require for his own personal use and maintenance, give a verdict which would pecuniarily compensate her."

It is said that error was committed in omitting the word "reasonable" before the word "probability" in line two of the instruction. "Probability" means the state or character of being probable. Webster's and the Century dictionaries define "probable" as follows:

"Having more evidence for than against; supported by evidence which inclines the mind to belief but leaves some room for doubt; likely."

This definition is accepted in numerous cases in which the word "probable" is construed. The Century, in referring to the definition, gives the word "reasonable" as cognate and synonymous therewith. As used in the instruction under examination, we think the word "probability" imports "reasonable."

[9] Objection is made to instruction XXX. The court instructed the jury:

"In determining the probable length of life the decedent would have enjoyed, you are entitled to consider the mortality or expectancy tables as evidence bearing on that question."

It is said that the court should have added the words "and as tending to show the ordinary experience in like cases." We are unable to see how the clause suggested would have added anything to the instruction. It has been said that instructions must be construed in reference to the proof. *Brumagim v. Bradshaw*, 39 Cal. 24. The record shows that the following took place during the course of the trial:

"Mr. Spence: It may be stipulated, may it, Mr. Lipman, that the average man who attains the age of 57 years has an expectancy of 16.1 years to live?"

"Mr. Lipman: According to the American Experience Table of Mortality."

"Mr. Spence: Yes, according to the American Experience Table of Mortality."

[10] Under the circumstances we think this assignment of error is without merit. The further objection is made to this instruction that the jury should have been told that the expectancy tables were to be considered only if decedent's death was found to be proximately caused by defendant's negligence. It seems necessary to reiterate: The instructions must be taken, considered, and construed as a whole. The instruction criticized is relevant to the measure of damages. The record shows that the court told the jury that the instructions relating to damages were only to be considered if the decedent's death was found to be proximately caused by defendant's negligence.

[11] The last objection is to instruction XXXV, as follows:

"You are further instructed that the deceased had the right to cross Montgomery street at its intersection with Sumner street."

It is argued that this instruction as it stands implies an absolute right in the decedent to cross Montgomery street irrespective of the rights of others. This instruction, like other instructions criticized, should be read in conjunction with the whole charge of the court, and particularly should it be read in connection with the instruction which immediately precedes it, to wit, instruction XXXIV, which is as follows:

"A public highway is open in all its length and breadth to the reasonable common and equal use of the people on foot or in vehicles."

The owner of an automobile has the same right as the owner of other vehicles to use the highway, and he must exercise reasonable care and caution for the safety of others.

"A traveler on foot has the same use to the public highway as an automobile or other vehicle. In using such highway all persons are bound to use reasonable care to prevent accidents. Such care must be in proportion to the danger in each case. The persons having the management of the automobile and the travelers on foot are both required to use reasonable care, circumspection, prudence, and discretion as the circumstances require. Both are bound to the reasonable use of all their senses for the prevention of accident, and the exercise of all such reasonable caution as ordinary careful and prudent persons would exercise under like circumstances."

It will readily be seen that this last assignment of error, like the others which have preceded it, is wholly without merit.

The judgment is affirmed.

We concur: TYLER, P. J.; RICHARDS, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In the petition for transfer to this court, petitioner does not complain of the giving of the instructions set out in the opinion of the District Court of Appeal, but contends that the verdict is excessive and that the death was not proximately caused by the injury.

These points are satisfactorily determined by the District Court of Appeal, and that court also correctly answers the objections made by petitioner to the instructions set out in that opinion.

We do not wish, however, to be understood as approving those instructions. The measure of damages for injuries to result in the future is well settled. See section 3283, C. C.; also, *Saylor v. Taylor*, 42 Cal. App. 474, 183 Pac. 843; *Melone v. Sierra Ry. Co.*, 151 Cal. 113, 91 Pac. 522; *Walker v. Sou. Pac. Co.*, 162 Cal. 121, 121 Pac. 369; *Wiley v. Young*, 178 Cal. 681, 174 Pac. 316; *Richman v. S. F., etc., Ry.*, 180 Cal. 454, 181 Pac. 769.

The petition is denied.

64 Cal. App. 4

PEOPLE v. PORTER et al. (Cr. 1134.)

(District Court of Appeal, First District, Division 2, California. Oct. 1, 1923. Hearing Denied by Supreme Court Nov. 26, 1923.)

1. Criminal law §517(4)—Corpus delicti held proved as basis for introduction of defendant's confession.

In prosecution for burglary, evidence held sufficient to establish corpus delicti as basis for introduction of defendant's confession.

2. Criminal law §531(3)—Confession held voluntary.

In prosecution for burglary, evidence held to show defendant's confession to have been voluntary.

3. Criminal law §815(9)—Instruction on possession of stolen property held not to exclude consideration of other evidence.

In prosecution for burglary instruction that mere possession of stolen property recently after the theft is not presumptive evidence of guilt but a circumstance tending to prove it, and that, if defendants were in possession thereof, the attending circumstances should be considered, the proximity of the place where found to the place of burglary, the lapse of time, whether the property was concealed, and whether party having possession had admitted or denied it, their demeanor, etc., held not to advise that the jury was to consider solely and alone the possession of the stolen property.

4. Burglary §14—Instruction that return of property was not defense held not error.

In prosecution for burglary, an instruction that, if any property was taken and recovered or returned, such was not to be considered as a defense, was not error.

5. Criminal law §741(1), 742(1), 1159(2, 4)—Conflict in evidence, weight thereof, and credibility of witnesses for jury, and no interference on appeal save for abuse of discretion.

Conflict in testimony, the weight of it, and the credibility of witnesses are matters which the jury determine, and, where no abuse of discretion is shown, the appellate court may not interfere.

6. Criminal law §695(6)—Written confession of defendant's accomplices properly introduced in absence of objection.

In prosecution for burglary, where a police officer testified to confessions of other defendants in writing and read before defendant, pursuant to Code Civ. Proc. § 1870, subd. 3, and to defendant's conduct in relation thereto, it was proper to receive such documents in evidence, in view of defendant's failure to mark irrelevant passages therein, and ask to have the reading confined to those matters within the issue at trial.

7. Burglary §41(1)—Evidence held sufficient to justify conviction.

In prosecution for burglary of an apartment, evidence, though circumstantial, held sufficient to justify conviction.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Dillard Porter and another were convicted of burglary, and they appeal. Affirmed.

Ernest B. D. Spagnoli, of San Francisco, for appellant Porter.

Edward D. Mabson, of San Francisco, for appellant Young.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

STURTEVANT, J. The appellants were informed against by the district attorney in a joint information. They appeared and moved for separate trials, their motions were denied, a trial was had, and from judgments of imprisonment the defendants have appealed, each filing a separate notice of appeal, and each filing a brief, but both standing on one and the same transcript.

Before proceeding further it is advisable to state by way of preface that the case made by the prosecution consisted of circumstantial evidence obtained by working backwards. After the offense alleged in the information was committed, the defendants, Dillard Porter and Albert Young, produced and offered to one Robert Pilotek and William Siegman a grip containing silverware, etc., claimed by the prosecution to have been taken from the residence of the complaining witness, Mrs. Charlotte S. Mack, 1824 Jackson street, San Francisco, on the occasion when her residence was burglarized as alleged in the information. When the possession of the silverware was traced to Pilotek and Siegman they were arrested. When they were arrested they made statements to clear themselves. Separately Pilotek made a statement to the police, which was taken down in writing; so did Siegman, and likewise Porter. Some of those statements covered many other crimes, and referred to matters other than were necessarily involved in the information before the court in the case charged by the information.

Proceeding now with the case presented by the appellants, and the points made by the appellants, it may be stated that the information charged that the appellants jointly burglarized the apartment of Charlotte S. Mack at 1824 Jackson street, San Francisco, on the 23d day of November, 1922; that both defendants were arraigned and pleaded not guilty; that the defendant Young moved for a severance of the trials; that his motion was denied; that the cause was then set for a joint trial before a jury; that a trial was had; that thereafter the jury returned a verdict, "We, the jury in the above-entitled cause find the defendants Dillard Porter and Albert Young guilty of the crime of felony, to wit: Burglary, as charged in the information. We determine the same to be second degree;" that thereafter the defendants were arraigned for judgment; that they each moved for a new trial; that their motions were denied; that thereafter the defendants suggested the granting of probation; that the suggestions were denied; that thereafter judgment was pronounced; and, as stated above, thereafter each defendant appealed from the judgment of conviction and from the order denying him a new trial.

Porter's Appeal.

[1] After his arrest the defendant Porter made a purported confession. On the trial

of the case that confession was offered in evidence. Over the objection of defendant the confession was admitted. The order overruling the defendant's objection is by him assigned as error. As we understand the appellant his objection is twofold. One objection is that the confession should not have been admitted until the corpus delicti had first been proved. Taking up that contention first, it may be stated that aside from the confession there was before the jury a story that runs as follows: The two defendants did, prior to the burglary, appear before Theas Young, the consort of the defendant Young, and, presenting to her what purported to be a package of groceries, asked and obtained her writing on the package of the address, "Mrs. Charlotte Mack, 1824 Jackson Street." Thereupon the defendants disappeared. On the 21st day of November, 1922, Mrs. Mack had left her residence to go to Menlo Park. She did not return until the 24th. While she was absent her apartment was entered, and there were stolen therefrom dresses and silverware of the value of \$3,200, but there was left in the residence the package wrapped in the piece of manila paper on which Theas Young had written the address hereinabove mentioned. After the burglary had been committed, and when the officers arrested the defendant Albert Young, they found in his apartment some of the dresses that had been taken from the apartment of Mrs. Mack, and when the arresting officers went to the apartment of the defendant Porter they found a leather case containing tools and appliances which had been taken from the same apartment. Shortly before their arrest the defendants Young and Porter produced in the building occupied by Robert Pilotek a suit case containing practically all of the silverware which had been taken from the Mack residence, each piece of silverware having engraved thereon the letter "M" as the monogram of the Mack family. Moreover, the fact that the Mack residence was burglarized by some one was completely and fully testified to by Mrs. Mack, and, so far as we can notice, her testimony was not challenged by either defendant. It is quite clear, therefore, that the corpus delicti was proved before the confession of Porter was received, and furthermore that there was at the same time some evidence connecting the defendant therewith.

[2] In the second place, it is contended by the defendant Porter that his confession was not voluntary. It may be conceded, for the purpose of this opinion, that the evidence on that subject is conflicting. However, as we understand the record, Porter's wife, then living as the consort of another man, aided the police in making the arrest. That man, whose name is not given, on one occasion said to the detective sergeant, Richmond Tatham, "There he goes," pointing to the defendant Porter. The officers gave chase. Irving R.

Findlay made the arrest, and, after having done so turned the defendant over to Sergeant Tatham, who accompanied the defendant to the hall of justice. After arriving at that place, the officer said to him:

"Porter, we have got it on you, you have got the stuff in your room, and we have found a lot of property in your room; now, Porter, we have got it on you. Are you going to talk? Siegman and Pilotek have talked," and he thought it over a little while, and he said, 'Yes; I will talk.' Q. You didn't coerce him or promise him? A. I did not. Q. Any immunity or award? A. I did not. Q. Any statement he made to you was made freely and voluntarily? A. Absolutely. Q. Did you reduce his statement to writing? A. I reduced the major part of it. * * * Q. You stated, Detective Sergeant, that before Porter made this statement that he had better make the statement, that Pilotek and Young had already done so, is that true? A. Why, words to that effect; I cannot remember the exact words; I said, 'You may as well talk'; I said, 'Now I am going to have this—we will sit down—wait until we get in the Hall of Justice and we will sit down, and you put it all in writing, and start in the very commencement, and you will go right through it,' and he said, 'I will,' using some epithets against the other defendants. Q. How long after his arrest was it? A. Immediately."

Considering all of the foregoing voir dire examination, it is patent that the trial court could have gathered from the statements of the officer that the confession was obtained voluntarily and without inducement or otherwise. We cannot say as a matter of law that the trial court erred in holding that the statement was made voluntarily.

[3] Among other instructions the trial court instructed the jury as follows:

"You will understand, ladies and gentlemen, that the mere possession of stolen property, if there was possession of it in this case, the fruits of a burglary, recently after the theft, by the person or persons charged, is not presumptive evidence of guilt, but is a circumstance tending to prove guilt. If the jury believes, from the evidence, that the defendant or defendants were found with the stolen property in their possession, or that they had it in their possession shortly after the alleged commission of this offense, or that either one of them had possession of it shortly after the alleged commission of this offense, then in determining the weight to be attached to that circumstance, as tending to prove guilt, the jury should consider all the circumstances attending such possession, the proximity of the place where found to the place of the burglary, the lapse of time since the property was taken, whether the property was concealed, whether the party having possession had admitted or denied its possession, and the demeanor and character of the accused. All these circumstances, so far as they have been proved, are proper to be taken into account by you in determining how far the possession of the property by the accused, if it has been proved, tends to show guilt."

The appellant complains because the trial court did not insert after the word "circumstance," "to be considered with the other testimony introduced in the case as." The objection is without merit. It is patent that the trial court, by the instruction quoted, did not advise the jury that the jury was to consider solely and alone the possession of stolen property. Neither did the instruction conflict with the rule announced in *People v. Ah Ki*, 20 Cal. 178; *People v. Nichols*, 39 Cal. App. 33, 177 Pac. 861; or *People v. Horton*, 7 Cal. App. 35, 93 Pac. 382.

[4] The appellant makes a third point to the effect that the court erred by instructing the jury as follows:

"The court further instructs you that, if any property was taken and the property recovered or returned, such is not to be considered by you as a defense in this proceeding."

In this behalf the appellant proceeds to state hypothetical situations that might have been. It is sufficient to say that there was no evidence in the record of and concerning those hypothetical contingencies. The court did not err in giving the instruction.

Young's Appeal.

[5] The appellant Young sets forth the evidence, and contends that the record shows that the dresses which we have stated were found in his possession were in fact found in the possession of the consort of Young, who was commonly known as Theas Young. We have read all of the record. True it is that there was some evidence in the record to the effect that the dresses, in a certain sense, could be said to be in possession of Theas Young. But it is also true that there was evidence in the record from which the jury could conclude that the possession of Theas Young was the possession of the appellant Young. The conflict in the testimony, the weight of it, and the credibility of the witnesses were all matters which the jury were entitled to determine, and the record does not present any showing of abuse of discretion. We may not interfere.

This appellant complains because the confession of Porter was admitted. The confession was clearly admissible against Porter. The trial court made no ruling, or rulings, against the appellant Young wherein or whereby that evidence was not correctly limited to the purpose for which it was legally admissible.

[6] As we have stated above, the confession of Porter was taken down in writing; the statement of Pilotek was taken down in writing, and the statement of Siegman was taken down in writing. Thereafter the appellant Young was called before a police officer, and the author of each of said writings was also produced; thereupon the of-

Ex parte HALL. (Cr. 735.)

(District Court of Appeal, Third District, California. Sept. 28, 1923.)

ficer read to the appellant Young each of the above-mentioned documents. On the trial that police officer was called to the stand and testified to the foregoing facts, and in that connection read the statement before the jury which had been so read in the presence of the appellant Young, and in addition thereto gave testimony of and concerning Young's "conduct in relation thereto." This procedure was in compliance with the provisions of subdivision 3 of section 1870, Code of Civil Procedure. But the appellant complains that some of those documents contained damaging statements of and concerning other offenses for which the defendant was not on trial. That is true, but when the officer was about to read the particular paper the appellant did not ask to see it and mark the irrelevant passages, and ask the trial court to confine the reading to those matters only that came within the issue on trial. Numerous objections were made by counsel, but we have failed to find a single instance in which the trial court made any error in ruling thereon. The appellant specially calls attention to the fact that Siegman was not called as a witness. If Siegman's statement had not been read in the presence of Young that objection might have merit, but, as we have pointed out above, the value of the incident arises by reason of the statement having been read to Young in the presence of Siegman and the officer's testimony as to what Young said or did in relation thereto. We think it is clear, therefore, that the evidence contained in those documents was properly received by the trial court.

[7] This appellant also complains that the evidence was insufficient to convict him. It is unnecessary for us to repeat the evidence recited above, which, exclusive of the confession of Porter, proved or tended to prove not only that Mrs. Mack's apartment was burglarized, but also that the two appellants committed the act. In addition to that evidence, when the case went to the jury, there was the additional showing contained in the written confession of Porter, and thereafter read to the appellant Young, in which Porter stated that he and Young did the job. Furthermore there was before the jury the statement of Pilotek and Siegman that, at the time Porter and Young produced the grip containing the stolen silverware, that they then stated that they had taken the same from an apartment on Jackson street. There was therefore plenty of evidence, if the jury believed it, which warranted the jury in bringing in the verdict.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

1. Criminal law $\Leftrightarrow$ 228—One accused of threatening to kill another entitled to an immediate preliminary hearing.

Under Const. art. 1, § 6, and Pen. Code, § 704, a person charged with threatening to kill another is entitled to an immediate hearing before a magistrate, instead of being kept in jail without bail to await magistrate's convenience.

2. Bail $\Leftrightarrow$ 40, 43—One accused of threatening to kill another entitled to release from custody on bail pending preliminary hearing.

One who was accused of threatening to kill another was entitled to release from custody on bail pending a postponed preliminary hearing before the magistrate, under Const. art. 1, § 6, and Pen. Code, § 704, but not entitled to release without giving bail.

3. Criminal law $\Leftrightarrow$ 228—Magistrate held not to lose jurisdiction by continuing preliminary hearing.

A magistrate held not to lose jurisdiction to hold preliminary hearing by improperly continuing the hearing to a time convenient to him, instead of granting an immediate hearing.

Original application for writ of habeas corpus by Charles A. Hall. Writ granted.

T. B. Scott, of Modesto, for petitioner.

William J. Brown, Dist. Atty., of Modesto, for respondent.

FINCH, P. J. Petitioner seeks his release from custody by habeas corpus. August 31, 1923, he was arrested without a warrant and confined in the Turlock jail. On the following day he was taken to the county jail, where he was held without any charge being preferred against him until September 6th. On the afternoon of the latter date an affidavit was filed with a justice of the peace, alleging that on the 31st day of August, 1923, petitioner had threatened to kill one Albert Mello, and praying that petitioner be required to give security to keep the peace. The justice of the peace thereupon issued a warrant for the arrest of petitioner, who was taken before that officer on the afternoon of September 7th. Petitioner controverted the charge made against him and demanded an immediate hearing. The justice of the peace was then engaged in the trial of a case, and had civil and criminal cases set for trial before the court which would occupy practically all of his time until 3 o'clock p. m., September 12th, for which time the justice of the peace set the hearing of the charge against petitioner, denied petitioner's request for an immediate hearing, refused to admit him to bail, and committed him to the custody of the sheriff. On September 12th,

at the hour set for the hearing, the justice's court was engaged in the trial of a civil action, and, without the consent of petitioner, continued the hearing to September 15th.

[1-3] To uphold the proceedings set forth would be to set at naught the constitutional provision that "all persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great." Const. art. 1, § 6. If a justice of the peace has authority to commit an accused without bail, in such a case, for two weeks, pending a hearing, he has authority, under similar circumstances so to commit him for two months, or longer. Section 704 of the Penal Code provides:

"When the person informed against is brought before the magistrate, if the charge be controverted, the magistrate must take testimony in relation thereto."

It is evident from a reading of the law providing for security to keep the peace that a summary proceeding is contemplated. The person so charged is entitled to an immediate hearing, instead of being thrown into jail, without bail, to await the convenience of the magistrate. It is not necessary to decide whether the magistrate may order the accused into custody during the progress of the hearing, for no such question is presented here. No sound reason has been advanced, however, for the release of the petitioner without his giving bail, or to hold that the magistrate has lost jurisdiction to hear the charge.

It is ordered that petitioner be released from custody pending the hearing before the magistrate, on giving bail in the sum of 1,000, the bond to be approved by the magistrate before whom the charge is pending.

I concur: HART, J.

(64 Cal. App. 1)

PEOPLE v. SANDERS. (Cr. 1096.)

(District Court of Appeal, First District, Division 2, California. Oct. 1, 1923. Hearing Denied by Supreme Court Nov. 28, 1923.)

1. Criminal law ☞1001—Revoking parole held not an abuse of discretion.

Where one placed on probation, if not afterwards guilty of forgery, associated with the guilty party, and gave worthless checks, obtaining for one of them a phonograph, which he immediately sold and spent the proceeds, and violated the terms of his parole by not reporting to the probation officer or returning to his home as therein ordered, the court did not abuse its discretion under Pen. Code, § 1203, in revoking his probation.

2. Criminal law ☞1147—On appeal from order revoking probation, only question is whether court abused its discretion.

The only question on an appeal from an order of the trial court revoking probation under

Pen. Code, § 1203, is whether the court abused its discretion.

3. Criminal law ☞1001—Notice to defendant of hearing of motion to revoke probation not required.

No provision is made under Pen. Code, § 1203, nor other section, for notice to defendant of a hearing of motion to revoke probation.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Clinton Sanders was convicted of grand larceny, and from an order revoking probation, he appeals. Affirmed.

Walter F. Lynch, of Stockton, and Ernest B. D. Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal from an order of the superior court of the city and county of San Francisco granting a motion to revoke and terminate defendant's probation. Appellant was accused by information of the crime of grand larceny committed in December, 1921. He was convicted on January 26, 1922, and on February 24, 1922, the court granted him probation for a period of three years, and ordered that he return to his home in Oklahoma City, Miss., and report to the probation officer weekly by letter. On October 10, 1922, a motion of the probation officer to revoke and terminate the probation came on for hearing. After several continuances granted at the request of the defendant, the motion of the probation officer was granted.

[1] Appellant objects to the action of the trial court upon the ground that at the hearing on the motion of the probation officer hearsay testimony was admitted, and that defendant was not properly served with notice of said hearing. Apart from any hearsay evidence which appears in the record, there were proven sufficient facts by unimpeachable evidence to warrant the exercise of the discretion of the court in revoking the probation. They are: The defendant did not go to his home in Mississippi, as he was directed to do upon the granting of the probation. Instead, according to his own testimony, he went to Modesto, Cal., where he remained a few days, and then went to Sacramento, and from there to Bakersfield, where he was arrested on the charge of forgery. According to his own testimony he was not guilty of this charge, but was associated with a man who was guilty of the crime. He was confined in the county jail for several months, and when he was released he returned to San Francisco. Here defendant obtained funds from a hotelkeeper upon defendant's check, which was returned

unpaid because defendant had no account at the bank upon which it was drawn. Defendant then purchased a phonograph, giving in payment therefor a check upon an out-of-town bank, which, it was ascertained by telegraphing to said bank, was of no value because defendant had no funds in said bank. The day after purchasing the phonograph defendant went to an auction house and sold the same, representing it to be his property, and secured \$75 therefor. Before the phonograph could be delivered the company from which it had been purchased ascertained by telegraph that the check given in payment therefor was of no value, and reclaimed their property. The auctioneer then caused defendant's arrest upon the charge of obtaining money under false pretenses. At the time of his arrest defendant was in an intoxicated condition, according to the arresting officer, and had been driven to his hotel in a taxicab. He stated to the arresting officer that he had spent in one day the \$75 which he had received for the phonograph.

There are many other matters in the record which indicate either directly or by inference, that the appellant, at the time of the revocation of his parole, had not been conducting himself in a manner expected and required of one upon probation.

[2] It is apparent from the foregoing that the trial court did not abuse its discretion in revoking appellant's probation, and that the record contains sufficient admissible evidence to warrant the action taken. The only question arising in an appeal from an order of the trial court revoking probation under section 1203 of the Penal Code is as to whether or not the court abused its discretion. *People v. Sapienzo* (Cal. App.) 213 Pac. 274.

[3] The only other question presented is with reference to the service of notice upon defendant. Section 1203, subsec. 3 of the Penal Code, provides that at any time during the probationary period of the person released on probation any probation officer may, without warrant, or other process, at any time until the final disposition of the case, rearrest any person so placed in his care and bring him into the court, or the court may, in its discretion, issue a warrant for the rearrest of any such person, and may thereupon revoke and terminate such probation if the interest of justice so requires, and if the court shall have reason to believe, from the report of the probation officer or otherwise, that the person so placed upon probation is violating the conditions of his probation, or engaged in criminal practices, or has become abandoned to improper associates or a vicious life.

We find no provision for any form of notice to a defendant of a hearing of a motion to revoke his probation. In this case the defendant was arrested charged with a crime.

While that matter was pending defendant was brought before the court upon motion of the probation officer for revocation of his parole. He was personally present in court, and also represented by counsel, not only at the first hearing, but upon the two subsequent dates to which the hearing was continued. The showing made by the probation officer that defendant had violated his parole by not returning to his home in Mississippi and by not reporting to the probation officer was sufficient to justify the order made.

The order appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

(192 Cal. 384)

In re KITCHEN.

KITCHEN v. BALLARD.

(L. A. 7478.)

(Supreme Court of California, Nov. 6, 1923.)

1. Wills ⚡439—Intent of testatrix must be given effect.

The intent of testatrix as expressed in her will must be given effect.

2. Wills ⚡641—Testatrix could attach any lawful condition to disposition of her property.

A testatrix could give or refrain from giving her property and could attach to her gift any lawful condition which her reason or caprice might dictate, and the beneficiary under her will must take the gift upon the terms offered.

3. Wills ⚡651—Provision for forfeiture of legacy in event of contest of will by legatee is valid.

A provision in a will that a forfeiture of any legacy in the event of a contest of the will by the legatee is valid.

4. Wills ⚡651—Provision that legatee must not resort to law for collection of recoverable demand against estate, enforceable.

A provision that a legatee shall not resort to law for the collection of any claim or demand upon the testatrix's estate for a debt which if not relinquished might be recoverable is enforceable.

5. Wills ⚡658—Legatee instituting action against estate for payment of claim, held to have forfeited legacy by reason of forfeiture clause.

The preamble of a will directing payment of funeral charges, expenses of last illness and all "just debts" and then providing if any beneficiary "shall commence any suit in any court, * * * sue and disturb, * * * my executor" or any other beneficiary the legacy to the beneficiary bringing such suit shall be void, held to penalize the commencement of any suit, and where a legatee made a choice of instituting a suit for the collection of an alleged debt against the estate, in which she failed by reason of Code Civ. Proc. § 1880, which prevented her from testifying in her own behalf, she forfeited her legacy, her good or bad faith or the justness of the claim being immaterial.

6. Wills ⚡656—Forfeiture clause not given wider scope than language requires.

Strict construction of a forfeiture clause means simply that no wider scope is to be given to the language employed than is plainly required.

7. Witnesses ⚡125—Purpose of statute preventing party suing estate from being witness in own behalf, held to protect estate from possible presentation of fraudulent claims.

Under Code Civ. Proc. § 1880, preventing party suing on a claim against the estate of a deceased person from being witness as to any matter occurring before the death of deceased, the fact that a niece of a testatrix was prevented by that section from testifying in her own behalf does not warrant an inference that a debt actually existed, the purpose of the statute being to protect the estate from the possibility of fraud, perjury and injustice.

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Appeal by Lulu Ruble Kitchen (formerly Lulu Ruble) from an order in favor of Mary A. Ballard, in the matter of the estate of Josephine G. Kitchen, deceased. Affirmed.

Kemp & Clewett and H. S. Clewett, all of Los Angeles, for appellant.

Hunsaker, Britt & Cosgrove, of Los Angeles, for respondent.

LENNON, J. This is an appeal from the order of the superior court in and for the county of Los Angeles declaring a legacy given in the last will and testament of Josephine G. Kitchen, deceased, to her niece by marriage, Lulu Ruble, appellant herein, forfeited, and decreeing that such legacy be included in the residuum of the estate devised to Mary G. Ballard, residuary legatee, and respondent herein.

The will of Josephine G. Kitchen, deceased, provided for the payment of various legacies to friends and relatives and different charitable organizations, aggregating about \$86,000, and devised and bequeathed the "rest, residue and remainder" of her estate, which estate amounted in all to about \$128,000, to Mary A. Ballard, sister of the deceased.

The portions of the will directly involved in the controversy here are as follows:

"I direct that my funeral charges, the expenses of my last illness, the cost of burial lot and suitable monument, the expense of administering my estate and all my just debts be paid."

"I give, devise and bequeath to Josephine Ruble and Grace Ruble, nieces by marriage the sum of One Thousand Dollars (\$1,000.00) each; and to Lulu Ruble, niece by marriage the sum of Two Thousand Dollars (\$2,000.00) and, as a special token of my appreciation and of my love, my earring with the diamond setting therein, it being one of the pair of my set of diamond earrings, the other having been reset in a pin, also my set of white and gold china table-ware, and cut glass vase with mirror base and silver border; also the complete set of American Encyclopedias with the annuals, together with the complete set of Shakespeare's works in separate volumes. * * *"

"I give, devise and bequeath to my beloved sister, Mary A. Ballard, all the rest, residue and remainder of my property real, personal and mixed of every kind and nature whatsoever and wheresoever located."

"In case any person or persons to whom any legacy or benefit out of, from or by reason of this my will, shall commence any suit in any court whatsoever, or by any ways or means, sue and disturb, or cause to be sued or disturbed, my executor herein named, or any other person or persons whatsoever, to whom anything is by me given in this my will, from the recovering, quiet enjoying and possessing, of what is by me herein given as aforesaid, and in such manner as is therein mentioned, then my will and meaning is, that all and every legacy and legacies, herein by me given to any such person or persons whatsoever who shall so sue and disturb as aforesaid shall cease, determine and be utterly void. And that then and from thereafter I do give and bequeath all and every the legacies which I had in my will given to such person or persons unto my beloved sister, Mary A. Ballard, as a part of the residue and remainder of my estate."

Lulu Ruble, appellant herein, niece by marriage of the testatrix, during the course of the administration of the estate presented a claim for \$25,000 to the executor of the estate for allowance, based upon an alleged express oral contract claimed to have been made between appellant and the deceased in the month of February, 1908, immediately following the death of testatrix's husband, the uncle of appellant. Appellant claimed that testatrix at that time promised her that "if the said Lulu Ruble would remain in the household of the deceased and act as a daughter and perform the duties of a daughter to said deceased, that the said deceased would amply provide for and adequately compensate said Lulu Ruble in her will." The claim presented by appellant was rejected by the executor and thereupon appellant brought an action against the executor to compel the payment of the claim. At the trial of the action the jury rendered a verdict in favor of the appellant for the sum of \$24,960 and costs. This judgment was set aside by the trial court and a new trial granted. Upon the second trial the jury were directed to find for the defendant. Upon appeal to the Supreme Court the latter judgment was affirmed. It was pointed out in that decision that appellant could not recover upon the first cause of action, which was based upon the alleged express oral contract, for the reason that she was incompetent to testify in her own behalf as a witness because of the provisions of section 1880, Code of Civil Procedure, and that she had no other evidence of the alleged oral contract. The second cause of action was upon a quantum meruit and plaintiff offered to prove the allegations as to the rendition of the services and the value thereof by testimony other than her own. The court held that such proof would

not be sufficient, in the absence of proof of an express oral contract, by reason of the fact that the relation of appellant to the deceased, as alleged in the complaint filed, was that of a daughter, and the presumption, therefore, would be that such services were not intended to be compensated. *Ruble v. Richardson*, 188 Cal. 150, 204 Pac. 572.

Upon the filing by the executor of his petition for the distribution of the estate, objection was presented by Mary A. Ballard, as residuary legatee, to the distribution to Lulu Ruble of the \$2,000, or any property whatsoever, upon the ground that said Lulu Ruble, by the institution and prosecution of the action upon the alleged oral contract with the deceased, had violated the condition upon which said gifts and bequests were made to her, and thereby forfeited all right to receive or have distributed to her any money or property given or left to her by said will.

[1] It is the cardinal rule of construction that the intent of the testatrix, as manifested by the terms of the will, must be given effect. The sole question presented, therefore, is whether or not the testatrix, by the particular and peculiar language employed in the forfeiture clause of the will in this particular case, intended to put her niece to an election either of taking the legacy or attempting to prove her claim against the estate.

[2, 3] Preliminarily it may be well to note that the testatrix was at full liberty to dispose of her property as she saw fit and upon whatever condition she desired to impose, so long as the condition was not prohibited by some law or opposed to public policy. The testatrix could give or refrain from giving; and could attach to her gift any lawful condition which her reason or caprice might dictate. She was but dealing with her own property and the beneficiary claiming thereunder must take the gift, if at all, upon the terms offered. It has been definitely decided in this state that a provision in a will providing for a forfeiture of any legacy in the event of a contest of the will by a legatee is not contrary to public policy. but, on the contrary, meets with its approval. *Estate of Hite*, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993. Such a provision is, therefore, valid and permissible. *Estate of Miller*, 156 Cal. 119, 103 Pac. 842, 23 L. R. A. (N. S.) 868; *Matter of Garcelon*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134.

[4] By an analogy of reasoning it must also be true that a provision in a will that the legatee shall not resort to law for the collection of any claim or demand upon the testatrix's estate for a debt, which, if not relinquished, might be recoverable, is a lawful provision and will be enforced. *Rogers v. Law*, 66 U. S. (1 Black) 253, 17 L. Ed. 58. If

such a provision has been included in the will in controversy the legatee must make a choice as to whether she will take what the will gives her or take a chance of making good her claim to the estate or some part thereof. The question which she has to decide is the ordinary one which arises in almost every business transaction—whether the thing offered is worth the price demanded.

[5] The condition in the will hereinbefore set out provides that if any beneficiary "shall commence any suit in any court whatsoever or by any ways or means, sue and disturb, * * * my executor herein named," or any other beneficiary, the legacy to the beneficiary who shall bring such suit shall be null and utterly void. We see no escape from the conclusion that the testatrix by the use of the language employed, which is much broader than the usual contest clauses in wills, intended to penalize the commencement of any suit whatever. And the appellant having made her choice of instituting and prosecuting a suit for the collection of the alleged debt against the estate cannot escape the palpable fact that there was a "suit commenced" by her.

[6, 7] The rule that a forfeiture clause is to be strictly construed means simply that no wider scope is to be given to the language employed than is plainly required. It does not require the court to put a strained or overtechnical construction upon the language employed, ignoring the essence of the condition imposed upon the legacy and refusing to give effect to the lawful intention of the testatrix, to enable a legatee to affirm a will so far as it is to her own profit and at the same time repudiate the validity of its provisions which are for the benefit of others. No artificial distinctions are to be taken advantage of or quibbling indulged in to the end that a person plainly and palpably coming within the scope of the forfeiture clause may by "some hook or crook" escape the penalty of forfeiture.

We find no merit in the argument advanced by appellant that by the terms of the will the testatrix directed that her "just debts" be paid; that among those debts was the one owed to her niece; that Mary A. Ballard was entitled only to the residue after the payment of the debts and legacies provided for in the will, and being entitled only to such residue she, as residuary legatee, was not disturbed from the "recovering, quiet enjoying and possessing" of what was left to her by the will, by reason of the suit prosecuted by the appellant to obtain the payment of the debt, and as a consequence the condition against the bringing of any suit whatsoever was not violated. This argument is based upon the erroneous assumption that it is necessarily to be conceded that the debt sued for by the appellant was a "just debt"

despite the absence of any proof to that effect. It cannot, of course, be successfully maintained that the fact that the niece of the testatrix was prevented by the provisions of section 1880, Code of Civil Procedure, from testifying in her own behalf proves or even warrants an inference that a debt actually existed. This section prohibits the parties, or assignors of parties, to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or a demand against the estate of a deceased person, from being witnesses as to any matter or fact occurring before the death of such deceased person. To infer that because the claimant was prevented from testifying her claim was necessarily a good one would be to impute to this section the purpose of thwarting the payment of just claims. On the contrary, the purpose is to prevent a claimant from mulcting an estate by proving by claimant's own testimony that which the decedent might perhaps disprove were his lips not sealed by death. Its declared purpose is to protect the estate from the possibility of fraud, perjury and injustice. *Monsen v. Monsen*, 174 Cal. 97, 162 Pac. 90.

It is true that the testatrix directed that all her just debts should be paid. But it by no means follows that this evidenced an intent on the part of the testatrix that a suit commenced by a legatee for the collection of a debt would not be a suit of the character penalized in the forfeiture clause. The provision for the payment of just debts is included in the provision for the payment of the expenses of the last illness, the payment of the funeral expenses, expenses of administration, et cetera. These are the phrases usually adopted as preambles to wills in general, and were probably inserted with no idea of the stress which would be attempted to be placed upon them. "They are much like the formal, meaningless terms of endearment and pious phrases printed in the formal part of blanks for making wills." *Estate of Porter*, 138 Cal. 618, 623, 72 Pac. 173, 174. On the other hand, the language in the forfeiture clause that a legacy was to be forfeited for the commencement of any suit was evidently adopted after consideration and with the purpose of effecting a definite object—the prevention of the institution of any suit whatsoever against the estate. It would be allowing the plain intent of the testatrix to be overthrown by indulgence in an overrefinement of reasoning to hold that despite the clearly and plainly expressed intention of the testatrix that no beneficiary bringing any suit whatsoever against the estate should participate in the distribution of that estate, nevertheless, appellant could with impunity commence an action and escape the penalty imposed therefor because of the fact that she alleges that the action

commenced by her is for the collection of a just debt. It is, we think, immaterial, whether or not the debt was a just debt which appellant was entitled to recover had she been able to establish it by proper proof. This is so for the reason that the intent of the testatrix is so clearly and definitely expressed in the forfeiture clause as to allow no room for any other construction than that it was her intent, in the event any suit were brought by a legatee under the will, for any purpose whatsoever, including even the collection of a "just debt," that the legacy of such beneficiary should thereby become null and utterly void.

Appellant relies largely upon the decision in the Estate of Bergland, 180 Cal. 629, 182 Pac. 277, 5 A. L. R. 1363, as holding that in the absence of proof of bad faith appellant was at liberty to institute the action without incurring the forfeiture. It was held in that case that the attempt in good faith to probate a later purported will, spurious in fact, but believed to be genuine by the party seeking its probate, did not fall within the forfeiture clause of the genuine will. The decision in that case depended entirely upon the construction given the language used in the forfeiture clause, which is entirely different from that in the instant case. The question decided was that an attempt to probate the later spurious will did not come within the prohibitions of an objection "to the distribution [of the estate] as made [by the will]." It was likewise held that such an attempt was not an "attempt to defeat the provisions of this will," inasmuch as the primary purpose of such an attempt was to establish what was believed to be the final expression of the testator's wishes and the fact that the establishment of the later will would necessarily defeat the provisions of the former will was only incidental. It was held, however, that a direct contest of the will would bring the contestant within the scope of the forfeiture clause regardless of the good or bad faith of the beneficiary. It cannot be said that the action to compel compensation in the instant case was only incidentally "a suit in any court whatsoever." This action falls squarely within the prohibition imposed in the forfeiture clause. This being so, the good or bad faith of the appellant is immaterial.

Under the particular and peculiar phrasing of the forfeiture clause the appellant was called upon to decide whether she would attempt to enforce her alleged claim or take under the will. Having made her choice of attempting to establish her claim rather than the choice of accepting the legacy, she must accept the penalty prescribed in the will for such an attempt—the forfeiture of the legacy.

The order is affirmed.

We concur: WILBUR, C. J.; WASTE, J.; MYERS, J.; KERRIGAN, J.; LAWLER, J.; SEAWELL, J.

192 Cal. 376

PACIFIC STATES SECURITIES CO. v. STEINER. (S. F. 10880.)

(Supreme Court of California. Nov. 3, 1923.)

1. Contracts ⇨238(2)—Written contract cannot be modified by contemporaneous oral agreement conflicting with it.

Under Civ. Code, § 1625, and Code Civ. Proc. § 1856, a written contract cannot be modified by a contemporaneous oral agreement between the same parties in direct conflict therewith.

2. Assignments ⇨100—Oral agreement not binding upon parties' successors in interests.

Under Code Civ. Proc. § 1856, if an oral agreement is not binding upon the parties to a written contract it is not binding upon their successors in interest.

3. Evidence ⇨441(9)—Contemporaneous oral agreement in conflict with written agreement could not vary it.

Where a written contract of purchase of an automobile was certain in its terms, complete on its face, and specified purchase price and time of payments of various installments, it could not be varied by a contemporaneous oral agreement to allow any reduction in price made by manufacturer in view of Civ. Code, § 1625 and Code Civ. Proc. § 1856.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Pacific States Securities Company against David H. Steiner. Judgment for plaintiff, and defendant appeals. Affirmed.

Goldman & Altman, of San Francisco, for appellant.

G. J. Irwin, of San Francisco, for respondent.

WILBUR, C. J. The plaintiff brought suit to recover the balance due upon a conditional contract of sale of an automobile, wherein Al. G. Faulkner Company was the seller and the defendant, David H. Steiner, was the purchaser. The seller assigned the contract to the plaintiff, who obtained judgment in the trial court for the balance due upon the automobile. Defendant appealed from the judgment upon the judgment roll alone.

[1-2] The only defense offered in the trial court was one growing out of an oral agreement made at the time of the sale by which the seller and purchaser agreed that in the event the Marmon Company, the maker of the automobile, should reduce their list prices before the automobile was paid for,

a corresponding reduction would be made in the purchase price. The answer sets up the making of this agreement without specifically alleging whether it was a written or oral agreement. But the court specifically finds that this agreement with reference to the reduction in price was an oral agreement. The contract of purchase and sale was reduced to writing, was certain in its terms, and was complete on its face, and the purchase price was therein specified and the time of payment of the various installments was therein specified. The effect of the oral agreement would be to reduce the purchase price \$885 below that fixed in the written agreement, consequently it would directly contradict the express terms of the written contract. See note, 12 A. L. R. 354. A written contract cannot be modified by a contemporaneous oral agreement in direct conflict therewith between the same parties (Civ. Code, § 1625; Code Civ. Proc. § 1856). This is a rule of substantive law (Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319; Dollar v. International Banking Corp., 13 Cal. App. 331, 343, 109 Pac. 499; Harding v. Robinson, 175 Cal. 534, 540, 166 Pac. 808).

[3] The oral agreement not being binding upon the parties to the contract would not be binding upon their successors in interest (Code Civ. Proc. § 1856).

It is therefore unnecessary to consider the arguments advanced upon the theory that the plaintiff as an assignee of the contract of sale occupies a more favorable position than the seller by reason of a provision in the contract in favor of assignees thereof.

Judgment affirmed.

We concur: MYERS, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; KERRIGAN, J.; WASTE, J.

192 Cal. 393

Ex parte MANN. (Cr. 2618.)

(Supreme Court of California. Nov. 7, 1923.)

1. Habeas corpus § 92(1)—Warden of penitentiary, and Supreme Court in habeas corpus proceedings, may examine minutes of trial court to ascertain whether sentence of conviction ran concurrently.

Though a judgment imposing two sentences of five years each and a commitment should express the sentence really imposed by the superior court, and the more orderly course would be to have such judgment and commitment modified *nunc pro tunc*, if that is not done the warden of the penitentiary in determining the effect of the commitment issued by the superior court, and the Supreme Court in a habeas corpus proceeding before it, may examine the minutes of the court to ascertain whether the sentences run concurrently.

2. Criminal law § 1216(2)—Trial court may make sentences run consecutively only when convictions on both counts precede a sentence upon either.

Under Pen. Code, § 669, the trial court has no power or jurisdiction to make sentences of conviction run consecutively except where the convictions on both counts precede a sentence upon either.

In Bank.

Habeas corpus proceedings by Frank Mann against J. J. Smith, Warden of the State Prison, to secure petitioner's release from custody. Petitioner discharged.

F. F. Mann, in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

PER CURIAM. This is the second application of the petitioner for a writ of habeas corpus. The first application was refused (In re Mann (Cal.) 219 Pac. 71), but he has renewed his application by showing in addition to facts heretofore stated that the state board of prison directors by a formal resolution have already granted him sufficient credits to require his discharge of the two sentences imposed upon him by the trial court of five years each run concurrently instead of consecutively.

[1] Upon the previous application we held that the state board of prison directors had no power to provide that the terms should run consecutively when the judgment of the court was that they should run concurrently. In the present application, however, the petitioner presents with his application the commitment under which he is held, and it appears therefrom that although issued the same day, neither refers to the other and there is no statement in the commitment that the sentences run either concurrently or consecutively. Upon the return of the writ it is conceded that the minutes of the superior court show that the court ordered the sentences to run concurrently and also show that sentence was imposed upon one plea of guilty before the plea of guilty was entered in the other case. While the more orderly course would be to have the judgment and commitment modified *nunc pro tunc* to express the sentence really imposed by the court, it is unnecessary to do this for the reason that in determining the effect of the commitment issued by the superior court, the warden of the penitentiary, and, upon this petition, this court, is entitled to examine the minutes of the superior court for the purpose of ascertaining whether or not the sentences run concurrently. Ex parte Kirby, 76 Cal. 514, 18 Pac. 655.

[2] From that record it appears not only that the court directed the sentences to run concurrently, but also that the court had no power to do otherwise, for it is only where

the convictions on both counts precede a sentence upon either that the trial court has power or jurisdiction to make the sentences run consecutively (section 669, Pen. Code; Ex parte Morton, 132 Cal. 346, 64 Pac. 469; Ex parte McGuire, 135 Cal. 339, 67 Pac. 327, 87 Am. St. Rep. 105).

In view of the fact that it now appears that the sentences imposed by the trial court run concurrently and that the board of prison directors have by formal resolution granted petitioner sufficient credits so that the term of imprisonment has expired, the prisoner is entitled to his discharge.

Petitioner discharged.

192 Cal. 377

TRAFFIC TRUCK SALES CO. OF CALIFORNIA et al. v. JUSTICE'S COURT OF RED BLUFF TP., TEHAMA COUNTY, et al. (S. F. 10720.)

(Supreme Court of California. Nov. 6, 1923.)

1. Prohibition ☞1—Writ lies only to restrain inferior tribunal from doing some unauthorized act.

A writ of prohibition lies only where an inferior tribunal is about to do some act unauthorized by law, to restrain the commission of a future act, and not to undo an act already performed, nor can it reach ministerial acts which are in no sense judicial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Prohibition (Writ of).]

2. Prohibition ☞28—Record, when sufficient for writ of review, will be examined, and court will give such relief as record will warrant.

An application for writ of prohibition to restrain sale of an automobile seized as being used in transporting liquor, bringing up the complete record in the case so far as relates to the point involved, when the record presents a sufficient case for consideration as one arising on a writ of review, will be considered, and the court will give such relief as the record will warrant.

3. Courts ☞78—Where procedure not prescribed, courts may adopt mode suitable to achieve desired result.

Under Code Civ. Proc. § 187, providing that when jurisdiction by the Constitution or statutes is conferred on a court, and the course of proceeding is not specifically pointed out, any suitable mode of proceeding may be adopted which may appear most conformable to the spirit of the Code, if a law as written provides none, it is permissible to adopt any suitable procedure which will achieve the desired result, provided there is some constitutional or statutory jurisdiction to make the section applicable.

4. Intoxicating liquors ☞250—Justice's court cannot declare forfeiture of \$1,900 automobile when its jurisdiction in such matters limited to \$300.

Where the justice's court ordered that a truck worth \$1,900, seized for transporting intoxicating liquors in violation of Wright Act, should be forfeited and sold, it did not have jurisdiction to entertain the proceeding, for, regarded solely as a legal action for a penalty or forfeiture given by statute, its jurisdiction is limited to actions in which the penalty or forfeiture does not amount to \$300, and, if regarded as one in equity, it was without lawful right to assume judicial authority, since by the Constitution equitable jurisdiction cannot be conferred upon a justice's court.

5. Criminal law ☞95—Federal courts have exclusive jurisdiction over offenses under National Prohibition Act.

Federal courts have exclusive jurisdiction of offenses committed under the National Prohibition Act.

6. Intoxicating liquors ☞250—Jurisdiction to enforce state prohibition law and procedure must be determined from state law.

Jurisdiction to enforce the state prohibition act must be found in the Constitution or statutes of this state, and the procedure in such actions is determined by state law.

7. Intoxicating liquors ☞250—Where no special proceeding for enforcing penalties under state prohibition act, the general provisions concerning jurisdiction of courts govern.

No statute other than the Wright Act having been passed purporting to give jurisdiction to the courts of this state over the penalties provided by the federal Prohibition Act, and no proceedings for the enforcement of such penalties and forfeitures having been adopted, the general provisions concerning the jurisdiction of courts over such matters govern.

8. Forfeitures ☞7—Title of state absolute after decree of condemnation.

Although the inchoate title of the state to goods forfeited is not fully consummated until after proceedings to ascertain the facts of forfeiture and judicial condemnation have been had, the forfeiture becomes absolute at the time of the commission of a prohibited act, and the title from that moment vests in the state, and the decree of condemnation relates back to the date of the wrongful act.

9. Forfeitures ☞5—Proceeding is in rem.

A proceeding for a declaration of forfeiture and for an order of sale is one in rem, and not against the owner or possessor of the property, but against the property itself, which is treated as the real offender; the proceeding being to foreclose the rights of all persons who may claim adversely to the state and to procure a sale of the property under an order or decree of court.

10. Intoxicating liquors ☞250—Forfeiture a proceeding in equity which superior court can entertain.

A proceeding for a declaration of forfeiture under the prohibition laws is indisputably a proceeding of equitable cognizance, jurisdiction

to entertain which is lodged in the superior court.

In Bank.

Application for writ of prohibition by the Traffic Truck Sales Company of California and another, to be directed to the Justice's Court of the Township of Red Bluff, County of Tehama, and others, to restrain sale of an automobile. Judgment ordering sale annulled.

Cooley & Crowley, of San Francisco, for petitioners.

J. H. Riordan, of San Francisco, and Fred C. Pugh, of Red Bluff, for respondents.

WASTE, J. The parties are here on an order to show cause why a writ of prohibition should not be granted restraining the respondents from selling an automobile alleged to have been illegally used in transporting intoxicating liquor. The petitioner Traffic Truck Sales Company of California, on or about the 1st day of March, 1923, delivered to Joseph Mussio an automobile truck under the terms of a conditional sales agreement, wherein and whereby title to the truck was reserved in the vendor until it should be fully paid for. The sales company assigned the contract to R. A. Crandall Company, the other petitioner, as security for payment of the notes given in consideration for the truck.

Mussio placed the automobile truck in the custody of John Anselmino, who was apprehended on April 6, 1923, in the county of Tehama, by the constable of Corning township, while using it in the unlawful transportation of intoxicating liquor. At the time of his arrest Anselmino was personally in charge of the truck and the liquor, both of which were seized by the arresting officer. A complaint was filed in the justice's court of Red Bluff township, charging him with possessing and with transporting intoxicating liquor in violation of the Wright Act, and he was arrested on a warrant duly issued. The automobile was placed in a garage in the city of Corning, and there held by order of respondent Ballard, as sheriff of the county of Tehama. Anselmino was tried by a jury in the justice's court presided over by the respondent Lennon as justice of the peace, and was found guilty upon each count. On May 15 he was sentenced by the justice of the peace to pay a fine of \$250 for each offense, with the alternative of imprisonment unless the fines were satisfied. As part of the judgment it was ordered that the wine in the possession of Anselmino at the time of his arrest be destroyed, and that the truck be forfeited and sold by the respondent sheriff "after giving notice as provided by law." The justice of the peace signed and filed a notice of seizure of unclaimed auto truck, and the

sheriff proceeded to advertise and sell the same. The notice of seizure and order of sale, together with a notice of sale, were published in full in the Red Bluff Daily News and the Corning Observer, two newspapers of general circulation printed and published in Red Bluff and in Corning. The same matter was printed in the form of handbills, which were posted in three public places near the place of seizure, one of them being at the garage where the truck was held by the sheriff. The notice stated that the truck would be sold on the 4th day of June, 1923, at 10 o'clock, at the garage in Corning, at public auction, to the highest bidder for cash. The sheriff also gave notice of the sale by posting as in cases of sale under execution.

The automobile truck, when seized, was worth \$1,900 and there was unpaid \$1,254 on the purchase price. The rights of Mussio under the conditional sales contract had been terminated because of default in payment. At all times the defendant Anselmino disclaimed ownership in the property, and it is recited in the judgment, and is stipulated here, that no claimant of the truck appeared or made any claim of ownership or interest therein at or prior to the time of pronouncing judgment. On or about the 22d day of May, 1923, petitioner Traffic Truck Sales Company for the first time learned of the order of confiscation and contemplated sale of its property. On June 1 petitioners filed in the court of the respondent justice of the peace a petition, claiming ownership of the truck, and praying for its release and delivery. The petition was denied upon the ground that the court had no further jurisdiction in the matter after having made the order of forfeiture and sale. Application to this court for a writ of prohibition to prevent the sale of the truck was then made. The prayer of the petition is that the respondent justice's court and the justice thereof be prohibited from treating the automobile truck as confiscated, and from depriving petitioners of their property without due process of law, and that the respondent sheriff be restrained from selling the truck and from all further proceedings in the matter.

[1, 2] In support of this application it is the contention of the petitioners, first, that the justice's court of Red Bluff township had no jurisdiction in the premises, and, second, that assuming it did have jurisdiction to order the confiscation and sale of the truck, it had continuing jurisdiction, and it was its duty to hear and determine the plea of petitioners in seeking its release. Certain general constitutional objections are also urged. Whether a writ of prohibition, which only arrests judicial proceedings without or in excess of jurisdiction (Code Civ. Proc. § 1102), should issue on the facts in this case, seems very doubtful. It is only

where the inferior tribunal is about to do some act unauthorized by law that the writ will lie. It is a preventive, rather than a corrective, remedy, and issues only to restrain the commission of a future act, and not to undo an act already performed. *Hevren v. Reed*, 126 Cal. 219, 222, 58 Pac. 536; *Hull v. Superior Court*, 63 Cal. 179; *Havemeyer v. Superior Court*, 84 Cal. 327, 394, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192. Acts simply ministerial in their nature, and in no sense judicial, cannot be reached by prohibition. *Taylor v. Board of Election Com'rs*, 54 Cal. 404, 406. It is not necessary, however, to make close application of the foregoing well-established rules of procedure, for the record presents a sufficient case for consideration as one arising on a writ of review. The petition, the answer, and an agreed statement bring here the complete record in the case, in so far as relates to the point involved and the facts relevant to the questions presented for consideration. Under these circumstances, there is no reason why the court should not give such relief as the record so presented will warrant. *Van Hoosear v. Railroad Commission* (Cal. Sup.) 207 Pac. 903.

The sole question propounded upon this application is whether or not the respondent justice's court rightly assumed to itself jurisdiction to enter judgment of forfeiture and order of sale of the automobile truck belonging to the petitioners. The penal provisions of the National Prohibition Act, frequently designated as the Volstead Act (41 U. S. Stats. at Large, c. 85, p. 305), were enacted into the law of this state by the act of the Legislature known as the Wright Act, approved by referendum at the election held November 7, 1922 (Stats. 1921, p. 79; *In re Burke* [Cal. Sup.] 212 Pac. 193). One of the acts prohibited by the Eighteenth Amendment to the federal Constitution and by section 3 of title 2 of the Volstead Act, and prohibited and declared unlawful by section 2 of the Wright Act, is the illegal transportation of intoxicating liquor. The National Prohibition Act provides specific penalties for the violation of any of its provisions, including the seizure and forfeiture of the liquor being transported and the vehicle or other property used in transporting it. *U. S. v. Federal Ins. Co.* (C. C. A.) 234 Fed. 821, 822. It is provided (section 26) that whenever intoxicating liquor, illegally transported, shall be seized by an officer, he shall take possession of the automobile in which such liquor was being transported, and, upon conviction of the person arrested, the court, unless good cause be shown by the owner, shall order a sale at public auction of the property seized, including the vehicle used in transportation, and the application of the proceeds of the sale in the manner provided in the section. The procedure to be followed in such cases is fully set out,

and it was followed exactly by the respondents in this case.

[3] By section 1 of the Wright Act the courts of this state are vested with the jurisdiction to enforce the penalties of the Volstead Act, but no procedure is outlined or adopted, and no directions are given as to how these penalties are to be enforced. If the respondent justice's court had jurisdiction to enforce this particular penalty, the procedure followed in advancing to a sale of the automobile would, no doubt, have been effective. It is provided in section 187 of the Code of Civil Procedure that—

"When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

This provision is merely declaratory of the common law. *Golden Gate, etc., Mng. Co. v. Superior Court*, 65 Cal. 187, 192, 3 Pac. 628. When the law as written provides none, it is permissible to adopt any suitable procedure which will achieve the desired result. *Nathan v. Porter*, 36 Cal. App. 356-359, 172 Pac. 170. But there must be some constitutional or statutory jurisdiction to make section 187 applicable. *Tulare County v. Kings County*, 117 Cal. 195-202, 49 Pac. 8.

[4-7] In this case the justice's court of Red Bluff township did not have jurisdiction over the subject-matter of the proceeding. It is, of course, elementary that the federal courts have exclusive jurisdiction or offenses committed under the National Prohibition Act. Jurisdiction to enforce the Wright Act must be found in the Constitution or statutes of this state, and the procedure in such actions must be determined by the state law. *Ex parte Brambini* (Cal. Sup.) 218 Pac. 569. No statute, other than the Wright Act, having been passed purporting to give jurisdiction to the courts of this state over the penalties provided by the federal Prohibition Act, and no special proceedings for the enforcement of such penalties and forfeitures having been adopted, as has been the case in other states, we are compelled to resort to the general provisions concerning the jurisdiction of courts over such matters. If the proceeding be regarded solely a legal action for a penalty or forfeiture given by statute, the respondent court could not entertain the proceeding, for its jurisdiction in such matters is limited to actions in which such penalty or forfeiture does not amount to \$300. *Code Civ. Proc.* § 112; *Thomas v. Justice's Court*, 80 Cal. 40, 22 Pac. 80. The admitted value of the automobile involved here was \$1,900. If the proceeding be regarded as one in equity,

the respondent court was without lawful right to assume judicial authority, for, under the Constitution, equitable jurisdiction cannot be conferred by statute upon a justice's court. *Young v. Wright*, 52 Cal. 407, 410. If the relief sought is analogous in form to the relief granted in courts of equity, then it is a case in equity within the meaning of the Constitution. *People v. Mier*, 24 Cal. 61, 66.

[8] When a forfeiture of property is made absolute by statute the forfeiture must be deemed to attach at the moment the offense is committed. *Gelston v. Hoyt*, 16 U. S. (3 Wheat.) 311, 4 L. Ed. 381; *U. S. v. Bags of Coffee*, 12 U. S. (8 Cranch) 398, 405, 3 L. Ed. 602; *Kreiss v. Faron*, 118 Cal. 142, 146, 50 Pac. 388; *Upham v. Hosking*, 62 Cal. 250, 257. The adjudicated cases establish the rule beyond all doubt that the forfeiture becomes absolute on the commission of the prohibited acts, and that the title from that moment vests in the state. *Henderson's Distilled Spirits*, 81 U. S. (14 Wall.) 44, 57, 20 L. Ed. 815. In case a prosecution of the offender ensues, and a decree of condemnation follows in a court of competent jurisdiction, the decree relates back to the date of the wrongful acts alleged and proved at the trial or in the hearing of the cause. *Henderson's Distilled Spirits*, supra. But the law requires proceedings to be instituted for the purpose of ascertaining the facts of the forfeiture (*Wessels v. Beeman*, 87 Mich. 481, 490, 49 N. W. 483), and the inchoate title of the state to the goods forfeited is not fully consummated until after judicial condemnation has been had (*Caldwell v. U. S.*, 49 U. S. [8 How.] 366, 381, 12 L. Ed. 1115; *Tracey v. Corse*, 58 N. Y. 143, 149).

[9, 10] The proceeding for a declaration of forfeiture and for an order of sale, in such cases, is one in rem, not against the owner or possessor of the property, but against the property itself, which is treated as the real offender. *People v. Three Barrels Full et al.*, 236 N. Y. 175, 140 N. E. 234; *Goldsmith, Jr. Grant Co. v. U. S.*, 254 U. S. 505, 511, 41 Sup. Ct. 189, 65 L. Ed. 376; *Gelston v. Hoyt*, supra. The object of the proceeding is to declare a forfeiture. In other words, it is one to foreclose the rights of all persons who may claim adversely to the state, and to procure a sale of the property under an order or decree of court, which is in the nature of a decree to enforce a lien. Of necessity, the form of the decree and nature of the relief sought is such as under the old system obtained only in the court of chancery. It would appear, therefore, to be indisputably a proceeding of equitable cognizance, jurisdiction to entertain which is lodged in the superior court. *People v. Mier*, supra.

We are led to the conclusion, therefore, that in the instant case the respondent jus-

tice's court was without jurisdiction. The purpose of a writ of review has been accomplished by the stipulation of facts filed here. The parties have expressed a desire for a determination of the present controversy on this hearing on the order to show cause.

The judgment of the justice's court in declaring the automobile forfeited, and ordering a sale, is therefore annulled and set aside.

We concur: WILBUR, C. J.; LAWLOR, J.; KERRIGAN, J.; LENNON, J.; SEAWELL, J.; MYERS, J.

63 Cal. App. 777

PEOPLE v. EVANS. (Cr. 704.)

(District Court of Appeal, Third District, California. Sept. 28, 1923.)

1. Criminal law ☞1041—Failure to object to juror's affidavit to impeach verdict waiver thereof.

While a juror is not a competent witness to impeach his own verdict, except in case of a resort to chance, his competency may be waived, and must be held to have been waived, by failure to object.

2. Witnesses ☞76(1)—Failure to object is waiver of incompetency of witness.

Failure to object on the ground of incompetency of a witness who gives competent testimony is a waiver of such incompetency.

3. Criminal law ☞857(2), 858(3)—Facts improperly before jury held prejudicial to fair trial.

In prosecution of a special policeman for murder, the admission in evidence of his statement after arrest, which had been transcribed by a stenographer and contained matters not referred to at trial, and delivery of it to the jury after retirement, together with a juror's statement during deliberation that defendant was a crack shot, were prejudicial to a fair trial.

Appeal from Superior Court, Humboldt County; E. P. McDaniel, Judge.

Uly Evans was convicted of manslaughter, and he appeals from an order denying a new trial. Reversed.

Puter & Quinn, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was charged with murder and convicted of the crime of manslaughter. He prosecutes this appeal from the judgment of conviction and the order denying his motion for a new trial.

At the time of the homicide the defendant was a special policeman of Eureka and had served in that capacity continuously for a period of more than 17 years. The deceased, Oscar Roberts, was an Indian. He and his brother, James Roberts, had been drinking

intoxicating liquors during the evening, and were intoxicated. Shortly before the homicide they engaged in two altercations with a white man who, in each instance, knocked the deceased down. The white man testified that when the Indians approached him the second time the deceased "had his hand behind his back as if he had something, a knife or gun or something."

James Roberts testified that he and the deceased left the scene of the second encounter and walked down the street to an alley, into which they turned; that while passing along the alley they looked back and saw a man behind them; that they then walked faster, and, as they were about to emerge from the alley at the opposite end from that at which they entered, the deceased was shot and fell upon the sidewalk; and that neither the witness nor his brother had any trouble with defendant prior to the shooting. Another witness for the prosecution testified that he saw defendant follow the two Indians into the alley and four or five minutes later heard two pistol shots. A third witness said he saw the defendant stagger and fall in the alley; that two white men helped defendant to arise; that while defendant was getting up the witness saw two Indians walking rapidly down the alley; that a few seconds later he heard three pistol shots and then went to the scene of the shooting; and that the defendant there said: "I got one of the sons of bitches, and I will get some more of them." Other witnesses testified as to the use of similar language by the defendant and some of them said he was under the influence of intoxicating liquor, but not drunk. Some of these witnesses admitted they were not friendly with defendant, one of them saying: "We do not speak."

Two witnesses for defendant, Everett Dale and John Henderson, testified that they saw the Indians knock the defendant down in the alley and then walk rapidly away; that these witnesses helped the defendant to arise and then followed the Indians; that they met the Indians on the street after leaving the alley and that the deceased "pulled off his coat and wanted to fight"; that the Indian said "they would go back to the alley and get that fellow," and then started back towards the alley; and that shortly thereafter they heard three shots. Another witness testified that after the homicide James Roberts stated that when he and the deceased went down the alley they were hunting for the man who had knocked the deceased down; that they found a man in the alley, but "it was the wrong man," and they ran; and that they were both drinking so much that they "had to fight with somebody."

The defendant testified that while passing through the alley in discharge of his duties the Indians attacked him; that after getting him down they hit and kicked him; that

one of them then said, "Let's beat it, there is somebody coming in the alley; * * * we will get you later; we will get you;" that two white men helped defendant arise, and one of them said, "Those Indians have jumped three or four people before this;," that as he was about to emerge from the alley he saw the two Indians again and that deceased said: "There is the son of a bitch now," and started for defendant; that defendant then drew his pistol and warned the Indians to stay away, but that they came on, and threatened to kill him; that deceased was crouched down and had one hand under his coat; that defendant backed away from them, but they followed him; that he then fired one shot at the feet of deceased and another in front of James to keep them away; and that when deceased continued to approach defendant and threatened to kill him the latter fired, inflicting the fatal wound. A few hours after the homicide, in answer to questions propounded by the district attorney, the defendant made a statement of the facts leading up to the shooting. In the main the statement so made agrees with defendant's testimony given at the trial, but in some material respects it is inconsistent therewith. There are also material discrepancies between the testimony given at the coroner's inquest, or the preliminary examination, and that given at the trial by some of the principal witnesses for the prosecution. As having some bearing upon the defendant's situation at the time of the homicide, it may be stated that he has a permanently stiff knee which naturally interferes with his activity.

An examination of the whole evidence leads to the belief that the learned judge, who presided with eminent fairness and impartiality at the trial, had ground for making the following statement at the time of pronouncing sentence:

"In this case the evidence seemed to me conclusive that the defendant acted in the belief that the men who had knocked him down shortly before * * * had assaulted him. He was knocked down by them and they ran away, and he found it extremely difficult to get up from this position on account of his leg. * * * I cannot see how the jury could have rejected the testimony of Henderson and Dale that those Indians, after coming on to C street returned then to the alley to 'get' him. That was the crucial point in the case. There is no doubt in my mind that the drunken Indians, unarmed however, and so drunk that they were easily handled as demonstrated by the first trouble—that was not known to the defendant Evans, however—that they thought that the same man who knocked Oscar Roberts down on D street was coming down the alley. Then it was that the shooting took place and the shots were fired in rapid succession. Now the defendant's story at the trial seemed to fit the circumstantial evidence in the case so well * * * as to make a story, if believed, that

would have excused or justified most men in his situation, in a dark alley after night and who had a short time before been attacked and thrown to the ground. * * * The court believes there was enough room for some doubt in this case so strongly that I can even say if I had been on the jury, not knowing any more about the case or the people involved, that perhaps my verdict would have been not guilty upon the ground of reasonable doubt; but I have no right to substitute my opinion, if that was my opinion, for the jury's."

The court also referred to contradictions and inconsistencies in the defendant's testimony as indicating that it was "not exactly truthful" and may have caused the jury to reject it, and intimated that the defendant may have resorted to the use of a deadly weapon too hastily and without any immediate necessity therefor. The evidence is sufficient to sustain the verdict and judgment. The foregoing outline of the case is given because of its bearing upon the question whether the matters hereinafter stated resulted in a miscarriage of justice.

During the progress of the trial a stenographer of the district attorney's office, who took the defendant's statement hereinbefore referred to in shorthand and thereafter transcribed the same, was sworn as a witness and asked to state what the defendant said on that occasion. By consent of the attorneys for both parties the transcribed statement was admitted in evidence as the testimony of the stenographer. Appended to the transcribed notes of the stenographer were certain questions propounded by persons other than the district attorney, and in the latter's absence, and the defendant's answers thereto, relating to the arrest of James Roberts immediately after the homicide. Such appended matter was not admitted in evidence, and neither the court nor the attorneys for defendant knew until after the verdict was rendered that the same was attached to the statement. The questions and answers so appended are as follows:

"Q. Mr. Evans, you arrested this man [James Roberts] here, didn't you? A. Yes; I went out of the alley and found him on Second street and I told him to come along. Q. You brought him? A. Well, we started, and he came along all right until we got to Third street this side of E and he started to raise a little rough house, grappled with me and tore me as you see here, my sleeve and shirt, knocked my glasses off, and I have not found them yet and suppose they are down there, and he started to run up Third street by the Woolworth store and I shot at him. * * *"

Neither the underscored words nor the facts which they narrate were at any time referred to during the taking of testimony. During their deliberations the jurors came into court and requested that the defendant's aforesaid statement which had been admitted in evidence be read to them. The parties consented that the statement be delivered to

the jury for their perusal, and the same was taken to the jury room by them, neither the court nor the attorneys for defendant knowing of the appended matter. Such matter was read by at least some of the jurors. Unquestionably the attorneys for defendant were negligent in failing to examine the transcript before its admission in evidence and in consenting that it be taken to the jury room without knowing its contents. It may be said, however, that the leading counsel for the defendant was temporarily absent when the statement was admitted in evidence and also when it was given to the jury and the associate counsel was not in attendance during all of the trial. The trial court, in referring to the matter said: "I do not blame counsel for the inadvertence."

[1] In addition to the foregoing, in support of his motion for a new trial, the defendant presented the affidavit of one of the jurors containing the following:

"During the deliberations of the jury, Walter Coggeshall, one of the jury, stated that defendant was a crack shot; that he went out in the mountains hunting every summer and that he, the defendant, could shoot the buttons off of a person's coat one after the other and argued that being so he could have shot the deceased in the foot or arm and not where he did shoot him."

[2] The affidavit was admitted without objection and was considered by the trial court. While a juror is not a competent witness to impeach his own verdict, except in case of a resort to chance, his incompetency may be waived and must be held to have been waived by failure to object. *People v. Chin Non*, 146 Cal. 561, 80 Pac. 681; *Milbourne v. Robison*, 132 Mo. App. 198, 110 S. W. 598. The evidence contained in the affidavit was competent. Failure to object on the ground of incompetency of a witness who gives competent testimony is a waiver of such incompetency. *People v. Rulia Singh*, 182 Cal. 457, 188 Pac. 987.

[3] There is evidence to the effect that the defendant was under the influence of liquor but not drunk, though he and some other witnesses testified that he was sober. A natural inference from the verdict of the jury is that they concluded the defendant acted too hastily and recklessly in shooting the deceased and that he could reasonably have defended himself without taking life. If, as stated by the juror, he is an expert shot, he might well have shot to disable the deceased instead of killing him. If immediately after killing the one man and arresting the other, who was intoxicated, the defendant shot at the latter on his attempt to escape, the jury would probably attribute to him a reckless disregard for human life and the more readily conclude that he shot the deceased without any real necessity therefor. The natural effect of the facts improperly before the jury

would be to prejudice the defendant's case. It may be that the jury would have returned a verdict of guilty on the evidence regularly admitted during the progress of the trial, but the defendant had the right to a decision of the jury uninfluenced by the evidence improperly received out of court. A careful consideration of the whole case, including the evidence, leads to the conclusion that the defendant is entitled to a new trial.

The judgment and the order denying a new trial are reversed.

I concur: HART, J.

64 Cal. App. 12

PEOPLE v. CUNNINGHAM. (Cr. 718.)

(District Court of Appeal, Third District, California. Oct. 2, 1923.)

1. Homicide ☞255(2)—Evidence supported verdict of guilt of involuntary manslaughter.

In prosecution for manslaughter, evidence held to warrant findings that death was brought about by defendant's act while engaged in driving an automobile while drunk, in violation of St. 1915, p. 406, § 17, as amended by St. 1919, p. 214, § 11, or driving beyond the prescribed speed limit in violation of section 22, as amended by St. 1919, p. 220, § 13.

2. Homicide ☞62—Drunken driver killing pedestrian when exceeding speed limit, guilty of involuntary manslaughter.

Where the death of a pedestrian was brought about by defendant while driving an automobile when under the influence of liquor and also exceeding the prescribed speed limit in a closely built up district, in violation of St. 1915, pp. 406, 409, §§ 17, 22, as amended by St. 1919, pp. 214, 220, §§ 11, 13, his act constituted involuntary manslaughter.

Appeal from Superior Court, Sacramento County; Stanley Murray, Judge.

William P. Cunningham was convicted of manslaughter, and he appeals. Affirmed.

James F. Gaffney and George E. Foote, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was accused of the crime of manslaughter in an indictment returned to the superior court in and for the county of Sacramento by the grand jury of said county. Said indictment charges that on the 30th day of March, 1923, in said city, the defendant "did then and there willfully and unlawfully and feloniously kill one James Seadler, a human being." Upon a trial of the defendant upon said charge the jury returned a verdict of guilty, and the defendant appeals from the judgment and the order denying him a new trial. There is but one point urged for a reversal

and that is that the evidence is insufficient to support the verdict.

[1] It appears that, between 11 and 12 o'clock on the night of the 30th day of March, 1923, the defendant, while driving an automobile through and over M street in the city of Sacramento, ran into or against the deceased who was then in the act of crossing from the south to the north side of M street on Twentieth street, in the city of Sacramento, causing the latter to be thrown violently to the ground; that the deceased sustained serious injuries, from the effects of which he died at the emergency hospital in the city of Sacramento within an hour after the collision occurred, he having been conveyed in an unconscious condition to said hospital a short while after he was hurt. The record discloses testimony showing, or which, believed by the jury, would warrant them in so finding, these facts: That the defendant, at the time of the killing of deceased and for a short period prior thereto, was engaged in the business of carrying on an automobile repairing shop in the city of Sacramento, in partnership with one Goyette and another party by the name of Howard; that near the hour of 6 o'clock of the evening of the 30th of March, 1923, he and Goyette left their shop in a two-passenger Overland roadster, the latter driving the car; that when they reached a point on I street, between Seventh and Eighth streets, in said city, defendant got out of the car and Goyette proceeded on, in the car, to his home at 1630 F street; that thereafter, or about 8 o'clock of said evening, Goyette returned to Seventh and I streets and again met the defendant, who got in the car and together the two drove to L street, between Fourth and Fifth, remaining there for a short time; that they later left L street and went to Second and K, where they met an acquaintance by the name of Sullivan. Sullivan, at the invitation of one of the parties, got into the car and the three then drove to Seventh and I streets and went to the room of Sullivan in a building situated on the northeast corner of Seventh and I. The three had several drinks of wine in Sullivan's room and then returned to the automobile and started for a drive about the city. They had gone a few blocks when it occurred to either Sullivan or the defendant that he had left a package of cigarettes in Sullivan's room. They thereupon returned to said room and then on their way back to the street they met two women, a Mrs. M. and a Mrs. C. They invited these women to take a ride with them, and the women accepted the invitation and got in the machine. The defendant took the wheel and sat on the extreme left-hand side of the car. Sullivan sat next to him and Goyette sat on the extreme right. Mrs. M. sat on the lap of Sullivan and Mrs. C. on

the lap of Goyette. They thus drove to the town of Washington, which is immediately across the river from the city of Sacramento, and went to a soft-drink establishment maintained in said town. They remained there for some time, and each drank two or three glasses of claret wine. They then got in the car, their positions therein being the same as above described, and started out with the intention of going to a roadhouse in the direction of and beyond Thirty-First and M streets. By devious routes through the city they finally reached a soft-drink saloon situated at Thirty-First and M streets. The defendant here left the car and went into said saloon and remained there for some 15 minutes, a portion of which time was devoted to a conversation with the bar-keeper. The other members of the party remained in the machine. There is no testimony that any of them drank liquor at the last-mentioned place. After the defendant returned to the machine he, with the other parties in the respective positions on the seat as already indicated started the car west on M street. When they reached Twentieth and M the deceased, who, as above stated, was crossing M street from the south to the north, was struck by the defendant's car, with the result as already explained. The railroad tracks of the Western Pacific run through the city of Sacramento from the north to the south limits thereof between Nineteenth and Twentieth streets. The accident, if such it may be called, therefore, occurred near said tracks and the little cabin occupied by the watchman employed by the company to warn travelers of the approach of trains. The watchman testified that his attention was attracted to the car by reason of the fact that it was approaching the tracks at a very rapid rate of speed. He testified to having heard the crash incident to the striking of the deceased by the car and immediately following the collision heard moans or groans proceeding from the spot where the deceased was struck. He observed that it was a human being who had been struck, and he thereupon gave notice to other persons of the same and shortly thereafter certain people who gathered about the scene of the accident caused the deceased to be taken to the emergency hospital. The watchman could not definitely say the rate of speed at which the car was traveling, but did declare that it was going at a very rapid rate. He testified that the car was not stopped, but went on, and, if anything, at a greater rate of speed than that at which it was going at the time it struck the deceased.

Mrs. C. testified that she was sitting on the lap of Goyette during all the time they were driving about the city and also at the time the deceased was struck. She stated that before the car reached the deceased she plainly saw him walking toward the north

side of the street. She stated that after the deceased had been struck down the machine continued on at a rapid rate of speed; that some one in the car asked, "Did we not hit some one," to which another of the party replied in the negative. They proceeded down M street until they reached either Fourth or Fifth, when they turned toward N, and finally, the car having bumped along the street as if something were wrong with one of the wheels, the defendant stopped and they all got out and inspected the car. It was discovered that the tire on the right front wheel of the car was missing and that the fender was so seriously bent as that it presented the appearance of having a large hole in it. The defendant then suggested that they drive to some point and leave the car and then send in a report to the police department the next morning that the car had been stolen. Accordingly, the defendant drove the machine (the other parties still with him in the car) to a point on Burnett way, between Twenty-Third and Twenty-Fourth streets, where they left the automobile and went to a street over which the street cars operate, and took the first street car that came along and went to Seventh and J streets. Mrs. C. testified that the car, according to her judgment, was going at the rate of between 20 and 25 miles an hour at the time that the deceased was struck. She further testified that the defendant was in an intoxicated condition while driving the car. In fact, she declared, on cross-examination, that he was drunk.

Goyette testified that when the defendant, Sullivan, the two women, and he arrived at the town of Washington, they got out of the machine and went into a place where soft drinks and other liquids were dispensed and into one of the booths therein and ordered a bottle of wine; that he took one drink and then stepped into the barroom, leaving the other parties in the booth; that as far as he knew the defendant at that place drank two glasses of wine; that after remaining there for approximately three-fourths of an hour they all got into the car and recrossed the river to the Sacramento side, the defendant driving the machine. The parties, Goyette testified, occupied the single seat of the car in the manner above described. He testified that the defendant was under the influence of liquor. He further stated that he said to the defendant, "You had better let me drive because you are pretty well liquored up," and that the defendant replied, "No; I can drive; I can drive good," and so, proceeded the witness, "I didn't insist upon driving; I thought maybe he would be all right." He then testified as to the ride through and over certain streets in Sacramento which led them to Thirty-First and M streets, and as to the running into the deceased. He testified, however, that he saw no one in front of the machine just be-

fore the collision occurred, and, although he realized that the car had struck some object at Twentieth and M, he did not know or realize at the time what the object was.

It was shown that on the day following the killing of the deceased Mr. Howard, who, as seen, was a partner of the defendant and Goyette in the auto repair shop business, reported to the police department that the roadster, in which the parties above named were riding at the time of the killing, had been stolen. A record was made by the police department of the alleged theft, but it seems that the officers began an immediate investigation of the cause or circumstances leading to the death of the deceased and so got possession of facts sufficient to indicate that the deceased was run into by the car while it was being run at excessive and unlawful speed; that their investigation led to the discovery of the machine on Burnett way, between Twenty-Third and Twenty-Fourth streets; that they took possession of the machine and kept the same in the yard back of the police station until and during the trial of the defendant. The tire of the right front wheel of the car was missing, and the fender was badly bent.

The people introduced testimony showing that M street, from Thirty-First to Nineteenth, is lined with buildings—residences, apartment house, etc.—and that said street for the distance mentioned is thickly populated.

The above comprises a statement in substance of the important testimony presented by the people.

The defendant, testifying in his own behalf, declared that he was not intoxicated on the night of the 30th of March, 1923, and that he was not driving at a rapid rate of speed at the time that his car struck the deceased. He stated that he saw no one passing across the street in front of him as the car was approaching Twentieth street. He thought possibly this was due to the fact that his vision was to some extent obstructed by Mrs. M., who was sitting on the lap of Sullivan, the latter, as shown, occupying the seat next to the defendant. He stated that he did not realize that his car had struck a human being, and had heard one of the parties say that no one had been hit; that for this reason and believing that he had not struck any person he did not stop the car. He stated that he drove the car, from Thirty-First and M to where the collision occurred, at the rate of between 20 and 23 or 24 miles an hour.

On cross-examination the defendant was asked whether or not, prior to his arrest, he made a statement to the district attorney, in the presence of several other persons, including the stenographer who took down the statement, in substance as follows: That on the night of the 30th of March he did not go to Thirty-First and M streets in a car in

the company of Sullivan, Goyette and the two women referred to; that he went to his home and retired for the night at about the hour of half past 9 o'clock; that he had a very indistinct recollection of meeting Mrs. C. some time in the evening of that day; that he did not drive from Thirty-First and M streets west on the latter street either with the parties above named or any one else on the night in question and that he was not in a car which struck any human being or any other object at Twentieth and M streets on that night. He admitted making the statement that he had no positive recollection that Mrs. C. was with him and also that his car did not run into any person on the night referred to, but sought to excuse making that statement on the ground that he was not under oath. He said that he did not remember having made the statement that he went home and retired at 9:30 p. m. on the 30th of March.

The above statement of the testimony is sufficient to show that there is no reasonable ground for doubting that the verdict is amply supported. The jury could have found, as the verdict indicates that they did find, the following facts: (1) That the defendant, while driving the automobile on the evening in question and at the time the deceased was struck down by the defendant's car, was under the influence of liquor (both Mrs. C. and Goyette, as will be noted, so testified). (2) That at the time the deceased was knocked to the ground, as shown, the defendant drove the car west on M street, at a rate of speed between 20 and 25 miles an hour. (As seen, not only did Mrs. C. so testify, but the defendant himself admitted on the witness stand that he was driving the car at the time of the infliction of the injury upon the deceased at a rate of speed in excess of 20 miles per hour. Furthermore, the fact that the tire of the right front wheel was knocked from the wheel and the fender bent in, as has already been described, is a strong circumstance tending to show that the impact was of such force as would ordinarily be incident to the driving of an automobile at an unusual rate of speed. In this connection, it is to be noted that there is testimony, uncontradicted, that M street, from Thirty-First to Nineteenth streets, is "closely built up." See Stats. 1915, p. 406, § 17, as amended by Stats. 1919, p. 214, § 11.) (3) That the defendant, in approaching the railroad crossing on a street between Nineteenth and Twentieth streets, drove his car at a greater rate of speed than 15 miles an hour. See Stats. 1915, p. 409, § 22, as amended by Stats. 1919, § 13, p. 220. As to this latter proposition, the testimony of the watchman at the railroad crossing on M, between Nineteenth and Twentieth streets, was to the effect that he was attracted to the defendant's car before it reached Twentieth

street, because of the rapid speed at which it was traveling, and that its speed was not diminished after it crossed said street nor as it was thereafter approaching the railroad tracks and passed over the same.

In the disposition of these appeals, however, consideration of the last-stated proposition may be waived, since there is evidence to support the verdict either upon the theory that the defendant was intoxicated at the time his automobile collided with the deceased and produced the injuries from the effects of which he died, or upon the theory that the speed at which he was going at the time the deceased was struck down was in excess of that limited by the law over a "public highway where the territory contiguous thereto is closely built up." Section 17, as amended by Stats. 1919, p. 214, provides:

"No person who is under the influence of intoxicating liquor and no person who is an habitual user of narcotic drugs shall operate or drive a motor or other vehicle on any public highway within this state. Any person violating the provisions of this section shall be punished by imprisonment in the county jail for not less than six months nor more than one year or by imprisonment in the state prison for not less than one or more than three years or by a fine of not less than five hundred dollars nor more than five thousand dollars."

Section 22 of said statute, as amended by Stats. 1919, p. 220, provides, *inter alia*, that no person shall operate or drive a motor vehicle or other vehicle on any public highway, where the territory contiguous thereto is closely built up, at a greater rate of speed than 20 miles an hour. There is no provision in the statute expressly prescribing a penalty for the violation of section 22 as to speed limit, and therefore the operation of a motor vehicle beyond the speed limit under the circumstances defined by the statute is subject to the penalty provided by section 32, subdivision (a), of said statute, as amended by section 16, to the effect that, excepting as in said act otherwise provided or where a different penalty is expressly fixed therein, any person violating any of its provisions "shall be guilty of a misdemeanor, and upon conviction thereof, unless in this act otherwise provided, shall be punished by a fine not exceeding \$500 or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

It will thus be observed that the defendant, while operating his machine on the occasion referred to and at the time he struck the deceased and so caused the injuries from the effects of which he died, committed two different misdemeanors, to wit: (1) Being under the influence of intoxicating liquor while so operating the machine; (2)

driving the machine beyond the prescribed speed limit.

Manslaughter is defined by the Penal Code as:

"The unlawful killing of a human being, without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion; 2. involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Section 192, Pen. Code.

[2] It is clear that upon the evidence, tested by the rules of law hereinabove enunciated, the act of the defendant in producing the death of the deceased in the manner above described constituted the crime of involuntary manslaughter upon either of the two theories last above referred to. In other words, the death of the deceased was brought about by the act of the defendant while he was engaged in the commission of two different misdemeanors or two different unlawful acts, neither of which, nor both taken together, amounted to felony. The court below in effect correctly so instructed the jury.

It requires the citation of no authorities to sustain the conclusion arrived at herein.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

64 Cal. App. 27

PEOPLE v. HUBBARD. (Cr. 989.)

(District Court of Appeal, Second District, Division 2, California. Oct. 2, 1923.)

1. Homicide $\S$ 123—Refusal to instruct that defendant had right to eject deceased from house rented by him though living in illicit relationship with woman therein held error.

In a homicide prosecution, in which the defendant claimed that he shot deceased accidentally while trying to eject him from a house occupied by himself and a woman to whom he was not married, refusal to instruct that, if defendant had rented the house in which the shooting took place, he had a right to exclude the deceased therefrom, and to use such reasonable force as may have been necessary, though defendant and the woman were living therein in illicit relationship, held prejudicial error.

2. Homicide $\S$ 62, 74—Defendant could be guilty of manslaughter though shooting was accidental.

A defendant could be guilty of manslaughter though the shooting was accidental if the shot was fired in the commission of an unlawful act not amounting to a felony, or if the shot was fired in the commission of a lawful act if the defendant was using the weapon without due caution and circumspection, under Pen. Code, $\S$ 192, subd. 2.

3. Homicide ☞18(1) — Defendant could be guilty of murder in second degree though shooting was accidental.

A defendant could be guilty of murder in the second degree though the shooting was accidental if it was done in the commission of a felony, or if, even though not engaged in the commission of a felony, the defendant was guilty of such a wanton recklessness as to show an abandoned and malignant heart, under Pen. Code, § 188, or if it happened in the commission of any unlawful act not amounting to a felony which in its consequences naturally tended to destroy life.

4. Homicide ☞123 — One who had rented house for occupancy of himself and paramour had right to eject therefrom another person invited therein by paramour.

One who had rented a house for the occupancy of himself and his paramour could eject another who had been invited therein by the paramour, and on such other person's refusal to go could use such force as might be reasonably necessary to remove him after allowing a reasonable time for his departure, and need not retreat if intruder resists ejection, but may intentionally take intruder's life if he has reason to believe and does believe that his own life is in danger, or that he is in danger of receiving great bodily harm.

5. Homicide ☞123—One may not intentionally kill another in defense of habitation unless intruder resists ejection and leads occupant to think that his life is in danger.

Under Pen. Code, § 197, one may not kill another intentionally solely in defense of habitation, but is not required to retreat if intruder resists ejection, and may intentionally take the intruder's life if he has reason to believe, and does believe, that his life is in danger, or that he is in danger of receiving great bodily harm.

6. Homicide ☞18(1)—Defendant who pointed pistol at deceased and fired it accidentally not guilty of murder.

A defendant who had pointed a pistol at deceased in effort to eject deceased from his house, without intention of firing the pistol, and who fired the pistol accidentally and unintentionally, was not guilty of murder, as the defendant in pointing the pistol at deceased was guilty merely of a misdemeanor, and not a felony, under Pen. Code, § 417.

7. Homicide ☞18(1)—Unintentional killing in commission of unlawful act dangerous to human life is murder.

If the actual consequences of an unlawful act be dangerous to life, an unintentional killing in the commission of the act is murder, though the unlawful act is merely a misdemeanor.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

J. C. Hubbard was convicted of murder in the second degree, and from the judgment of conviction, and from an order denying his motion for a new trial, he appeals. Reversed.

Ticknor, Carter & Webster, of Pasadena, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. Defendant was charged with the murder of one Dennis Cope. He was convicted of murder in the second degree, and now appeals from the judgment, and from an order denying his motion for a new trial.

The killing, which was admitted, was caused by a bullet from defendant's pistol, discharged in the course of a scuffle while defendant was endeavoring to eject Cope from a house occupied by the defendant and one Lillian Hopkins, a young woman with whom he was living in a meretricious relation. Defendant testified that the discharge of the pistol was accidental and unintentional. His principal contention here is that the trial court erred in refusing to give an instruction, presently to be quoted, which would have advised the jury that he could rightfully use all force reasonably necessary to eject Cope from the premises.

The main facts in the case are substantially as follows: On June 18, 1922, defendant, under the name of M. L. Hopkins, rented a house and paid the first month's rent, falsely representing to the owner that he and Lillian Hopkins were husband and wife. The couple moved into the house on June 20, and occupied it together until the evening of the shooting—June 21. At about 3 o'clock in the afternoon of the day of the homicide defendant, who had left the house that morning, returned, and though Lillian was away he attached no significance to her absence, concluding that she doubtless was at work. It was his custom to keep a pistol under the mattress of his bed. About 5 o'clock in the afternoon, while waiting for Lillian to return, defendant removed his pistol from under the mattress for the purpose of cleaning it. After oiling, cleaning, and reloading the weapon, he laid it on the table in the front room, under a magazine. About 7 o'clock that evening Lillian returned to the rented premises. To an inquiry of defendant as to where she had been, she replied that she had been to the beach, and had had a good time. Then ensued a quarrel, engendered, without doubt, by jealousy on the part of defendant, who in the course of the quarrel struck the woman several blows. Telling defendant that she was going to call some one to help her, Lillian left the house, and went to a nearby drug store, from which place she telephoned to Dennis Cope. Defendant, who had followed Lillian to the drug store, picked up and carried away her purse, she having laid it on the counter while telephoning. According to defendant's testimony, he took the purse because he found in it his watch, which

he claimed the woman had taken away with her without his knowledge or consent. On returning to the house after telephoning to Cope, defendant, according to Lillian Hopkins' testimony, locked the front door. Lillian succeeded in getting out of the house through a rear window. About 15 minutes later she met Cope, and after riding around with him for a short time she returned, alone, to the house. A few minutes later, while defendant and Lillian were in the front room, Cope came to the front door and knocked for admission.

What took place from the time Cope knocked at the front door is described by Lillian Hopkins, one of the only two surviving eyewitnesses, in language which, condensed and reduced to narrative form, is substantially as follows:

Mr. Hubbard was standing right inside the door. I was inside, too. After Mr. Cope rapped on the door I said: "Come on in, Dennis." Cope came in. He stood there a minute, and then said, "Have you got your purse in here?" I said: "Yes; lying right near the table on a chair." Cope went to pick it up, and as he did so the defendant took it, and said: "No; you can't have this purse." Cope replied: "Joe, I don't think you are treating Lillian like a lady; I don't think you are treating her right." The defendant replied: "Well, that is none of your affairs; I will take care of this. You get out of here." To which Cope, who was standing with his back to the door, replied: "No; I won't." Then they argued back and forth. They stood facing each other, about two feet apart. I was standing to the left of defendant, who kept saying—addressing his remarks to Cope—"You get out of here," while Cope kept saying, "No; I won't." Then defendant went toward Cope as though he was going to push him. I spoke up and said: "Don't do that; you will push him back down the steps—might break his neck." While I was saying this Cope stood there without saying a word. Then defendant put his hand to Cope's chest and shoved him. Cope then took hold of defendant's right arm, and shoved him back toward the table in the front room where defendant's pistol lay under a magazine. The next thing I saw was the pistol in defendant's hand. He was holding it down. Cope at the time was about three feet distant from defendant, who said to Cope, "Now go on and get out of here," meanwhile shaking his pistol up and down, and trying to "bluff" Cope. Defendant did not appear angry. There wasn't any loud talking at any time. I stepped in between them, and said: "Joe, please don't do this, for my sake." He shoved me aside with his left hand, and said to me, "You get away," and then he again said to Cope, "Go on and get out," to which Cope replied, "No; I won't." As defendant talked he stepped closer to Cope, who with both hands caught hold of defendant's arms between the elbows and shoulders and shoved him back; and while he had defendant by the two arms the latter, with both of his hands, caught Cope on the hips, and shoved back. Then the pistol in defendant's right hand went off. Cope caught his side and said, "Oh!" and then turned around and ran down

the steps. Defendant stood there without saying a word. When Cope got to the steps I said, "Why, he is shot; he will fall down there and die." Defendant ran down the steps, said, "Come on back, Cope, and we will see what we can do," and then put his arm around Cope's shoulder and helped him back up the steps. Cope, leaning against a little pillar on the porch, said, "I have to go, because I have to meet my father at 10 o'clock," and then ran down the steps, got into his machine and started off. I did not see him after that.

Defendant's account of the shooting, while differing from Lillian Hopkins' version of the unfortunate affair in some particulars, closely follows her description in all of its general aspects. After describing to the jury how he told Cope to get out, and how the latter refused to go, defendant testified substantially as follows:

I tried to push him out of the door, and he pushed back. That lasted for two or three minutes. He pushed me back against the table. Then I thought of the gun, and I picked it up and showed it to him, and said, "Now will you get out?" I had no intention of shooting him. I thought I would bluff him with the gun, but he didn't seem to take it. My finger was not on the trigger. It was outside of the trigger. The safety device was on the gun, and at no time did I remove it. When I took the gun off the table we stood apart. We were separated for a few seconds. Then he advanced toward me, grabbed me by the arms, and started to push me. He grabbed hold of my shoulders with both hands—between the elbows and the shoulders—and started to shove me. I shoved back. When I started to shove back I had to rest both my hands on Cope's hips. I tried to shove him out of the door and close the door in his face. When I got him pretty near to the door, and was just about to shove him out, he reached out and grabbed my hand. He got hold of both my hand and the gun, I think. Then the pistol went off. I did not pull the trigger, that I know of, nor did I remove the safety device, that I know of. When he reached down and grabbed my hand and the gun he sort of twisted his body.

Cope died of his wound. The bullet entered the left side of the mid-axillary line three inches above the crest of the ilium, passed upward and toward the right side at an angle of about 30 degrees, and finally lodged in the soft tissues of the right arm-pit.

Defendant's claim that the shooting was an accident is not directly contradicted by any evidence in the case, and is at least consistent with all that was testified to by the only other living eyewitness. He was entitled, therefore, to have the theory of an accidental and unintentional shooting considered by the jury in the light of all instructions properly applicable to the case.

The trial court gave to the jury the customary definitions of the various grades of crime embraced within an information charg-

ing murder, but refused defendant's request to give the following instruction:

"If you believe from the evidence that at the time of the shooting of Dennis Cope the defendant, Joe Hubbard, had rented the premises at No. 1016 Coronado street in the city of Los Angeles, and was at said time occupying said premises as a tenant, then he had a right to exclude the said Dennis Cope therefrom; and if you find that the defendant ordered the said Dennis Cope to leave said premises, and that the said Cope thereupon refused so to do, the said defendant, Hubbard, had a right to use such reasonable force as may have been necessary to eject the said Cope from said premises; and this would be true even though you should find that the said defendant Hubbard and Lillian Hopkins were living upon said premises in an illicit relationship."

[1-3] The instruction should have been given. The refusal to give it was not only error but was highly prejudicial to defendant's rights. The mere fact that the shooting was accidental would not necessarily exculpate defendant. It might have been done in the commission of an unlawful act, in which case it could be manslaughter or even murder in the second degree. Defendant could be guilty of manslaughter, notwithstanding the shooting was accidental, if the shot was fired in the commission of an unlawful act not amounting to a felony, or even though it was fired in the commission of a lawful act, if at the time defendant was using the weapon without due caution and circumspection. Pen. Code, § 192, subd. 2. He could be guilty even of murder in the second degree, notwithstanding the shooting was accidental, if it was done in the commission of a felony. As was said in *People v. Doyell*, 48 Cal. 94:

"Whenever one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is murder."

See, also, *People v. Olsen*, 80 Cal. 122, 22 Pac. 125; *Holmes v. State*, 88 Ala. 26, 7 South. 193, 16 Am. St. Rep. 17; note to *People v. Sullivan*, 63 L. R. A. 353.

In such cases the felonious intent, as an element of the homicide, is supplied by the intention to do the unlawful act of which the homicide is a consequence.

"The intent is transferred by implication of law." 13 R. C. L. p. 844.

Or, as is said in *People v. Olsen*, supra, 80 Cal. 126, 22 Pac. 126:

"Where the killing is the result of the commission or the attempt to commit a felony, whether it be one of those named in section 189 of the Code or not, the law attaches the felonious intent accompanying the crime contemplated to the act of killing, and constitutes it murder."

Defendant could be guilty of murder in the second degree, even though he was not engaged in the commission of a felony, and

notwithstanding the shooting was unintentional, if the circumstances disclose such a wanton recklessness as to show an abandoned and malignant heart. Pen. Code, § 188; *People v. Doyell*, supra, 48 Cal. 96. Or he could be guilty of murder in the second degree, even though the killing was unintentional, if it happened in the commission of any unlawful act not amounting to a felony, but which in its consequences naturally tended to destroy life. *People v. Doyell*, supra, 48 Cal. 95. That the learned trial judge was mindful of these principles is shown by the fact that he very properly charged the jury that, if the killing is "done in the commission of an unlawful act the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned heart, this is murder of the second degree."

It thus will be seen that it was of the utmost importance to defendant's case that the jury should be fully advised as to his right to eject Cope from the premises. For whether the killing, assuming it to have been accidental and unintentional, was done in an attempt to perpetrate a felony, or was done in the commission of an unlawful act not amounting to a felony, but which in its consequences naturally tended to destroy life, or whether the circumstances showed an abandoned heart, are all questions to which a jury of laymen could not be expected to give correct answers unless they were given some instruction respecting defendant's legal right to eject Cope from the premises, and also as to what force might rightfully be used for that purpose. It is quite possible that the jurors, because they were not instructed as to his right to eject Cope from the premises and to use all force reasonably necessary to that end, believed that defendant was guilty of a felony in endeavoring to remove Cope by force; and it is quite possible that the verdict of murder in the second degree was returned because, and solely because, the jury believed that the shot which killed Cope, even if it were fired accidentally and unintentionally, was fired while defendant was committing or attempting to commit a felony. These considerations will show how essential it was that the jury should be fully instructed with respect to defendant's right to eject Cope and to use force if necessary.

It only remains to consider, therefore, whether the proposed instruction correctly states the law. If it does, then, for the reasons stated, its refusal was clearly prejudicial to defendant's rights.

[4] That the requested instruction is a correct statement of the law is clear. Defendant was the sole tenant of the premises.

Though he had rented the house for the occupancy of himself and his paramour, he, and he only, was the legal tenant, and when Cope, uninvited by defendant, crossed the threshold, defendant, who was rightly in possession of his rented premises, had the right, notwithstanding Lillian Hopkins' invitation to Cope to enter, to request the intruder to leave, and upon the latter's refusal to go to use such force as might be reasonably necessary to remove him, after allowing a reasonable time for his departure.

"One who is lawfully in charge of premises, and has requested another to leave whom he had a right so to request, may lawfully use as much force as is necessary to remove such other, after allowing him a reasonable time to depart." 5 C. J., p. 745.

It has been held that the fact that the dwelling house occupied by a family is the property of the wife does not affect the right of the husband, as the "head" of the family, to use such force as may be necessary to eject a guest who fails to leave the house when ordered to do so by the husband. *State v. Lockwood*, 17 Del. (1 Pennewill) 76, 39 Atl. 589. The person who is acting in defense of his habitation must first use moderate means before resorting to extreme measures. But he may resist force with force, increasing it in the ratio of the intruder's resistance, without measuring it in golden scales; and whether he has used excessive force or not is a question for the jury.

"The question of the amount of force justified in repelling an assault or maintaining the possession of property [italics ours] is one peculiarly within the province of the jury." *Fawkes v. Reynolds* (Cal.) 211 Pac. 449.

[5] While one may use force if necessary to remove an intruder who refuses to leave after being requested to depart, it must not be assumed that he may intentionally kill another solely in defense of habitation. No person may intentionally kill merely because he cannot otherwise effect his object, although the object sought to be effected is right. He can kill intentionally only in defense of life or person, or to prevent a felony. Pen. Code, § 197. But a person assailed in his own house is not bound to retreat from the house to avoid violence, even though a retreat may safely be made. And, if the intruder resist his ejection and assaults the lawful occupant, the latter need not retreat, but, in protecting his person, he may, if necessary, intentionally take the intruder's life if he has reason to believe and does believe that his own life is in danger or that he is in danger of receiving great bodily harm. *People v. Lewis*, 117 Cal. 186, 48 Pac. 1088, 59 Am. St. Rep. 167. In *Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508, it is said that—

"This right of defending one's dwelling is in some sense superior to that of the defense of his person; for in the latter case it is frequently the duty of the assaulted to flee, if the fierceness of the assault will permit, while in the former a man assaulted in his dwelling is not obliged to retreat, but may stand his ground, defend his possession, and use such means as are absolutely necessary to repel the assailant from his house, even to the taking of life."

In *McIlvoy v. Cockran*, 9 Ky. (2 A. K. Marsh.) 276, the court employed this language:

"But although a wounding cannot be justified barely in defense of possession, yet, if in attempting to remove the intruder, or prevent his forcible entry, he should commit an assault upon the person of the possessor or his family, and the owner should, in defense of himself or family, wound him, the wounding may no doubt be justified."

There is authority for the proposition that one who has ordered an intruder to leave his habitation has the right to draw a weapon and to hold it in readiness as he goes toward the intruder and orders him to depart. Thus in *State v. Raper*, 141 Mo. 327, 42 S. W. 935, the court, referring to the rights of the prosecuting witness, one James Long, employed this language:

"It was his house and he had a right to protect it against any peace-disturbing, profane intruder, even if necessary to the taking of life. [Citing authorities.] For this reason Long had the right to draw and open his knife and hold it in his hand ready for use when he went towards defendant and ordered him out of his house."

In *State v. Yancey*, 74 N. C. 244, the court says that—

"A threat to use a deadly weapon, with the power to do it, may often be justifiable, when a battery with the same would not be."

See, also, *State v. Austin*, 123 N. C. 749, 31 S. E. 731.

[6] The pistol was discharged while defendant's hands rested upon Cope's hips during the struggle. At no time prior to the moment when he caught Cope by the hips did defendant point the weapon at the intruder. Lillian Hopkins, called as a witness for the people, testified that defendant did not point the pistol directly at Cope, but that even when he used it to "bluff" Cope he held it pointed downward. That is, it was pointed toward the ground when defendant shook it up and down and said to Cope, "Now go on and get out." Assuming, therefore, without conceding, that it was unlawful thus to "bluff" Cope by shaking the pistol in his presence in the manner described, still defendant's act would amount to no more than a misdemeanor under section 417 of the Penal Code, and would not amount to a felony. *People v. Ross*, 19 Cal. App. 469, 126 Pac.

375. But, if defendant's conduct, prior to the actual discharge of the pistol, was at most but a misdemeanor, and if, as he testified, the shot was fired accidentally and unintentionally, he could not properly be found guilty of murder on the theory that the shooting, though accidental, was done in the commission of or attempt to commit a felony. How essential it was, therefore, that the jury should be fully instructed as to defendant's right to remove Cope from the house and to use force if necessary to effect that purpose!

Our conclusion is that defendant was entitled to have the jury instructed as requested. And, as we cannot say that the verdict which was returned in this case would have been the one which the jury would have brought in had the requested instruction been given, it must be held that the error in refusing to give the instruction resulted in a "miscarriage of justice," necessitating a reversal of the judgment.

[7] Since there must be a retrial it is necessary to consider one other matter. Complaint is made of an instruction in the course of which the court charged the jury that, if the killing "is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, * * * this is murder of the second degree." The instruction as a whole, including the part which we have quoted, follows almost literally the language of the Supreme Court in *People v. Doyell*, supra, and is unquestionably a correct statement of the law. If the natural consequences of the unlawful act be dangerous to human life, then the unintentional killing will be murder, even though the unlawful act amount to no more than a misdemeanor. For, if the natural consequences of an unlawful act be dangerous to life, and so known to the wrongdoer, there is implied such a high degree of conscious and willful recklessness as to amount to that malignancy of heart which constitutes malice, and the malice aforethought which is an essential element of the crime of murder will be implied. This is clearly stated in the *Doyell* Case, where it is said:

"But, besides those committed in the perpetration of felonies, a large number of homicides have been adjudged murder, where the specific intent to take life does not appear or does not exist. Thus, where the killing is involuntary, but happens in the commission of an unlawful act, which, in its consequences, naturally tends to destroy life, it is murder; so, if the intent to kill is not made apparent, but the killing is unlawful, and not done in the heat of passion, or the specific intent to take life not appearing, all the circumstances show an abandoned and malignant heart. In these, and in like cases, the malice aforethought is implied, the law attributing to the slayer the intent to kill, although such intent is not made

manifest as a fact." *People v. Doyell*, 48 Cal. 95.

An instruction similar to that of which appellant complains was upheld in *Josey v. State*, 137 Ga. 769, 74 S. E. 282. See, also, *Tarvers v. State*, 90 Tenn. 485, 16 S. W. 1041, and *People v. Holmes*, 118 Cal. 460, 50 Pac. 675.

The judgment and the order denying a new trial are reversed.

We concur: WORKS, J.; CRAIG, J.

64 Cal. App. 104

HAMBLIN v. SCHULTIS. (Civ. 4606.)

(District Court of Appeal, First District, Division 2, California. Oct. 10, 1923.)

1. Negligence ⚡83—Doctrine of last clear chance.

The doctrine of last clear chance is not excluded by evidence of negligence of the person injured.

2. Municipal corporations ⚡705(10)—Automobile driver held liable under last clear chance doctrine for injury to pedestrian.

Where an automobile driver saw a pedestrian start across the street in front of him, notwithstanding that such action of the pedestrian was ill-advised, it was his duty, under the last clear chance doctrine, to stop his car and not take a chance on human life by attempting to dodge around the pedestrian.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by Martha R. Hamblin against John Schultis. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, for appellant.
Wm. R. Geary, of Oakland, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for \$1,500. The action was one to recover damages for personal injury alleged to have been caused by the negligent operation by defendant of his automobile in the city of Oakland, Cal. The only point urged upon the appeal is that the trial court erred in instructing the jury upon the doctrine of last clear chance. No contention is made that the instruction given on this subject was not a correct statement of law, but the appellant urges that the record does not disclose a state of facts to which this doctrine applies.

[1] In supporting his position appellant argues that the evidence shows the plaintiff to have been guilty of contributory negligence and sets out portions of the testimony to sustain this contention. We may concede

this, without aiding him in the least in his attack upon the instruction of which complaint is made. The doctrine of last clear chance is not excluded by evidence of negligence upon the part of the person injured; on the contrary, it is precisely in cases where the plaintiff has been negligent and has placed himself in a position of imminent danger that the humane doctrine of last clear chance announces a rule of conduct.

[2] The only other reason advanced by appellant as to why the instruction upon the doctrine of last clear chance was improper is that the record contains "no evidence showing or tending to show that defendant had knowledge of any dangerous situation of plaintiff in time to have avoided the accident." The accident occurred upon a public street in the city of Oakland in broad daylight. Briefly, the plaintiff was crossing the street and was about 15 feet from the curb, according to the witness McCarthy, when an outcry was heard by McCarthy, who was standing near the car track in the center of the street. McCarthy thought this outcry was made by the defendant, and at the time McCarthy heard it, plaintiff and her companion were in the path of the defendant's automobile if it had continued on its way without swerving. They hastened to reach the curb. The automobile, instead of either continuing in its path or stopping, swerved toward the curb, and struck plaintiff and her companion when they had reached the curb, and when plaintiff had one foot on the sidewalk. The witness McCarthy testified:

"They were in the path of the auto at the time I heard the alarm. They made an effort to get out of the path. He (defendant) made an effort to get around them and go in the same direction with them, keeping them in his path all the time. He curved to the right as they approached the curb."

Certainly, from the testimony, a jury was justified in concluding that the defendant saw the plaintiff in any event at a time when she was 15 feet from the curb and continued to drive his car, according to the witness McCarthy, at about 35 or 40 miles an hour, attempting to "dodge" the plaintiff.

From this situation a jury might well have concluded that it was the duty of the defendant to have put on his brakes and stopped his car in the path in which he was driving, when the outcry was given and when the women started to hurry toward the curb in response to this warning, rather than to take a chance of swerving and trying to avoid them in that way. There are other facts appearing in the record, from which a jury might have concluded that the defendant saw the plaintiff in time to have stopped his car, had he chosen to do so. Indeed, he must have seen them, if he was looking ahead, as

he states he was doing, as they were directly in his path, and he admits that he saw them leave the crowd near the street car track and start toward the curb. The conflict arises upon the question of how far they were from his car at the moment they left the crowd of people and started toward the curb. However, the defendant made no attempt to stop his car, according to his own testimony, and when he saw the plaintiff and her companion start across the street in front of his car, conceding that such action on the part of the plaintiff was ill-advised, we think it was his duty under the last clear chance doctrine to have stopped his car, and not to have taken a chance upon human life in attempting to dodge around persons in imminent danger.

The designation of the above evidence disposes of the only contention upon this appeal.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

64 Cal. App. 21

DIXON v. NORMAN. (Civ. 4301.)

(District Court of Appeal, Second District, Division 2, California. Oct. 2, 1923.)

1. Appeal and error ⇨671(3)—Construction and sufficiency of findings only questions on appeal in absence of evidence.

In the absence of evidence no question for the appellate court relating thereto is presented, but only the construction of the findings and their sufficiency to support the judgment.

2. Executors and administrators ⇨86(1) — Duties of administrator stated.

Under Code Civ. Proc. §§ 1581, 1613, 1615, an administrator is accountable for the entire estate which he attempts to administer, and must collect all the debts, unless after diligence collection cannot be made.

3. Executors and administrators ⇨89—Facts held to show gross neglect by administrator failing to collect notes.

Where the inventory and appraisal and the administrator's first account included certain notes made by "Matteo Rufrano" or "Matteo Bufrano," the first letter in the surname of the signer being indistinct, and the administrator presented the notes for payment to person with the former name, who denied having executed the notes, and thereafter, following the death of such person, and his appointment as public administrator of such person, administrator brought an action against "Matteo Bufrano," though he had no reason to believe that there was such a person, and permitted the cause of action on the notes against "Matteo Rufrano" to expire by limitations, and did not account for the notes in his final account, he was guilty of gross neglect.

4. Executors and administrators ⚡567(2) — Finding that person signed notes not essential to charging administrator with responsibility for failure to use reasonable diligence in collection of notes.

An administrator could be held charged with responsibility for failure to use reasonable diligence in collecting notes from a certain person who denied having signed the note on a finding that the administrator had abundant reason to believe that such person signed the notes and failed to bring suit against him for their collection, notwithstanding failure of court to find that he in fact did sign the notes.

5. Executors and administrators ⚡506(1) — Presumption that the administrator could have collected notes held to obtain.

In proceedings by administrator for settlement of final account involving question of whether the administrator by the exercise of reasonable diligence could have collected notes included in inventory and administrator's first account, it will be presumed that the administrator could have collected the notes in the absence of a showing to the contrary.

6. Appeal and error ⚡219(2) — Objection to form of findings made for first time on appeal not considered.

Objection that findings are not correctly and positively stated without argument, made for the first time on appeal, will not be considered.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Proceedings by A. H. Dixon, administrator with the will annexed and public administrator of the estate of John N. Perry, deceased, for settlement of his final account, to which Mary Norman filed exceptions. From order settling final account in accordance with exceptions, the administrator appeals. Affirmed.

W. A. McGinn, of Bakersfield, E. L. Foster, of Los Angeles, and Lester R. Godward, of Maricopa, for appellant.

Kaye & Siemon, of Bakersfield, and L. E. Nathan, of Los Angeles, for respondent.

CRAIG, J. Letters of administration with the will annexed were issued to A. H. Dixon in the matter of the estate of John N. Perry, deceased, and, pursuant to the intermediary steps leading up to the filing of said administrator's final account and petition for distribution, which are not included in the record brought here, they were filed on the 12th day of May, 1922; the respondent filed objections and exceptions thereto, and this appeal is taken by the administrator from the order settling his final account in accordance with said exceptions.

The final account as first presented by the administrator charges him with cash on hand upon settlement of his first account, \$353.49, and he asks credit for \$330.54, which latter amount included \$154.63 as his fee, and the

same amount as attorney's fee, besides 50 cents for verification of complaint, and \$7 paid for filing the same in an action by said administrator against one Matteo Bufrano.

The respondent objected to settlement of such account, alleging that she was the devisee under the will of said decedent, and that appellant had not accounted for two promissory notes for \$500 each, due the estate from Matteo Bufrano, as she claimed were shown by the inventory and appraisal and first account of said administrator. The matter was heard by the court, and thereafter it made an order entitled "Order settling exceptions and objections to final account, and settling final account," and in which it was recited that among other items of property coming into the hands of such administrator were two promissory notes for \$500 each, dated May 28, 1914, with interest at 7 per cent. per annum, payable to John N. Perry, and made by one Matteo Rufrano or Matteo Bufrano; that the first letter in the surname of the signer was indistinct, but the court finds that the signatures were identical with many specimens of Matteo Rufrano's signature found at a savings bank where the latter had done business for several years, and among the papers of decedent, and elsewhere. It is further recited in the order that the court finds that Matteo Rufrano and the decedent had been intimate friends, and had worked and lived together, and that no one by the name of Matteo Bufrano was or had been known in that community. The trial court states that it finds from the evidence that the appellant, as such administrator, twice presented said notes to Matteo Rufrano for payment, and, upon the latter's denial of execution advised him to obtain counsel for his own protection, but did nothing more; that Matteo Rufrano died subsequently, whereupon appellant became administrator of that estate, and thereafter prepared and filed suit against "Matteo Bufrano" upon said notes, without any knowledge of or belief in the existence of any person by the name of Matteo Bufrano; that he made no inquiry or investigation to learn whether or not said notes had in fact been executed by said Rufrano, and never caused the same to be filed or presented against Rufrano's estate, although the sum of \$2,232.06 was distributed to the heirs of Rufrano after paying all claims and expenses of administration; and further, that "the court therefore finds that said A. H. Dixon failed to use ordinary care and diligence in the care and management of said estate of John N. Perry regarding said notes, and that by reason of the neglect, mismanagement, and lack of due care on the part of said Dixon, as aforesaid, said notes have been lost to this estate, and that the filing of said suit against said Matteo Bufrano was wholly unwarranted."

[1] Neither said inventory and appraisal, the administrator's first account, nor any of the evidence adduced upon the hearing before the trial court, has been furnished us in the transcript on appeal. No findings of fact nor conclusions of law, except as appear in the order herein mentioned, seem to have been filed. The clerk's certificate merely recites "the foregoing to be true copies of final account, petition for distribution, objections and exceptions to final account and order settling exceptions and objections to final account and settling final account," and the statement that "the foregoing papers, hereto annexed, constitute the judgment roll in said action," is stricken out, as also is acknowledgment of service of the notice of appeal; a stipulation to the effect that the transcript contains full, true, and correct copies of the original papers on file and of the record in the Clerk's office, is not signed by either counsel. As we have said, the court recites in its order that it finds the foregoing facts from the evidence, and concludes the same with a charge against the administrator of said two notes, with interest until due, and thereafter compounded, eliminating the credits of \$7.50 expended upon filing the suit. Therefore, no question is presented as to the evidence supporting the findings, but only questions of construction of the findings and of their sufficiency to support the judgment rendered.

[2, 3] An administrator is accountable for the entire estate which he attempts to administer (Code Civ. Proc. § 1613), and must collect all the debts (Id. § 1581), unless after diligence it be shown that collection could not be made (Id. § 1615). It seems to us that *Estate of Sanderson*, 74 Cal. 199, 15 Pac. 753, *Estate of Moore*, 96 Cal. 522, 31 Pac. 584, *Elizalde v. Murphy*, 4 Cal. App. 114, 117, 87 Pac. 245, *Maddock v. Russell*, 109 Cal. 417, 24 Pac. 139, and *Harrington v. Keteltas*, 92 N. Y. 40, cited by respondent, are in point. Certainly, one who endeavors to represent conflicting interests, and has accessible evidences of identity of a debtor, but merely institutes proceedings against one whom he has reason to believe does not exist, letting the statute of limitations run against the claim, cannot be said to have exercised a degree of diligence commensurate with the responsibilities of his trust, but, on the contrary, is at least guilty of gross neglect. At all events, the inventory and appraisal, and the administrator's first account, having included the notes in question, they should have been accounted for in some way in the final account, which apparently ignored them.

In the *Estate of Sanderson*, 74 Cal. 199, 15 Pac. 753, an account was contested upon the ground that the executor had not accounted for an uncollected portion of a note, and complaint was also made therein that

the court had failed to find upon the issues. The Supreme Court said:

"But the transcript contains no bill of exceptions which shows that findings were not waived, *if findings were proper*. There is a bill of exceptions which recites that, when the 'statement on motion for a new trial' was settled, the judge struck out from the proposed statement an allegation, 'On October 3, 1883, counsel for contestants requested counsel for the executor to waive findings of fact, which counsel for the executor declined to do,' and that 'the said matter so struck out recited facts.' The trial of the contest took place April 12th, and the order settling the account was made and entered October 11, 1883. For aught that appears, findings may have been waived at the close of the testimony, or before or after October 3, 1883, and prior to the entry of the decree. The bill of exceptions fails to show distinctly that findings were not waived. * * *

"Every executor is chargeable with the whole of the estate of the decedent which may come into his possession, at the value of the appraisal contained in the inventory. Code Civ. Proc. § 1613. No executor is accountable for any debts due the decedent, 'if it appears that they remain uncollected without his fault.' Code Civ. Proc. § 1615. But if it do not so appear to the court, the executor must be held answerable for the amount of a debt due the decedent as appraised in the inventory. In the account herein presented, all that appears is that the executor is debited with a balance of the Braly note uncollected, and that the executor is credited with the same balance; that is, that a portion of the Braly note was not collected. That fact, if taken as true, is not a statement that it remained uncollected 'without fault' on the part of the executor. There is no presumption here as to the executor having done his duty. The presumption is, he could have collected the note in the absence of showing by his own averment, *at least*, that a portion was not collected without any fault in him." (Italics by Supreme Court.)

See, also, *Wheeler v. Bolton*, 92 Cal. 159, 28 Pac. 558.

[4] It is insisted that the finding that "there is and was abundant reason for believing said notes to have been actually executed by Matteo Rufrano," is insufficient as a finding that Matteo Rufrano signed the notes in question, and that Dixon, the administrator, could not be held in the absence of a finding that Rufrano did sign them. The latter contention is clearly erroneous. In order that the appellant be charged with responsibility for having failed to use reasonable diligence in collecting the notes, it was unnecessary to have found positively that Matteo Rufrano signed them. It is enough that the administrator had abundant reason for believing that Rufrano signed them and yet failed to bring suit against him for their collection. If such reason existed, and as elsewhere found by the court, no effort was made to secure payment from Matteo Rufrano, except to present the

notes to him, and, if also, as found, Dixon failed to use ordinary care and diligence in the management of the estate of Perry regarding the notes, and thereby lost to the estate the indebtedness evidenced by them, if these facts are true, the court properly held the administrator liable.

[5] Section 1615 of the Code of Civil Procedure provides:

"No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault."

As said by the Supreme Court in *Re Sanderson*, supra, there is no presumption here as to the executor having done his duty; the presumption is that he could have collected the note, in the absence of showing by him to the contrary. When it appears to the trial court that a failure to collect was so completely the result of negligence and mismanagement on the part of the administrator as found by the court in the instant case, he is clearly responsible.

The findings of the trial court are possibly susceptible to the construction that Matteo Bufrano was not an existing person, and that the note in suit was actually signed by Matteo Rufrano, in which case the administrator would unquestionably be liable; if, on the other hand, the findings be construed as deciding that Bufrano, as well as Rufrano, had any existence, and that the note was signed by either the one or the other, appellant was at fault either in not proceeding against Rufrano or in not pressing his action against Bufrano to a conclusion.

[6] As to the contention that certain of the findings are not directly and positively stated, without argument, it is sufficient to observe that it has been held that a party cannot object for the first time on appeal to defects of form in the findings, and will not, therefore, be heard to urge that the findings are not sufficiently explicit. 2 Cal. Jur. (Appeal and Error) § 91; *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986; *Parke v. Hinds*, 14 Cal. 415.

The order of the trial court is therefore affirmed.

We concur: FINLAYSON, P. J.;
WORKS, J.

192 Cal. 765

ATCHISON, T. & S. F. RY. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(S. F. 10823.)

(Supreme Court of California. Dec. 28, 1923.
Rehearing Denied Jan. 24, 1924.)

Commerce ⚡27(5)—**Railroad watchman held engaged in "interstate commerce."**

One employed by a railroad during a strike to guard trains transporting both interstate and intrastate shipments, who was found alongside of a train where he had been shot and killed, held engaged in "interstate commerce," within the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), precluding recovery under the state Workmen's Compensation Act (St. 1917, p. 831).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

In Bank.

Application by the Atchison, Topeka & Santa Fé Railway Company for a writ of certiorari to review an order of the Industrial Accident Commission awarding compensation to Marjorie Burton and others. Award annulled.

E. W. Camp, Robt. Brennan, and M. W. Reed, all of Los Angeles, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

RICHARDS, Justice pro tem. This is an application for a writ of review, wherein the applicant seeks to have this court review the proceedings had and to annul the order issued by the Industrial Accident Commission in the matter of the several applications of Esther Burton as the widow, and certain others as the heirs, of Ray E. Burton, an employee of the Atchison, Topeka & Santa Fé Railway Company, the applicant herein, for an award on account of the death of said employee while acting as a guard of the properties of said railway corporation in its railroad yards at San Bernardino, Cal., on July 27, 1922. The applications for such award were filed before the Commission on August 30, 1922, and on September 25, 1922, the railway corporation answered said applications, admitting that it was the employer of said Burton at the time and place of his death, but specially pleading that at the time and place when and where said Ray E. Burton received the injuries which caused his death he was employed by said corporation in guarding and protecting the railway tracks, buildings, cars, and other equipment of said corporation as a common carrier engaged in interstate commerce, such goods being then and there contained in cars moving in interstate commerce, and in protecting the lives of the other employees of said corporation then and there engaged in interstate commerce, and in making safe and possible the carrying on of interstate commerce by said corporation in the city of San Bernardino, Cal., and that said corporation, at the time and place when and where said Burton was injured, was engaged in interstate commerce as a common carrier by rail and was employing said Burton in connection therewith in the protection of and the carrying on of said interstate commerce. The matter came on for hearing before the Commission on November 10, 1922, at which hearing it was stipulated that the injuries to said Ray E. Burton arose out of and in the course of his employment and were proximately caused thereby, and occurred while the said employee was performing services growing out of and incidental to the same. Evidence was also presented showing the circumstances surrounding the injuries to and death of said employee, and also as to the character of the commerce as to being interstate or intrastate or both, in which the said railway corporation was engaged at the time and place of Burton's said injuries, which evidence will be hereafter more particularly adverted to. The matter having been submitted to the Commission upon such stipulation and evidence, the Commission on April 11, 1923, made its findings to the effect that Ray E. Burton, the husband and father, respectively, of the said applicants, on July 27, 1922, at San Bernardino, Cal., while in the employ of the defendant corporation as

a watchman and car inspector, sustained injuries arising out of and in the course of his employment when he was shot by unknown persons, which injuries proximately caused his death; that his said employer was at said time a corporation engaged in interstate commerce by rail, and the deceased employee was engaged as a guard in the yards of said employer at San Bernardino, Cal., in which was handled indiscriminately both interstate and intrastate commerce, and the duties of said employee were to protect the entire yard, including trackage, buildings, and equipment against violence by striking employees or their sympathizers, and was at the time of his injury and death engaged in such service, and therefore at said time both employer and employee were subject to the provisions of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), and not to the jurisdiction of this Commission. It was accordingly ordered that the proceedings should be dismissed.

Thereafter and on May 4, 1923, petitions for rehearing were filed before said Commission by the several applicants for awards. On May 28, 1923, the Commission made an order granting said petitions for rehearing. No further evidence was introduced on such rehearing, but on July 28, 1923, the Commission made its findings and order upon such rehearing wherein it found substantially the same facts as were found by it upon the former hearing, except that the Commission found that—

"The employee is not shown to have been directly engaged in facilitating interstate transportation at the time of his death, and it is therefore determined that he was not engaged in interstate commerce at said time so as to come within the provisions of the federal Employers' Liability Act."

The Commission thereupon made its order for an award to the applicants therefor in the total sum of \$5,000, which still remains in force and effect and which constitutes the order assailed in this proceeding.

The circumstances under which Ray E. Burton met his death, as shown by the undisputed evidence before the Commission, were these: On the night upon which he was killed he was engaged in the service of his employer in the capacity of a watchman and guard, as set forth in the findings of the Commission, and was under instructions from his superior to go out into the yards and keep away strikers and not allow them to interfere with trains, but to keep them away from the engines and not permit any one to put emery in the engines or block the slides. That about 10 or 15 minutes before he was killed Burton left the yard office to go over to track No. 7 to inspect a freight train which was then pulling into the yard on that track

from the west and in which train were cars containing interstate shipments; that at the time he was killed, a few moments later a Union Pacific freight train, also containing interstate bound cars and which was also within the range of his duties while in said yard, was standing on track No. 1 and was to pull out later that evening. The body of Burton was found alongside of this latter train shortly thereafter on the spot where he had been shot and instantly killed. It would seem impossible to arrive at any rational conclusion other than that Burton was killed while engaged in the performance of duties which lay directly within the scope and course of his employment. He was at the place where his instructions directed him to be. He was in immediate proximity to a train which his duties required him to watch and safeguard. There is not a scintilla of evidence to show that he was engaged in any other mission, occupation, or service than that to which his instructions and his duties as a guard and watchman called him. His position in these respects is even stronger than was that of the engineer in the case of *Erie Railroad Co. v. Winfield*, 244 U. S. 171, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662, who, on concluding his work, was crossing some of the tracks of his employer on the way home when he was injured by one of its trains and who was held by the Supreme Court of the United States to have been injured in the course of his employment and while engaged in both the interstate and intrastate commerce of his employer. Nor can we find any distinction in principle between the facts of this case and those of the case of *Southern Pacific Co. v. Industrial Accident Commission*, 174 Cal. 8, 161 Pac. 1139, L. R. A. 1917E, 262, wherein the deceased employee was a crossing gateman or watchman at San Mateo, Cal., along the line of the Southern Pacific, upon which both interstate and intrastate trains were being operated over the crossing at which said employee met his death. This case is even stronger than that in the respect that in that case the deceased was killed by an intrastate train, notwithstanding which fact this court held that—

"Any work having for its immediate object, in whole or in part, the keeping of the track in condition for use according to schedule for interstate traffic has such a close and direct relation to interstate transportation as to be practically a part of it, and that such work as deceased was engaged in at the time of his death was work of this character."

The court further significantly said:

"His [deceased's] situation * * * was, * * * the same as it would have been if he had been one of a number of guards stationed along the line of railroad to prevent third per-

sons from removing the rails or unlawfully placing obstructions on the track."

In the foregoing case a petition for a writ of certiorari to review the foregoing decision of this court was presented to and denied by the Supreme Court of the United States in the case of *Industrial Accident Commission v. Southern Pacific Co.*, 244 U. S. 653, 37 Sup. Ct. 652, 61 L. Ed. 1373, and has since been followed by that court in the case of *P. & R. Ry. Co. v. Di Donato*, 256 U. S. 327, 41 Sup. Ct. 516, 65 L. Ed. 955, and by this court in the case of *Southern Pacific Co. v. Industrial Accident Commission*, 174 Cal. 16, 161 Pac. 1142. Upon the questions, both of the nature of the deceased's employment and of the character of commerce in which his employer was at the time of his death engaged, we think the foregoing cases are conclusive as to the jurisdiction and powers of the Industrial Accident Commission in the case at bar.

It follows that the awards should be annulled, and it is so ordered.

We concur: WILBUR, C. J.; LAWLOR, J.; LENNON, J.; KERRIGAN, J.; SEAWELL, J.

a disposition to proceed with the contempt proceeding notwithstanding its lack of jurisdiction.

2. Prohibition §3(3)—Remedy permitted where propriety not questioned.

Where petitioner for writ of prohibition to prevent respondent judge from proceeding with petitioner's trial for contempt alleged petitioner's disobedience of the contempt order, and petitioner unsuccessfully contended before respondent court that the latter had no power to make the order, and respondent did not question the remedy invoked by petitioner the court will entertain the proceeding though the proper remedy in such case is ordinarily certiorari or habeas corpus.

3. Discovery §107—Order in contempt proceedings held void as not showing evidence directed to be produced would be competent.

A contempt order based on respondent's refusal to produce correspondence between the agents of one of the parties to an action had at any time with reference to the transaction the subject matter of the action *held void* where it did not appear that the evidence which the order directed to be produced would be competent.

4. Discovery §107—Order in contempt proceedings held void as being too general for enforcement.

A contempt order directing respondent to produce, for inspection of a party to an action, correspondence had at any time by the defendant in the action between its London, San Francisco and Bogota offices relating to the transaction the subject-matter of the action *held void* as being too general for enforcement.

In Bank.

Prohibition by the Commercial Bank of Spanish America, Limited, and another, against the Superior Court of California in and for the City and County of San Francisco and Edward P. Shortall, as Judge thereof. Writ granted.

Lent & Humphrey, Robert J. McGahie, and Robert MacD Light, all of San Francisco, for petitioners.

Thomas, Beedy & Lanagan, of San Francisco, for respondents.

(192 Cal. 395)

COMMERCIAL BANK OF SPANISH AMERICA, Limited, et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 10712.)

(Supreme Court of California. Nov. 14, 1923.)

1. Prohibition §3(3)—Is proper remedy of one cited for contempt by court without jurisdiction.

While the remedy of one cited for contempt by a court in excess of its jurisdiction is ordinarily certiorari or habeas corpus, prohibition will lie where respondent in the contempt proceeding has without avail urged the question of jurisdiction, and the court has manifested

WILBUR, C. J. This is an application for writ of prohibition to prevent the respondent from proceeding with the trial of E. Leuenberger for contempt of court for refusal to obey an order of the respondent court as follows: "It is Ordered that said witness, E. Leuenberger, be, and he is hereby, commanded and directed, at the resumption of the taking of his deposition as a witness for the plaintiff above named before M. V. Collins, a Notary Public in and for the City and County of San Francisco, State of California, to produce for the inspection of plaintiff all correspondence, including telegrams and cablegrams, in the possession of the defendant, had at any time by the defendant be-

tween its London, San Francisco and Bogota offices, relating to the transaction the subject matter of the above entitled action." (Italics ours.)

Petitioners produced all correspondence passing before and during the pendency of the transaction involved in the action, but claimed that correspondence between the agents of the corporation after the transaction was completed was not competent evidence in the case and, therefore, refused to produce the same.

[1] Before passing on the validity of the order to produce the correspondence, we will first consider the remedy invoked by petitioners. If the affidavit filed with the trial court does not state facts sufficient to charge a contempt of court that court would not have jurisdiction to punish the person therein sought to be charged with contempt. *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853; *People v. Latimer*, 160 Cal. 716, 117 Pac. 1051; *Hotaling v. Superior Court* (Cal. Sup.) 217 Pac. 73; *Fletcher v. District Court of Appeal* (Cal. Sup.) 218 Pac. 391; *Volpi v. Superior Court* (Cal. Sup.) 218 Pac. 569. The remedy for such an excess of jurisdiction, however, is by writ of certiorari or by habeas corpus if the person is committed for imprisonment by an order void because of an excess of jurisdiction. See cases above cited. See, also 4 Cal. Jur. 1030, § 10.

In the case of *Town of Santa Monica v. Eckert* (No. 19156) 99 Cal. xix, reported in 4 Cal. Unrep. 92, 33 Pac. 880 it was said:

"The writ of prohibition will not ordinarily issue where certiorari will lie, unless it appears that the applicant for the writ will necessarily be injured if the court sought to be prohibited is permitted to proceed at all, as that court may, before final judgment, discover its want of jurisdiction, and dismiss its proceedings; while, if it should proceed to final judgment, the party is not injured by the entry of a void judgment, and proceedings to enforce such judgment may be prevented, and the judgment declared void under a writ of review. The mere denial of the writ of prohibition, where the question of jurisdiction, as in this case, was not decided, does not take away the right to a writ of review. * * * See, also, *Hill v. Superior Court*, 21 Cal. App. 424, 131 Pac. 1061; *Hayes v. Board of Trustees*, 6 Cal. App. 520, 92 Pac. 492.

It follows that the remedy of the petitioner E. Leuenberger is to first present his defense upon the hearing of the contempt proceedings and then, if found guilty of contempt, to apply to a higher court for a writ of certiorari or habeas corpus. See *Drew v. Superior Court*, 43 Cal. App. 651, 185 Pac. 680.

However, the trial of contempt proceedings has sometimes been stayed by a writ of prohibition where it is manifest from previous orders or decisions of the court that it will proceed notwithstanding a lack of jurisdic-

tion. *Gordan v. Buckles*, 92 Cal. 481, 28 Pac. 490; *Knutte v. Superior Court*, 134 Cal. 660, 66 Pac. 875.

[2] The petitioner E. Leuenberger alleges his disobedience of the order made by respondent. He has unsuccessfully contended before respondent that the respondent court had no power to make the order upon which the contempt proceeding is based. No point is made by the respondent as to the remedy invoked by the petitioners. We will, therefore, consider the question upon its merits.

[3, 4] The question sought to be presented by the petitioners in this case is as to the right of the trial court to require the production of the correspondence of the agents of one of the parties to the action, without some showing that this correspondence, if produced, would be competent evidence. The communications from one agent to another concerning a past transaction are not ordinarily admissible in evidence in favor of third persons whose rights are there under discussion. The order is void because it does not appear that the evidence which the order directs to be produced is competent, and because the order is too general in its terms to be capable of enforcement. *Ex parte Clarke*, 126 Cal. 235, 238, 58 Pac. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176; *Kullman, Salz & Co. v. Superior Court*, 15 Cal. App. 276, 286, 114 Pac. 589; *Hupp v. Superior Court*, 22 Cal. App. 162, 133 Pac. 987; 5 Cal. Jur., 960, sec. 53.

A peremptory writ of prohibition will issue, prohibiting the respondent from proceeding with the trial of petitioner E. Leuenberger for contempt.

We concur: MYERS, J.; KERRIGAN, J.; LENNON, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.

64 Cal. App. 71

Ex parte HERNANDEZ. (Cr. 985.)

(District Court of Appeal, Second District, Division 1, California. Oct. 4, 1923.)

1. Habeas corpus ☞30(2)—Failure of complaint to state offense held jurisdictional.

Where one is held in custody under a commitment issuing out of a justice's court, or other inferior court of that grade, based on a complaint failing to include some essential element necessary to a description of the alleged criminal act, lack of jurisdiction is established, and habeas corpus is an appropriate remedy.

2. Intoxicating liquors ☞207—Complaint held not to state any public offense.

In a prosecution for violation of a city ordinance making it unlawful for a person to have possession of intoxicating liquor in a public or semipublic place, a complaint charging unlawful possession, without charging that defendant kept the liquor in a public or semipublic place, held not to state any public offense, within the jurisdiction of the police court.

Original application by C. Hernadez for writ of habeas corpus against the sheriff of Kern County to secure petitioner's release from custody. Petitioner discharged.

Dorsey & Campbell, of Bakersfield, for petitioner.

H. E. Schmidt, Dist. Atty., of Wasco, for respondents.

CONREY, P. J. The return to the writ shows that the petitioner is held in custody under commitment issued out of the police court of the city of Bakersfield. This commitment was issued pursuant to judgment rendered in said court in an action of the people against petitioner. By that judgment it was ordered that the defendant be confined in the county jail of the county of Kern for 180 days, "as a punishment for the offense committed in the city of Bakersfield, Kern county, state of California, on or during Nov. 16, 1922, to-wit: violation of section 6 of Ordinance 64, New Series, a misdemeanor as charged in the complaint." At that time, November 16, 1922, the Wright Act (St. 1921, p. 79), the California prohibition enforcement law had not taken effect.

The complaint charged that on the stated date and within said city the defendant—

"did then and there willfully and unlawfully have in his possession and keep and store in the premises situate at 429 Beale avenue, in the city of Bakersfield, intoxicating liquor containing more than one-half per cent. alcohol by volume without a valid permit so to do, in violation of the provisions of section 6 of Ordinance No. 64, New Series, passed and adopted by the council of said city on the 13th day of September, 1920."

Section 6 of said ordinance reads as follows:

"It shall be unlawful for any person to have, keep or store any intoxicating liquor in any public or semipublic place in said city except as provided herein."

Petitioner contends that the complaint failed to charge the commission of any crime, in that it did not allege that the premises described were a public place or a semipublic place.

The question thus presented relates to the right of a prisoner, held in custody under a judgment based upon a defective complaint to obtain release by means of the writ of habeas corpus. In *Ex parte Greenall*, 153 Cal. 767, 96 Pac. 804, the petitioner was delivered into the custody of the sheriff pursuant to a judgment of a justice's court after conviction on a complaint purporting to charge that defendant had committed a misdemeanor. The Supreme Court, having first determined that the complaint in the justice's court did not state facts sufficient to constitute a public offense, stated that it has been the uni-

form practice to consider on habeas corpus, the question of the sufficiency of the complaint in an inferior court (as distinguished from a court of general jurisdiction), and to discharge the prisoner where such complaint failed to show a public offense under the laws of the state. It was recognized that under the decision in *Ex parte Ruef*, 150 Cal. 665, 89 Pac. 605, a different rule prevails as to superior courts. But the court said that this distinction had been fully considered in *Ex parte Kearny*, 55 Cal. 212, where the prisoner was discharged solely because of the insufficiency of the complaint to show a public offense under the laws of the state. The rule thus declared was expressly reaffirmed in *Matter of Ah Sing*, 156 Cal. 349, 104 Pac. 448.

[1] Respondent contends, however, and with this we agree, that in following the decisions in the Kearny Case and the Greenall Case, the court should not go so far as to consider that all allegations omitted which make a complaint subject to demurrer constitute essential elements of the complaint. The decisions on this subject have been reviewed very fully in the recent case of *Ex parte Hayward* (First District Court of Appeal, Division 1), 216 Pac. 414. As we understand it, the correct rule is that, if the complaint in its charge against the defendant completely fails to include some essential element necessary to the description of a criminal act, and the commitment has issued out of a justice's court, or other inferior court of that grade, the lack of jurisdiction is established. In such a case, habeas corpus is an appropriate remedy.

[2] We think that the complaint now before us is one which wholly fails to charge the commission of a crime, and is not merely defective in the attempted description of a crime covered by the ordinance. The case is very similar to that of *Matter of Worthington*, 21 Cal. App. 497, 132 Pac. 82, of which this court made disposition as follows:

"It appearing to the court that the act which petitioner is charged with having violated is one entitled, an act governing the use of automobiles upon public highways, and it not being averred in the complaint that the defendant used or operated his automobile upon a public highway, the complaint failed to state any public offense, and for that reason it is ordered that petitioner be discharged."

So here, as it was not charged that petitioner kept the intoxicating liquor in any public or semipublic place, the complaint did not state any public offense within the jurisdiction of that court.

It is ordered that petitioner be discharged from custody.

We concur: CURTIS, J.; SHENK, Justice pro tem.

(64 Cal. App. 103)

(64 Cal. App. 74)

Ex parte NEWELL. (Cr. 1160.)

(District Court of Appeal, First District, Division 1, California. Oct. 10, 1923.)

1. Habeas corpus ⚡57—**Properly denied where not verified by oath of party making application.**

An application for a writ of habeas corpus is properly denied where the petition fails to conform to the requirements of Pen. Code, § 1474, in that it is not verified by the oath or affirmation of the party making it.

2. Habeas corpus ⚡120—**Properly denied where same question has been disposed of on another application.**

An application for a writ of habeas corpus on the ground that the court exceeded its jurisdiction in proceeding to trial on the information, for the reason that petitioner had already been tried and acquitted on a similar information, is properly denied, where the question on which the application is based has been heretofore presented to and disposed of upon application made to the Supreme Court.

Application by Hugh H. Newell for a writ of habeas corpus against the Sheriff of Alameda County. Writ denied.

Hugh H. Newell, in pro. per.

ST. SURE, J. Petitioner was charged with violating section 476a of the Penal Code. It is claimed that there were two informations filed, identical in form and substance; that petitioner was acquitted upon the first; that the court exceeded its jurisdiction in proceeding to trial upon the second, which trial resulted in conviction; and that, therefore, the proceedings were void and petitioner should be discharged.

[1, 2] The application should be denied for the reason that the petition fails to conform to the requirements of section 1474 of the Penal Code, in that it is not verified by the oath or affirmation of the party making it. Furthermore, this same question has heretofore been presented to and disposed of upon an application made to the Supreme Court. Ex parte Hugh H. Newell, on Habeas Corpus, 188 Cal. 508, 206 Pac. 61. Petitioner herein there raised the question of jurisdiction, and the Supreme Court held that the validity of the new or second information filed could not be attacked on habeas corpus, and further held that if errors had been committed by the lower court the same were reviewable only on appeal. This same subject-matter is now under consideration by the Supreme Court in the pending appeal of People v. Newell (Criminal No. 2573) on hearing from this court, Division 2 (see 221 Pac. 622).

The application for a writ is denied.

I concur: TYLER, P. J.

SIMONS et al. v. PACIFIC GAS & ELECTRIC CO. (Civ. 2625.)

(District Court of Appeal, Third District, California. Oct. 5, 1923.)

1. Electricity ⚡19(2)—**Complaint not alleging negligence or facts from which it could be inferred insufficient.**

A complaint in an action for injuries causing death to plaintiffs' decedent while removing pipe from a well which came in proximity with electric wires from which the electricity jumped to the pipe and was conducted into the body of decedent, not alleging negligence or facts from which negligence of the company could be inferred, does not state a cause of action.

2. Negligence ⚡108(2)—**Allegations required.**

It is not necessary for the term "negligence" to be used in pleading, but it is necessary for it to appear by direct averment that acts causing injury were done negligently, where the facts stated do not constitute a cause of action unless done negligently, unless such facts necessarily exclude any other hypothesis.

3. Electricity ⚡19(2)—**Complaint held not to show power line was negligently maintained.**

As it was not negligence per se for a company to erect its power line with leaning poles, nor to string wires at height of 28 feet 10 inches from the ground, nor to maintain its line within 7½ feet of the well and derrick on which decedent was working at the time electricity jumped from the wires to a pipe of the well and killed him, complaint alleging that the power line was so erected and allowed to lean and that it encroached on decedent's land did not exclude any hypothesis other than that of negligence.

4. Appeal and error ⚡195—**Party not asking leave to amend cannot complain of denial of leave.**

Appellants cannot complain that the trial court in sustaining demurrer to their complaint abused its discretion by refusing leave to amend, where they did not ask for permission nor indicate how complaint could have been amended to meet objections raised by the demurrer.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Mary J. Simons, formerly Mary J. Graves, and others, against the Pacific Gas & Electric Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Lawrence Schillig, of Yuba City, and Charles B. Harris, H. T. Hiatt, and Frank L. Gafney, all of Sacramento, for appellants.

Richard Belcher, of Marysville, Wm. B. Bosley, John P. Coghlan, and Thomas J. Straub, all of San Francisco, for respondent.

JONES, Justice pro tem. This is an appeal from a judgment entered on an order sustaining a general and special demurrer

to the amended complaint of plaintiffs, who, as heirs at law of one Charles A. Graves, brought the action to recover damages from the defendant for the death of said decedent.

It is alleged in the amended complaint that the defendant was engaged in the business of generating, distributing, selling, and furnishing electricity and electric power; that the power line consisted of three heavy wires, strung on wooden poles, said wires being capable of the transmission of 60,000 volts; that the power line extended along the northern side of a certain public highway in the county of Sutter; that Charles A. Graves leased and was in possession of certain lands immediately north of said highway; that a certain well with an iron pipe and windmill above was located about 10 feet north of the property line, which was well known to the defendant; that the high voltage power line and poles and wires were permitted and allowed by the defendant to lean and encroach over and upon the real property of Charles A. Graves to the extent of 2½ feet all along the south side of said property, all of which was well known to said defendant, but said defendant neglected to warn said Graves that said power line was so leaning over and encroaching upon his ranch; that electric power, exceeding 60,000 volts, was carried and transmitted along and by said power line; that the said Graves was unaware and had no means of knowing of said encroaching of defendant's power line upon his property, and was unaware and had no means of knowing that said power line carried electricity of 60,000 volts, and was unaware of the property of electricity to jump from wires so heavily charged with electricity to another metal rod, pipe, or wire, placed in proximity thereto, but not touching; that said defendant neglected to warn said Graves of the amount and power of said current and of said property of electricity to jump and be transmitted through space; that said Graves was removing a certain pipe from the well with a derrick, and, while entirely upon the property of said Graves, the said pipe came in proximity with, but not touching, one of the said wires; that the electricity jumped from said wire to the said pipe and was thereby conducted into the body of said Graves, who was then and there killed by said electricity. The remaining allegations of the amended complaint need not, for the purpose of considering this appeal, be here set forth.

To this complaint, a demurrer, both general and special, was interposed by defendant, and was sustained by the court without leave to amend.

It is claimed by respondent that the order sustaining its demurrer was correct on at least two major grounds: (1) Insufficiency of the allegations to charge respondent with actionable negligence, and (2) contributory negligence of the deceased.

[1, 2] We are satisfied that the order must be held to be correct on the first ground stated, for, as we construe the pleading, it fails to contain allegations required to constitute a statement, of a cause of action based upon the negligence of the defendant. It is an established rule that—

"Although it is not necessary for the term 'negligence' to be used in pleading, it is necessary for it to appear by direct averment that the acts causing the injury were done negligently, where the facts stated do not constitute a cause of action unless done negligently, unless the facts themselves necessarily exclude any hypothesis other than that of negligence. *Silvera v. Iverson*, 125 Cal. 266." *South v. County of San Benito*, 40 Cal. App. 13, 180 Pac. 354.

In the same case, another rule is also stated, that—

"It should appear in what respects the defendant was negligent, and that such negligence had a causal connection with plaintiff's injury."

[3] In the opening brief of appellants, it is said that—

"The theory of the amended complaint is not predicated upon the negligent construction of the power line, but upon the fact of a course of negligent maintenance of the power line, poles, and wires after construction."

They contend that it was the duty of respondent to maintain its power line in a safe place after construction, and that the allegations of the amended complaint are equivalent to a statement that the power line was not so maintained. The allegations pertinent to this contention are as follows:

"That, at said times, all along the side of said Brickkiln Ranch, adjacent to said highway, the said power line was so erected that the lower wires thereof were strung at a height of less than 35 feet, to wit, at a height of 28 feet, 10 inches from the ground; and said poles thereof were allowed to, and did, lean to the north, so that said power line encroached over and upon said real property, for 2½ feet all along the south side thereof."

The apparent meaning of these allegations is that the power line was erected with wires strung at a height of 28 feet, 10 inches, and with poles leaning to the north as described, and there are no allegations that such conditions changed in any respect after construction.

It was not negligence per se for the respondent to have erected or maintained its line with leaning poles, assuming, of course, that they were rigidly fixed, and it is not here alleged that they were not; nor was it negligence per se for it to string its wires at the height stated; nor was it negligence per se for it to maintain its line within seven and a half feet of the well. The facts as alleged, whether referring to the conduct of respondent in constructing its line or in maintaining it afterwards, do not necessarily

exclude any hypothesis other than that of negligence. It should have been averred, in order that they should constitute a cause of action, that they were done negligently, and this the plaintiffs failed to do. The demurrer was, therefore, properly sustained.

[4] The appellants further contend that the court abused its discretion in not allowing them to file a further amended complaint. The record, however, fails to show that permission to amend was asked for or that it was indicated how the complaint could be amended to meet the objections raised by the demurrer. In the case of *Duval v. White*, 46 Cal. App. 305, 189 Pac. 324, it is said:

"It is quite apparent that appellants are in no position to complain that the trial court abused its discretion in sustaining the demurrer without leave to amend. This follows for the reason that it does not appear that they asked permission to amend, or indicated in any manner how the complaint could be amended so as to meet the objections raised by the demurrer. This rule is well settled in the state, and among the many decisions it is sufficient to specify *Stewart v. Douglass*, 148 Cal. 511, 83 Pac. 699; *Varni v. Devoto*, 10 Cal. App. 304, 101 Pac. 934; *Carley v. Vallecita Mining Co.*, 16 Cal. App. 781, 117 Pac. 1037."

The judgment is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

(63 Cal. App. 767)

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v. JAMES J. STEVINSON et al. (Civ. 2345.)

(District Court of Appeal, Third District, California. Sept. 26, 1923. Rehearing Denied Oct. 26, 1923. Hearing Denied by Supreme Court Nov. 22, 1923.)

1. Eminent domain ⇨202(4)—**Testimony as to proposed scheme of improvement by defendant held inadmissible in action to condemn water.**

In an action by a public service canal company against owner of swamp and overflow lands riparian to a river, to acquire water by condemnation, introduction of testimony of a proposed scheme of improvement of defendant's overflow lands, including items of cost and maintenance, *held* not proper for the purpose of showing the adaptability of the land.

2. Evidence ⇨155(3)—**Introduction of testimony in suit to acquire water by condemnation held not warranted by answers on cross-examination of plaintiff's witnesses.**

In action to acquire water by condemnation, introduction of testimony by defendant of a proposed scheme of improvement of his swamp lands *held* not justified by answers elicited on cross-examination of plaintiff's witnesses in which they expressed opinions against the feasibility of reclaiming the land, concerning which they had not been questioned in direct examination.

3. Eminent domain ⇨202(4)—**Evidence as to improvements by defendant to show adaptability of swamp lands held not rendered admissible by stipulation.**

In an action to acquire water by condemnation, testimony in behalf of defendant owner of riparian swamp lands of a proposed scheme of improvement was not rendered admissible by a stipulation of plaintiff, in which it guaranteed to defendant a certain quantity of water whenever defendant should have reclaimed the land and installed the necessary machinery for the irrigation thereof.

4. Eminent domain ⇨201—**Evidence as to defendant's rights as riparian owner held to necessitate collateral inquiries and properly excluded.**

In an action by a public service canal company against owner of riparian overflow and swamp land to condemn water, wherein plaintiff had stipulated guaranteeing to defendant a certain amount of water, the court did not err in not permitting plaintiff to show that the amount of water guaranteed was equal to the amount which defendant was entitled to as a riparian owner by showing the extent of riparian lands using and entitled to use the water of the river, as this would necessitate collateral inquiries as to who such other riparian owners were and the extent of their needs, and would have confused the jury.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by the San Joaquin & Kings River Canal & Irrigation Company, Incorporated, against James J. Stevinson, a corporation, and others, to acquire water by condemnation. From a judgment fixing damages, the plaintiff and named defendant both appealed, but defendant dismissed its appeal. Reversed in district court of appeal, and hearing denied in Supreme Court.

Edward F. Treadwell, of San Francisco, J. J. Griffin, of Merced, Forrest A. Cobb, of San Francisco, Gail C. Larkin, of Los Angeles, and Joseph C. Sharp, of San Francisco (R. S. Laughlin, of San Francisco, of counsel), for appellant.

James F. Peck and McWilliams & Hatfield, all of San Francisco, for respondent.

JONES, Justice pro tem. The history of this case is given by appellant in its opening brief as follows:

"Plaintiff, a public service canal company, having been enjoined from diverting more than a certain quantity of water in a suit brought by the owner of 2,407.27 acres of swamp and overflow lands, riparian to the San Joaquin river, brought this proceeding in 1909 to acquire by condemnation the right to divert an additional 500 second feet of water as against that land. On the first trial plaintiff was nonsuited, and on appeal the judgment of nonsuit was reversed. *San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson*, 164 Cal. 221, 128 Pac. 924. On the second trial the court submitted to the jury the questions of

public use and public necessity, and the jury found against the plaintiff on the issue of public necessity, and, on appeal, the judgment was reversed on the ground that those issues should have been passed upon by the court, and not the jury, and for other reasons. *San Joaquin & Kings River Canal & Irrigation Co. v. Stevenson*, 26 Cal. App. 274, 147 Pac. 254, 258. On the third trial the trial court decided the issues of public use and public necessity in favor of plaintiff, and on the issue of damages the jury awarded the defendant \$425,000. The trial judge set this verdict aside as being unsupported by the evidence, and on appeal this order was affirmed. *San Joaquin & Kings River Canal & Irrigation Co. v. Stevenson*, 30 Cal. App. 405, 153 Pac. 763. The trial court then granted a change of place of trial to Mariposa County, which order was affirmed on appeal. *San Joaquin & Kings River Canal & Irrigation Co. v. Stevenson*, 179 Cal. 533, 178 Pac. 292. A fourth trial was then held in Mariposa county and resulted in a verdict of \$200,000, to review which this appeal is prosecuted. Both parties appealed from the judgment, but defendant subsequently dismissed its appeal. 53 Cal. App. 756, 200 Pac. 767."

One of the grounds upon which appellant relies for a reversal of the judgment is that the court erred in permitting the defendant to present a proposed elaborate scheme for the reclamation and irrigation of the land, including the details and estimated cost thereof and the cost of the annual maintenance of the same. On the second trial of this action defendant was permitted to introduce an elaborate scheme of prospective reclamation and irrigation of its lands and was also allowed to introduce evidence of damage to other lands than those described in the complaint. On the appeal from the judgment rendered on that trial a reversal was ordered, based upon the error of the court in admitting such evidence. The respondent here contends that the evidence introduced on the third trial was not the same as that admitted on the previous one, but that it was carefully limited to meet the ruling of this court, which ruling it construes as referring only to the erroneous testimony concerning a large acreage not described in the complaint and for which it claimed damages. We do not so construe the opinion, for it is apparent that the court there held that not only was it erroneous, under the issues here involved, to receive evidence as to damages to other lands than those described in the complaint, but that it was also error to permit the introduction of a scheme of reclamation and irrigation of its lands. It was not the mere inclusion of other lands in the proposed plan that constituted error, but it was the introduction of a plan of improvement of the land involved in the action that was held to be improper. In support of the rule so announced a number of authorities may be cited. In the case of *In re Acquisition of Lands of Morris & Cummings Dredging Co.* (N. J.) 115 Atl. 433, it was held that

the admission of testimony showing possible improvements which could be placed upon the property and showing by drawings and plans the details thereof was error. Such testimony, it was said "furnished the jury with testimony which may have led them to consider as actualities things which were mere contingencies and possibilities." While in that case the cost of the proposed improvement was not given, yet it was held that "the effect of the testimony which was given regarding the development and the drawings and plans offered and received in evidence would tend to lead the jury to find the value of the property as if the improvements had been made."

In the case of *Manda v. City of Orange*, 82 N. J. Law, 686, 82 Atl. 869, Ann. Cas. 1913D, 581, testimony as to the cost of making certain improvements upon the land sought to be taken was excluded, and it was there said:

"It is argued that such testimony is requisite in order to show the true value of the land taken, because that value is not of the land in a waste state but which might be reasonably given to it by perhaps a slight expenditure. While the rule is that the landowner is entitled to receive the 'fair price for any use for which it has a commercial value of its own in the immediate present, or in reasonable anticipation in the near future,' * * * yet that concerns the present market value, having the reasonably anticipated use in view." This is "quite a different matter, however, from laying out the property in lots upon a map, estimating the costs of putting upon it the improvements of a city and calculating what the value would be if such improvements were actually made."

We find the following language in the case of *Harris v. Schuylkill*, etc., R. Co., 141 Pa. 242, 21 Atl. 590, 23 Am. St. Rep. 278:

"In estimating the value of the lot before the taking, its possible and probable uses are important elements, and may be shown by the opinions of experts. But the details of improvements, the cost, probable rent afterwards, etc., require knowledge of the subject, to insure the proper weight to be given, and the inferences to be drawn from them. Hence they are not admissible as independent facts for the jury, and the appellant's offers in that regard, as, e. g., to prove the cost of bulkheading this lot to make a wharf of it, were properly excluded."

The following paragraph is quoted from the dissenting opinion in *National Docks*, etc., *Co. v. Penn. Ry. Co.* (N. J. Sup.) 31 Atl. 462, 465:

"While it may be said that the trial court is bound to admit evidence showing or tending to show the availability of the property for valuable uses, it is quite another thing to admit evidence as to the cost of some particular erection said to be necessary to adapt the land to such uses."

Our Supreme Court has held that proof of the market value of land "should be limited

to showing the present condition of the property and the uses to which it is adapted, and may not be extended to speculative inquiries as to possible future uses under altered circumstances, which may or may not arise" *City of Santa Ana v. Harlin*, 99 Cal. 543, 34 Pac. 224, and in the case of *Los Angeles v. Kerckhoff-Cuzner Co.*, 15 Cal. App. 676, 115 Pac. 654, evidence of a particular scheme of improvements was held properly refused, and, referring to *Chicago & E. R. Co. v. Blake*, 116 Ill. 163, 4 N. E. 488, it was there said:

"It was therein held by the Illinois Court that where evidence of the variety mentioned was allowed to be introduced for the limited purpose of showing the adaptability of the property to the use which it was intended to put it to, no error was committed, but it was said that the use of such testimony, even for that purpose, should not be encouraged."

The case of *Marin Water Co. v. Railroad Com.*, 171 Cal. 706, 154 Pac. 864, Ann. Cas. 1917C, 114, cited by respondent, cannot be deemed as an authority supporting its contention, for, in that case, the question as to whether evidence showing probable expense of storage, distribution and sale of water resulting from additional dams, was properly admissible, was not considered.

[1-3] We conclude that the introduction of testimony of a proposed scheme of improvement, such as was shown in this case, is not proper for the purpose of showing the adaptability of the land and that its admission was not justified by the character of the answers elicited on cross-examination of certain witnesses of the plaintiff, in which they expressed opinions against the feasibility of reclaiming the land in question and concerning which they had not been questioned in direct examination; nor did the stipulation of plaintiff, in which it guaranteed to defendant 16 second feet of water whenever it should have reclaimed the land and installed necessary machinery for the irrigation thereof, render it admissible, for the cost and character of any such scheme could not throw any light upon the requirement of the condition in the stipulation. No matter what the cost of the reclaiming of the land and the installation of the machinery might be, or what method of reclaiming or irrigating might be adopted, the guaranty would apply. In view of the character of the testimony thus admitted, its importance and its probable effect upon the minds of the jurors, we feel that substantial injury resulted to plaintiff and that a new trial of the action should be had.

The conclusion which we have reached makes unnecessary a review of all the grounds upon which appellant relies for a reversal, as many of them pertain to matters which will probably not arise on another trial. It is, however, advisable to consider several of the other questions raised by appellant.

[4] Reference has already been made to the stipulation of plaintiff guaranteeing to defendant 16 second feet of water under conditions specified. It is claimed by the appellant that it was entitled to show that this amount of water was equal to the amount which the defendant was entitled to as a riparian owner, and for the purpose of establishing that fact it sought to show the extent of the riparian lands using and entitled to use the water of the river. This showing was not permitted. We are impressed with the argument of counsel for respondent to the effect that the admission of such evidence would necessitate collateral inquiries as to who such other riparian owners were and the extent of their needs. As is said by counsel in their supplemental brief:

"In the case of *Half Moon Bay Land Co. v. Cowell*, 173 Cal. 543, 160 Pac. 675, the rights of riparian owners between themselves was stated as follows: 'The mere objection by one riparian owner * * * is not sufficient to deprive any other riparian owner of the use of the water of the stream. Each owner has the right to use the whole or any part of the water on his own riparian land at any time when such use, does not interfere with the actual use by the other owners of their due shares. If any such owner is not using the water himself, he has no right to object to the use of it by any other riparian owner on riparian land.' To determine the time when defendant's use of the water of the river might be interrupted (it being an admitted riparian right on a stream) according to this authority, would involve an inquiry not only as to the present use of water, the probability of such present use continuing, but also the question of probability as to when water would be actually used by other riparian owners which is not being so used at present. This would manifestly lead into an investigation of a most complicated speculative nature. With this the jury would be confused and entirely at sea. It is clear that such an examination could be indefinitely continued on each piece of riparian land as to what the future held in store for it in the way of its securing water."

For the reason here shown if for none other, the ruling of the court was proper, for the impracticability of making a comparison, in the manner desired by plaintiff, between the right that the defendant would have as a riparian user with that guaranteed him by the stipulation, is, it seems to us, evident, and such an attempt could have but the one result of confusing the jury.

As to the admission in testimony of the judgment roll in the case of *Stevinson* against the present plaintiff, while we feel that it was not material evidence, yet in view of the instructions concerning it, given by the court, no injury resulted to the plaintiff by its admission.

Complaint is made by plaintiff of the action of the court in many instances, in allowing or rejecting testimony touching the matter of proof of value of the land. In the

opinion of this court on the appeal in this case, reported in 26 Cal. App. 274, 147 Pac. 254, 258, it was said:

"The damages to this particular land were to be ascertained by deducting from the market value of the land as it existed at the time of the issuance of the summons the market value it would have if deprived of this riparian right. It is manifest that these values would rest largely for their support upon the opinion of qualified witnesses, and *the method of proof is simple and familiar.*" (Italics ours.)

In view of the length of the trial and the opportunities arising for the commission of error, it would indeed be surprising if a record free from minor errors would result; but upon another trial of the action, and after further consideration of the rules of evidence applicable to actions of this character, it is probable that many of the questions here raised will not again arise.

The judgment is reversed.

We concur: FINCH, P. J.; HART, J.

Opinion of Supreme Court in Banc Denying Hearing.

PER CURIAM. In denying the respondent's petition for a transfer to this court we wish to note that no point is made on this application concerning the rejection of appellant's evidence as to the extent of respondent's riparian rights, and that we do not for that reason consider the ruling of the district court of appeal in that regard. The respondent is apparently satisfied with the ruling of the District Court of Appeal which will, of course, be the law of this case.

The petition is denied.

(64 Cal. App. 78)

Ex parte SHACKLEFORD. (Cr. 1159.)

(District Court of Appeal, First District, Division 1, California. Oct. 8, 1923.)

1. Habeas corpus ☞59—Sufficient probable cause must be shown for granting writ.

Before writ of habeas corpus is granted, sufficient probable cause must be shown to enable the court to form some judgment in the case, and if no sufficient ground is shown for applicant's discharge, the writ should not issue.

2. Criminal law ☞576(5)—Consent to trial more than 60 days from filing information presumed in absence of objection.

Where petitioner was brought to trial more than 60 days after filing of the information, as provided by Pen. Code, § 1382, and made no objection to actual trial proceedings, his consent thereto must be presumed.

3. False pretenses ☞27—Allegation that defendant uttered check in connection with allegations of intent to defraud stated public offense.

An allegation in information, drawn under Pen. Code, § 476a, that petitioner uttered a fictitious check in connection with allegations that it was done with intent to defraud a named company, and that petitioner knew that he had not sufficient funds in or credit with the bank to meet payments, stated a public offense, and was not objectionable as seeking to deprive defendant of liberty, merely because of an intent to defraud.

4. Constitutional law ☞255—False pretenses ☞2—Statute making it offense to draw check without funds in bank therefor held not invalid, as punishing mere intent to defraud.

Pen. Code, § 476a, making it unlawful, without sufficient funds in bank to meet them, to draw checks with intent to defraud does not purport to punish the intention to defraud independent of actual fraud or attempt to defraud, and hence one imprisoned on information thereunder is not deprived of liberty, in violation of state and federal Constitutions.

Original application for writ of habeas corpus by Thomas Wheatley Shackleford against the Sheriff of San Francisco County. Writ denied.

Thomas Wheatley Shackleford, in pro. per.

TYLER, P. J. Application for writ of habeas corpus, prayed to be directed against the sheriff of the city and county of San Francisco, to secure the release of defendant from custody.

The petition recites that in violation of the Constitution of the United States and of this state he is unlawfully detained and restrained of his liberty by sheriff, who claims the right to his custody by virtue of a commitment issued out of the police court of San Francisco dated June 30, 1923, holding petitioner to answer for a felony, to wit, violating the provisions of section 476a of the Penal Code, in that he did make, draw, utter, and deliver to the Hastings Clothing Company a certain check and draft for the payment of money drawn on a certain bank. Attached to the petition is a copy of the information filed on the 19th day of July, 1923, charging defendant with a violation of section 476a of the Penal Code. No other record is before us. It appears from recitals in the record that on July 31, 1923, petitioner was arraigned before Hon. Harold Louderback, sitting during the vacation of Hon. Michael J. Roche of department 6 of the superior court, and pleaded not guilty to the charge, and requested a transfer of said cause to another department so that he might have a speedy trial. This motion was denied, and the cause was put over until September 4, 1923, to be set down for trial after Judge Roche's return.

Upon said day the court, over defendant's objection, set the date of trial for September 20, 1923. On this day defendant made a motion to dismiss, which was denied, and the cause was set for trial the following day. Trial was then had, and defendant was found guilty.

[1, 2] It is first claimed that the case was set for trial beyond the 60 days provided for by section 1382 of the Penal Code, and that the motion to dismiss should have been granted. Before a writ of habeas corpus is granted, sufficient probable cause must be shown to enable the court to form some judgment in the case; and if it appears from the petitioner's statement that he has no sufficient ground for his discharge the court should not issue the writ. Nothing appears in the record before us to indicate that defendant made any objection to the actual trial proceedings. His consent must therefore be presumed. *Ex parte Apakean* (Cal. App.) 218 Pac. 768.

[3, 4] The second point made is that section 476a of the Penal Code and the information herein contravene the Constitution of the United States, because said section purports to punish the intention to defraud independent of any actual fraud or attempt to defraud any person, and that said information does not allege any fraud or attempt to defraud the Hastings Clothing Company or any one else.

The allegation that petitioner uttered the check, taken in connection with the other allegations that the act was done with intent to defraud the company, and the further allegation that petitioner knew that he had not sufficient funds in or credit with the bank to meet the payment of the check, clearly states a public offense. *People v. Russell*, 156 Cal. 450, 455, 105 Pac. 416. In the same case, at page 459 of 156 Cal., at page 420 of 105 Pac., the court quoted the following language:

"The intent of the Legislature evidently was to make it a crime to draw and utter a draft or check upon a bank or depository for the payment of money, for the reason that such drafts or checks are not usually drawn unless the drawer has funds in such bank or with such depository to meet the check or draft. * * * It was to prevent the fraudulent making and uttering of such drafts or checks that the section was enacted. The act applies to the whole class of persons who draw and utter checks * * * with intent to defraud, upon the persons named in the section."

In the case of *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009, the court said that the intent with which a check is "deposited" was a question exclusively for the jury; and the intent with which a person does an act may be inferred from all the surrounding circumstances. Taken in connection with the language in *People v. Russell*, supra, it is

plain that petitioner has not been deprived of his rights under the Constitution, as it clearly appears that the section in question does not purport to punish the "intention to defraud."

The writ is denied.

I concur: ST. SURE, J.

(64 Cal. App. 93)

SHAFFER v. NOZIGLIA. (Civ. 2510.)

(District Court of Appeal, Third District, California. Oct. 9, 1923.)

V. Attachment ~~§~~183—Attachment on land ceases to be lien thereon after three years.

An attachment lien on real property ceases, under Code Civ. Proc. § 542a, to be lien thereon after three years.

2. Evidence ~~§~~67(1)—Insolvency at time of deed not proven by proof of insolvency 3½ years before.

In suit to quiet title, where defendant alleged that plaintiff's grantor, without consideration and with intent to defraud creditors, deeded the land, proof of grantor's statement 3½ years prior to time of deed that she was without means did not raise presumption that she was insolvent 3½ years later, under Code Civ. Proc. § 1963, subd. 32.

3. Fraudulent conveyances ~~§~~261—Insolvency of grantor must be alleged.

In view of Civ. Code, § 3442, providing that no transfer can be adjudged fraudulent solely because it was not made for a valuable consideration, where a party relies on the provision of such section that any transfer made or given voluntarily or without valuable consideration by a party while insolvent or in contemplation thereof shall be fraudulent and void as to existing creditors, he must allege such insolvency or contemplation thereof at time of transfer.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by H. S. Shaffer against L. Noziglia. Judgment for plaintiff, and defendant appeals. Affirmed.

L. J. Schino, of Stockton, for appellant.
H. K. Landram, of Merced, for respondent.

FINCH, P. J. The defendant has appealed from the judgment herein quieting plaintiff's title to two town lots.

The complaint is in the usual form of an action to quiet title. The answer denies plaintiff's title and alleges ownership in defendant under an execution sale in an action by defendant against Jennie Prizer. The answer further alleges that on the 26th day of November, 1919, Mrs. Prizer—

"did, without any consideration therefor, and with intent to defraud her creditors, including

defendant herein, make, execute, and deliver to one Ella Hill a certain grant, bargain, and sale deed conveying, or purporting to convey to said Ella Hill all of her right, title, and interest in and to the real property mentioned and described in paragraph 1 of plaintiff's complaint herein; * * * that no consideration whatsoever was paid by the said Ella Hill to said Jennie Prizer for the making, execution and delivery of said deed, and that the same was made, executed, and delivered in order to defeat the rights of creditors, including defendant herein, in and to the said real property of said Jennie Prizer."

December 29, 1914, Eugene A. Prizer, the husband of Jennie Prizer, died intestate. January 7, 1915, the lots in controversy were conveyed to Mrs. Prizer in payment of services rendered by her husband during his lifetime. It is admitted that the amount due for such services was community property, and the lots were inventoried and appraised as a part of the estate of Eugene A. Prizer. These facts were known by all persons herein mentioned. August 11, 1920, the deed was recorded. January 14, 1915, the defendant herein commenced an action in the justice's court against Mrs. Prizer to recover the sum of \$201.50 due him for necessities of life purchased by her husband and furnished during his lifetime. On the same day a writ of attachment was issued and levied upon the town lots. May 26, 1916, Mrs. Prizer filed her petition for letters of administration. June 19, 1916, letters of administration were issued to her. On the same day an inventory and appraisal of the property of her husband's estate was filed. The same shows that the estate consisted of the town lots in suit, appraised at \$300, and household furniture appraised at \$50. November 26, 1919, Mrs. Prizer, by grant, bargain, and sale deed, conveyed the lots to Ella Hill and the deed was recorded the same day. The consideration expressed in the deed is \$10. December 10, 1919, an amended complaint was filed in the action aforesaid in the justice's court. December 15, 1919, judgment was rendered therein as prayed for. January 15, 1920, an abstract of the judgment was recorded in the office of the county recorder. March 12, 1920, execution was issued. April 13, 1920, the sheriff offered the lots for sale and sold the same to defendant herein. April 18, 1921, a sheriff's deed was executed and delivered to defendant and the same was recorded April 20, 1921. May 17, 1920, the whole estate of deceased, including the town lots, was set aside to Mrs. Prizer under the provisions of section 1469 of the Code of Civil Procedure. January 14, 1921, Ella Hill conveyed the lots to H. S. and C. R. Shaffer, and they later conveyed to Harry E. Doyle, who conveyed to plaintiff herein. In addition to the foregoing facts, appellant relies upon the following statement in a letter,

written to him by Mrs. Prizer, on the 3d day of July, 1916, referring to her intention of requesting the court to set aside the whole estate to her:

"My daughter and I are without means and we are absolutely compelled to accept this as the law offers and provides that we shall have it."

The court found the allegations of the complaint to be true: that the defendant recovered judgment against Mrs. Prizer, and that the purported sale of the lots was made as herein outlined; that on the 26th day of November, 1919, Mrs. Prizer sold and conveyed the lots to Ella Hill for a valuable consideration and without any intent to defraud any creditors; and that the subsequent conveyances by which plaintiff acquired title were made by grant, bargain, and sale deeds.

[1] The attachment lien ceased at the expiration of three years from the time it was levied, and therefore need be given no further consideration. Code Civ. Proc. § 542a.

[2, 3] Mrs. Prizer conveyed the lots by grant, bargain, and sale deed prior to recovery of judgment against her in the justice's court. At that time she was vested with a one-half interest in the lots as community property, subject to the payment of debts and expenses of administration. The title which she acquired by the decree setting aside the whole estate to her passed by operation of law to her grantee, Ella Hill. Civ. Code, § 1106. The only question remaining to be considered is whether the conveyance by Mrs. Prizer to Ella Hill was made with intent to defraud any creditor.

There is no evidence bearing upon the alleged fraudulent intent except the transactions enumerated and statement contained in the letter of July 3, 1916. It is very clear that the evidence is not such as to compel a finding that the conveyance was made with the intent to defraud creditors. The answer alleges that the transfer was made without consideration. There is no evidence upon the question other than the recital in the deed of a consideration of \$10. Section 3442 of the Civil Code provides that no transfer can be "adjudged fraudulent solely on the ground that it was not made for a valuable consideration." If appellant relies on the provision of section 3442 that "any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors," it is sufficient to say that he did not allege that Mrs. Prizer was insolvent or in contemplation of insolvency at the time of the transfer. *Tainter v. Broderick Land & Inv. Co.*, 177 Cal. 664, 171 Pac. 679. The only evidence relied on to prove insolvency is a statement in the letter of July 3, 1916, written by Mrs. Prizer, as follows: "My daughter and I are

without means." It is argued that this statement is sufficient proof that Mrs. Prizer was insolvent at the time the letter was written, and that from such proof a presumption arises that she was insolvent three and a half years later when, on November 26, 1919, she conveyed the property to Ella Hill. It is a disputable presumption "that a thing once proved to exist continues as long as is usual with things of that nature." Code of Civ. Proc., § 1963, subd. 32. It certainly cannot be said that insolvency usually continues for 3½ years after its existence has been shown. Plaintiff was not called upon to offer proof of Mrs. Prizer's solvency at the time of the transfer. Had defendant alleged that she was insolvent at that time, it may be that plaintiff could have shown affirmatively that she was solvent. Titles to real estate would be dangerously insecure if they could be overthrown by evidence as slight as that produced by defendant.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

(64 Cal. App. 84)

PEOPLE v. STUCKRATH. (Cr. 982.)

(District Court of Appeal, Second District, Division 2, California. Oct. 8, 1923.)

1. Criminal law ☞228—Continuance at preliminary examination in violation of statute does not affect superior court's jurisdiction.

Granting continuances at preliminary examination, in violation of Pen. Code, § 861, does not affect jurisdiction of the superior court to try one who has come to it under commitment in due form, showing completion of such examination.

2. Criminal law ☞1144(1)—Presumed defendant consented to continuances, in absence of objection thereto.

In absence of objection to continuances at preliminary examination, on appeal, it will be presumed defendant consented thereto.

3. Criminal law ☞228—Prejudice not shown from postponement of preliminary examination or commitment after completion.

Where, in preliminary examination, defendant consented to two continuances before and one after the one to which he made objection, and, after making unavailing objection to the third continuance he moved to extend postponement for 30 days beyond the time asked by the state, *held*, that prejudice to defendant did not appear because of imprisonment after the third continuance or by commitment after examination was completed.

4. Indictment and information ☞42—Information filed timely, if within 30 days after preliminary examination.

An information is timely filed within Pen. Code, § 809, if it is filed within 30 days after

completion of preliminary examination or after the commitment.

5. Criminal law ☞698(1)—Secondary evidence admissible, where no objection that best evidence should be produced.

Secondary evidence is admissible, where the objection is not made that existing best evidence should be produced.

6. Criminal law ☞1169(10)—Admission of judgment roll showing dissolution of a former marriage held immaterial.

In prosecution for bigamy, where the marriage which fastened a bigamous character on the marriage which was the basis of the prosecution was contracted with a woman who had been married before, and her testimony that her former marriage had been dissolved by divorce decree was the only evidence, aside from a foreign judgment roll showing a divorce, on the subject to which it related, the question of whether such roll was improperly admitted was immaterial on defendant's appeal.

7. Criminal law ☞1186(4)—Instruction not to consider question of morals as affecting fact of marriage, if error, held not to affect results.

In bigamy prosecution, where prosecution introduced letters from defendant to the woman whose marriage to defendant fastened bigamous character on the marriage on which prosecution was based, in which defendant addressed her as his wife and referred to himself as husband, an instruction that evidence as to whether defendant and the woman had lived together prior to time of the alleged marriage did not enter into the case, and that it made no difference whether defendant and the woman were moral or immoral, that there was either a marriage or none, if error, did not result in miscarriage of justice, in view of Const. art. 6, § 4½.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Arthur C. Stuckrath was convicted of bigamy, and he appeals. Affirmed.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

WORKS, J. This is an appeal from a judgment of conviction of the crime of bigamy, from an order denying defendant's motion for an arrest of judgment, and from an order denying his motion for a new trial. The order denying the motion for an arrest of judgment is not appealable.

[1] Appellant contends that the trial court erred in denying a motion made by him to set aside the information; the general point being that he was not legally committed by a magistrate. The motion was made upon two grounds, the first of which was that appellant's preliminary examination was not

terminated as required by Penal Code, § 861, which reads:

"The examination must be completed at one session, unless the magistrate, for good cause shown by affidavit, postpone it. The postponement cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of the defendant."

These are the facts involved in appellant's contention: The preliminary hearing was postponed four times, each continuance being for a period of more than 6 days, the extreme limit fixed by section 861. The first continuance was granted upon the application of respondent and with the consent of appellant, while the record fails to show, as to the second and fourth, upon whose motion they were granted, or whether appellant either consented or objected to them. The transcript shows what occurred at the time the third postponement was granted, after a certain "argument by counsel," the nature of which is not disclosed:

"Mr. Andrews [Deputy District Attorney]: If he wants the case continued so as to—

"Mr. Kelly [Counsel for Appellant]: I don't want the case continued. * * * I object to the defendant being brought in day after day, the case was set well in advance. * * *

"The Court: Mr. Andrews, I will continue the matter even over the defendant's objection, but I will do it only if you tell me that you think you can produce [certain missing evidence which the prosecution desired to offer]. * * *

"Mr. Andrews: I can do that, but I ought to have considerable time though. * * * I should think we should have 30 days to be sure to get the [missing evidence]. * * *

"The Court: * * * The matter will be continued for 30 days then. * * *

"Mr. Kelly: I would ask to have it continued for 60 days, if your honor please.

"The Court: Have you any objection to 60 days?

"Mr. Andrews: I don't think it makes any difference.

"The Court: It will be continued then until * * * Friday, the 13th of October, at 10 o'clock in the morning."

[2] The only question which appellant can make as to these continuances hinges upon the third, and, in fact, it is as to that one alone that he actually urges his point. The first continuance was granted upon appellant's consent, and was therefore allowed pursuant to the express terms of section 861. As the record fails to show that appellant objected to the second and fourth continuances, it will be presumed that they also, were consented to by him. *People v. Magee*, (Cal. App.) 213 Pac. 513. What, then, is the situation as to the third continuance? Appellant did make objection to that one, but such an objection cannot avail a defendant upon his appeal from a judgment of conviction,

as the granting of continuances in violation of the terms of section 861 does not affect the jurisdiction of the superior court to try one who has come to it under a commitment in due form following a preliminary examination which has proceeded to completion. *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538; *People v. Boren*, 139 Cal. 210, 72 Pac. 899. Under these cases a defendant who would profit by a violation of the provision of section 861 must seek by appropriate means to regain his liberty, if he be in fact under imprisonment at the time the violation occurs; and it has been held in at least one instance that such a defendant will not even be released upon habeas corpus, if his application for the writ comes after his preliminary examination has been concluded and he has been committed to answer before the superior court. *Ex parte Mazuran*, 57 Cal. App. 411, 207 Pac. 509.

[3] In view of some language in the opinion in *People v. Van Horn*, supra, it is pertinent to remark that we are not shown that appellant in the present case suffered any material prejudice because of his imprisonment after the third continuance was granted, or because of his commitment upon the completion of the preliminary examination. Appellant consented to two continuances before and to one after the one to which he made objection. It is to be observed, also, that after he entered his unavailing objection to the third continuance he himself moved the court to extend the period of postponement for a period of 30 days beyond the time asked by the district attorney. On the whole, it is plain that appellant's point is not well taken.

[4] Under his general claim that the trial court should have granted the motion to set aside the information, appellant's second point is that the pleading was not filed within the time prescribed by Penal Code, § 809. Appellant, looking to the delay incident to the completion of the preliminary examination, all owing to the granting of the continuances above mentioned, points to the fact that "four months and two days elapsed from the date of the original hearing" before the magistrate to the date of the filing of the information. He then insists that "the unconscionable continuances beyond the time allowed by the statute for completing the preliminary examination cannot give to the prosecution any additional advantages as to the time for filing the information." Section 809 does not fit itself to appellant's argument. The enactment provides that when a defendant has been examined, and committed it shall be the duty of the district attorney, "within 30 days thereafter," to file an information against him. Although appellant bases his point on section 809, he makes no contention that the information here in question was not filed within 30 days after the completion of the preliminary

examination or after the commitment. In fact, the point made is not really a point under section 809, but is merely a restatement in another form of the question of which we have made disposition above. The present "point" falls with what we have said in making that disposition.

[5, 6] Appellant's next point is that the trial court erred in receiving in evidence an attested copy of a certain judgment roll in a cause tried in the territory of Hawaii. It appeared in evidence in the present action that the first marriage of appellant, the one which fastened a bigamous character upon the marriage which was the basis of the present prosecution, was contracted with a woman who had before been married to one Cavins. In order to prove that the woman's union with Cavins had been dissolved before the performance of the wedding ceremony between her and appellant, thus stamping that marriage, as a legal one, the prosecution offered the Hawaiian judicial record, consisting of the proceedings in a divorce action which she had instituted against Cavins. The question now raised by appellant is that the attested judgment roll thus offered was not properly authenticated, but that question we need not decide. Without objection the woman testified that she had procured a divorce from Cavins before the ceremony with appellant was performed, and that was the only evidence, aside from the Hawaiian judgment roll, as to the status of the Cavins marriage. The primary evidence as to the disposition of that marriage, of course, was the judgment roll in the cause in which dissolution of it was wrought (22 C. J. 1007-1010), but the general treatment of the subject in the publication just cited will indicate that parol testimony upon such a subject is secondary evidence at least, as will also the opinions in *Dahler v. All Persons*, 163 Cal. 160, 124 Pac. 995, and *Reynolds v. State*, 58 Neb. 49, 78 N. W. 483. It is hardly necessary to cite authority for the statement that secondary evidence is admissible, where the objection is not made that existing best evidence should be produced, although such authority may be located with ease. See *estate of Bollinger*, 170 Cal. 380, 149 Pac. 995. As the testimony of Mrs. Cavins that her marriage with Cavins had been dissolved by divorce decree was the only evidence bearing upon the subject to which it related, the question whether the Hawaiian judgment roll was improperly admitted becomes an immaterial one.

[7] Appellant contends that the trial court erred in giving the following instruction:

"Some testimony, a great deal of testimony, has been received in this case, which in my judgment is not material to the issue. A great deal of testimony was received as to whether

the defendant and Madeline Stuckrath cohabited prior to the time of the alleged marriage. It makes no difference whether they did or not. It makes no difference whether Madeline Stuckrath or Arthur C. Stuckrath were moral or immoral men or women. This question does not enter into it at all, the morality or immorality of either of the parties to this action, and it makes no difference whatever in the case. There was either a marriage or not, and the morality or the immorality, whether they cohabited or did not cohabit, does not and should not enter into the case in arriving at your verdict."

The Madeline Stuckrath mentioned in this instruction is the woman who had been the wife of Cavins. The question made by appellant concerning the instruction arises in this manner: The prosecution introduced in evidence several letters written by appellant to Madeline, in which he addressed her as his wife or referred to himself as her husband. This was a part of the evidence designed to show that there had been a marriage between appellant and Madeline. Appellant insists that the evidence referred to in the trial court's instruction was proper for the consideration of the jury as tending to rebut the showing made by the letters. He says that, if believing that a meretricious relation had existed between Madeline and appellant, the jury might justly assume that the latter addressed the former as his wife and referred to himself as her husband only because of that relation and not because they were married. Appellant contends that the instruction took this question from the jury. We do not find it necessary to consider the particular question presented, in view of the provisions of section 4½ of article 6 of the Constitution, to the effect that no error in procedure shall cause the granting of a new trial in an action—

"unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

We have examined this entire cause, including the evidence. If it be conceded, which we do not decide, that the instruction now before us was erroneously given, we are clearly of the opinion that the error did not result in a miscarriage of justice. No one could read the evidence without being positively convinced that there was a marriage between Madeline and appellant.

Other points are made by appellant, but they are all disposed of by views which we have expressed above.

The appeal from the order denying motion for an arrest of judgment is dismissed. Order denying motion for a new trial affirmed. Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

63 Cal. App. 783

PEOPLE v. McCALLA et al. (Cr. 971.).

(District Court of Appeal, Second District, Division 2, California. Sept. 28, 1923. Hearing Denied by Supreme Court Nov. 26, 1923.)

1. Criminal law ☞1023(8) — Order denying motion in arrest not appealable.

An order denying a motion in arrest of judgment is not appealable.

2. Licenses ☞18½, New, vol. 12A Key-No. Series—Certificate of right to share in income held a "security" within Corporate Securities Act.

Where a corporation conveyed a small parcel constituting a 1/4000 part of a large tract subject to an oil lease, and the right on the part of the corporation to receive and disburse all income received from such land to the proper parties and to make any new agreements necessary for increasing or protecting such income, and contemporaneously with the execution of the deed issued to the grantee a certificate entitling the grantee to a 1/4000 part of the net income received from the land, held a "security" within Corporate Securities Act, § 4, subd. 6, as amended by St. 1921, p. 1116, § 1, defining a "security" as any instrument issued or offered to the public by any company evidencing or representing any right to participate or share in the profits or earnings, or distribution of assets of any business carried on for profit, since the grantee's relation to the corporation was similar to that of a stockholder, the contract between them being not merely one of agency.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Security.]

3. Licenses ☞42(5)—Whether certificate is a "security" within Corporate Securities Act, under conceded facts, question of law.

In a prosecution for violation of the Corporate Securities Act, the question of whether a certificate constituted a security under conceded facts is one of law for the court and not a question of fact for the jury.

4. Licenses ☞42(2)—Counsel's advice that instrument was not a security no defense; "knowingly."

In a prosecution for selling securities of a corporation in violation of Corporate Securities Act, § 14, making a person who "knowingly" issues or sells securities without a permit from the corporation commissioner guilty of violating the statute, it was no defense that the defendant acted in good faith in reliance on the advice of counsel that the instrument was not a "security" within the statute; the term "knowingly" meaning with knowledge of the essential facts and not knowledge of the legal consequences, in view of Pen. Code, § 7, subds. 1 and 5.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Knowingly.]

5. Criminal law ☞24—Intent presumed where not made affirmative element of crime.

When the intent is not made an affirmative element of the crime, the law imputes that the

act knowingly was done with criminal intent, though the offender was honestly mistaken as to the meaning of the law violated.

6. Criminal law ☞1172(1)—Instruction as to conclusive presumption held harmless in view of conceded facts.

In a prosecution for violating the Corporate Securities Act, an instruction that the defendants were conclusively presumed to know whether a permit had been issued, held harmless, in view of the conceded facts establishing that the defendants did in fact know that no permit had been issued.

7. Criminal law ☞1166(1)—Failure to give preliminary hearing not ground for reversal.

Failure to give defendant a preliminary hearing under Pen. Code, § 1390 et seq., held not ground for reversal, where the record showed conclusively that the defendant was guilty of the offense of which it was found guilty by the jury, under Const. art. 6, § 4½, since in such case the error did not lead to the verdict.

8. Criminal law ☞1162—Appellate court must determine whether error contributed to verdict.

The appellate court is not to determine as an original inquiry the question of defendant's guilt or innocence; but, when defendant has been found guilty, it must determine on a review of the entire record whether in its judgment an error committed in the trial court has led to the verdict.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

E. E. McCalla, the E. E. McCalla Company, and others were indicted for violating the Corporate Securities Act. The named defendants were convicted, and from judgment against them, and from orders denying their respective motions for a new trial, and from an order denying a motion in arrest of judgment, they appeal. Appeal from order denying motion in arrest of judgment dismissed, and judgment and orders denying motions for new trial affirmed.

Duke Stone, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

FINLAYSON, P. J. [1] The defendant E. E. McCalla and the E. E. McCalla Company, a California corporation, were convicted of a violation of the Corporate Securities Act (St. 1917, p. 673). They appeal from the judgments against them and from the orders denying their respective motions for a new trial. There also is an attempted appeal from the order denying a motion in arrest of judgment, but as that is not an appealable order the appeal therefrom must be dismissed. People v. Jackson, 133 Cal. 462, 71 Pac. 566.

The information contains three counts. The E. E. McCalla Company is not named in the title to the information, nor does that pleading specifically designate the corpora-

tion as one of the accused. But the facts alleged in count 1 are sufficient to show that the corporation, as well as the four natural persons who were expressly made defendants, committed a public offense by violating certain provisions of the Corporate Securities Act. It is expressly alleged in the body of the first count that the E. E. McCalla Company, having no permit from the corporation commissioner to issue or dispose of its securities, willfully and knowingly, and for a valuable consideration, to wit, \$200 in lawful money of the United States, sold and issued to one Lillian M. Lake an instrument in writing which represented a right to participate and share in the profits and earnings and distribution of assets of the corporation. Count 2 charges that the persons specifically accused by the district attorney—E. E. McCalla, C. R. Greenlee, C. S. Dye and P. H. Farone—acting as agents and brokers of the E. E. McCalla Company, to whom no permit had been issued by the corporation commissioner, issued and sold to Lillian M. Lake an instrument in writing representing the right of the purchaser to participate and share in the profits, earnings, and distribution of assets of the corporation. In count 3 McCalla, Greenlee, Dye, and Farone are charged with selling securities without having a broker's certificate authorizing them to act as brokers or agents. The corporation was convicted on the first count, and E. E. McCalla was convicted on the second count. The three other defendants were acquitted.

It was conceded at the trial that the E. E. McCalla Company is a California corporation; that E. E. McCalla was and is its president; that no permit was ever issued by the corporation commissioner authorizing the corporation to issue or dispose of any securities, and that these facts were known to the defendant E. E. McCalla.

One of the contested issues was whether or not the instrument which appellants caused to be delivered to Mrs. Lake was a "security," within the meaning of the act. The material evidence bearing upon this issue was, in substance, as follows: On June 19, 1922, the E. E. McCalla Company, as grantor, by its president, E. E. McCalla, and its secretary, D. G. Ruker, executed to Mrs. Lake a grant deed whereby the corporation conveyed to the grantee a small parcel of land, 20 by 21.2 feet, which was a $\frac{1}{4000}$ part of a larger tract of about 41.7 acres, all of which was originally owned by the grantor. The deed declares that the grant to Mrs. Lake is subject: (1) To a lease held by the Chancellor-Canfield-Midway Oil Company for the development and production of oil; (2) to an agreement by A. H. and W. M. Bradford to care for an orange grove on the land in consideration of their right to receive certain profits from the crops; and (3) "to an agreement by the E. E. McCalla Company, a corporation, to receive and disburse all income

received from said lands to the proper parties and to make any new agreements necessary for increasing or protecting the income from said land."

Contemporaneously with the execution of this deed the E. E. McCalla Company, by its secretary and by E. E. McCalla, its president, issued to Mrs. Lake a document denominated a "certificate," in which is incorporated as a component part thereof a declaration and acceptance of trust. The whole document, so far as pertinent to this case, is as follows:

"Certificate.

"No. 371.

Parcel No. ———.

"Net Income.

"This is to certify that Mrs. L. M. Lake holds a deed to a certain parcel of land which entitled him [sic] to $\frac{1}{4000}$ of all the net income received from the land described in the copy of the declaration of trust printed herein and which the undersigned trustee will pay to him [sic] or his [sic] order, at the times and in the manner set out in said copy of declaration of trust; it being specifically understood that the said $\frac{1}{4000}$ of net income belonging to this certificate shall begin to accrue for the benefit of the holder of this certificate, whose name appears above, on the date of issuance hereinbelow written.

"Declaration and Acceptance of a Trust.

"Know all men by these presents that E. E. McCalla Company, a corporation existing under and by virtue of the laws of the state of California, has this day accepted the obligation to manage, care for, rent, lease and receive all income accruing from the following described land from any source whatever [here follows a description of the 41.7-acre tract from which was carved the small parcel deeded to Mrs. Lake] and shall disburse the same as follows: 1. In payment of necessary and proper expenses in the care of said land, including taxes and a trust collection and disbursement fee of 5% of the gross income from said land. 2. The balance then remaining to the owners, their administrators or assigns, in the following manner: The net income accruing from said land [the 41.7 acres] for the preceding six (6) months shall, on January 1st and July 1st, respectively, be divided into 4,000 equal parts for distribution to the owners of the above-described land [the 41.7 acres], their heirs, administrators, or assigns. An owner's evidence of the proportion of said net income accruing to him shall be a certificate or certificates, signed by trustee herein, under the heading 'Certificate of Income,' each certificate representing $\frac{1}{4000}$ of the net income accruing and accrued from time to time.

"Attached to each certificate shall be twenty (20) coupons, each coupon representing $\frac{1}{4000}$ of the net income accruing from said land during the preceding six (6) months, and shall be payable on presentation at the office of E. E. McCalla Company, 634 West Sixth street, Los Angeles, on and after January 1st and July 1st, respectively. When all the coupons on a certificate have been used, it may be replaced by a new certificate issued under the same number. This certificate may be assigned,

but no assignment shall be valid until recorded and transferred on the books of the trustee herein.

"This trust shall last for a period of ten (10) years, after which time the trustee may resign and its duties and obligations cease upon the election of its successor; or the owners of 51% of the land mentioned herein may request the appointment of a new trustee. At any time during the life of this trust, the owners of 66% of the land mentioned herein may request a change of trustee, or the trustee herein shall have the right to secure some reputable bank or trust company to act in its stead and carry out the provisions of this agreement. [Signed] E. E. McCalla Company, by E. E. McCalla, President; by D. G. Rucker, secretary. [Seal] Issued this 19th day of June, one thousand nine hundred twenty-two. E. E. McCalla Company, by E. E. McCalla, President."

Indorsed on the certificate is the following: "Certificate for one of 4000 shares of the net income trust No. 12, E. E. McCalla Co. Issued to Mrs. L. M. Lake. Dated June 19, 1922. For value received, ——— hereby sell, assign, and transfer unto ——— shares of the net income represented by the within certificate, and do hereby irrevocably constitute and appoint ——— to transfer the said stock on the books of the within named corporation with full power of substitution in the premises. Dated ———, 19—. In the presence of ———. Notice: The signature of this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement, or any change whatever."

Attached to the certificate as introduced in evidence were 19 coupons, from 2 to 20, inclusive—coupon No. 1 evidently having been detached some time prior to the trial. The second coupon reads as follows: "Coupon No. 2. Certificate No. 371. Good for $\frac{1}{4000}$ net income accruing under trust No. 12, E. E. McCalla Co., Los Angeles, Calif., from July 1, 1922, to January 1, 1923, payable January 1, 1923." The remaining coupons, mutatis mutandis, are similar to coupon No. 2.

In construing this certificate the trial court held, as a matter of law, that the instrument is a "security" within the meaning of the act, and, so holding, instructed the jury that it is a "security," refusing to allow the defendant E. E. McCalla to show that he had been advised by reputable counsel that it was not a "security" within the definition of the act.

[2] In making these rulings the court committed no error. Section 2, subd. 6(c) of the act reads, in part, as follows:

"The word 'security' includes: * * * (c) any instrument issued or offered to the public by any company, evidencing or representing any right to participate or share in the profits or earnings or the distribution of assets of any business carried on for profit."

The certificate issued to Mrs. Lake falls within this definition of a "security." The "certificate," so called, is an instrument in

writing. It is an instrument which was issued or offered to the public. The evidence fully justifies the inference that it was one of a series of similar certificates every one of which was offered to the public. It was issued by the "company" through its president, the appellant E. E. McCalla. It evidences the right of its holder, Mrs. Lake, to participate and share in the profits or earnings of a business carried on for profit i. e., a business carried on for profit by the E. E. McCalla Company. The document, therefore, and the act of issuing it contain all the essential elements of a "security," as that word is defined in subdivision 6(c) of section 2 of the act.

Because Mrs. Lake held the legal title to the unit of land which the corporation had conveyed to her—the parcel 20 feet by 21.2 feet—appellants contend that the certificate gave to her no more than a right to share in profits accruing from her own land, and that therefore, it gave her no right to share in the profits of the corporation. The definition of the term "security," as given by the act, does not expressly declare that the profits or earnings, the right to share in which is evidenced by the "security," shall be the profits or earnings of the "company." The language is:

"The word 'security' includes * * * any instrument * * * evidencing * * * any right to * * * share * * * in the profits or earnings * * * of any business carried on for profit."

But though this particular part of the act does not expressly provide that, to constitute the instrument a security, the profits or earnings must be profits or earnings of the "company," it is quite possible that when all the provisions of the act are read and construed together it should be held that there is a necessary implication that the profits or earnings must be such as are made or earned by the "company." But however this may be, it is not necessary for us to decide the question now, and we refrain from doing so, for in the present case it clearly appears that the profits and earnings in which Mrs. Lake was entitled to share by reason of the certificate issued to her were profits and earnings of the corporation. (The certificate gave her the right to a $\frac{1}{4000}$ part of the "net" income to be received from the 41.7-acre tract, i. e., the income on hand after deducting from the gross income the expense incurred in the care of the land (including taxes) and the 5 per cent. which the corporation was entitled to retain as a "trust collection and disbursement fee." The net income which was thus to be distributed to the certificate holders was to be derived from the profits or earnings of a business carried on by the corporation for profit, namely, the business of managing, caring for, renting, and leasing the 41.7 acres and receiving the

income accruing therefrom. In its declaration of trust, incorporated into and made a part of each "certificate," the corporation obligated itself "to manage, care for, rent, lease, and receive all income accruing from" the 41.7-acre tract, and, after deducting all necessary and proper expenses, including a collection and disbursement fee amounting to 5 per cent. of the gross income, to pay the balance to the owners of the several land units—the owner of each unit being entitled to a one-four thousandth part of the total net income. And in the deed which the corporation executed to Mrs. Lake contemporaneously with the issuance of its certificate to her there is, as we have seen, a provision to the effect that the conveyance of the unit of land, 20 feet by 21.2 feet, shall be subject to an agreement by the corporation, not only to receive and disburse to the proper parties all the net income received from the 41.7-acre tract, but "to make any new agreements necessary for increasing or protecting the income from said land."

The sum and substance of the whole arrangement was simply this: Though the tract of 41.7 acres, or some portion thereof, was nominally owned by the respective grantees of the several land units—small holdings of 20 by 21.2 feet—and not by the corporation, still the latter was to have the sole right to manage, rent, and lease the entire tract, including the right to make any and all agreements for increasing and protecting the income therefrom. We have, therefore, this situation: The corporation, upon or with the lands of others, was to carry on a business for profit, it being agreed that a part of the income, 5 per cent. should be retained by the corporation and that the balance, after deducting all necessary and proper expenses, should be distributed to the landowners. Though the case differs in its outward form from that of a corporation engaged in extracting wealth from its own land, selling the produce, and dividing the net profits among its stockholders in the shape of dividends, still, in the essentials, there is no material difference between this case and that of a corporation so engaged in exploiting its own land. The difference is in the bark, not in the pith.

Appellants say that the contract between the corporation and Mrs. Lake was nothing but a contract of agency to look after the land and collect the profits. The rights and powers of the corporation were much greater than those of a mere agent to look after land and collect profits. Evidently the corporation and not the certificate holder, was to furnish whatever capital might be necessary to carry on the venture, for Mrs. Lake did not obligate herself to furnish any capital to be used in managing or leasing the land or in extracting wealth therefrom. It doubtless was expected by Mrs. Lake and by any other grantees of the land units that

the sums which they paid to their grantor upon receiving their respective deeds would be used by the corporation in leasing or "managing" the land or in exploiting it. But aside from those moneys—moneys which, when paid to it, belonged to the corporation—there is nothing to indicate that Mrs. Lake or any of the landowners had agreed ever to advance any money or to make any payment other than the initial payments made at the time of the execution of the deeds and the issuance of the certificates. The corporation, and not the certificate holders, was to make all contracts, manage, care for, rent, and lease the land and receive all the income. The certificate holders were to have no say in the matter. (There was expressly reserved to the corporation the exclusive right to make all agreements for increasing and protecting the income from the land. Until the net profits were distributed to the certificate holders the title to the gross income was not in the owners of the land units, but in the corporation, which was to furnish whatever capital might be necessary to carry on the business of managing or leasing the land. From all this it is manifest that in all of the essentials Mrs. Lake's relation to the E. E. McCalla Company was similar to that of a stockholder to a corporation.

The case falls within the letter and the spirit of the act, and it would be a reproach to the administration of the law if the perpetrators of such a thinly-veiled attempt to circumvent the manifest purpose of this salutary legislation should go unwhipped of justice. Appellants seem to place some reliance upon the decision of this court in *Ex parte Lamb* (Cal. App.) 215 Pac. 109. Between that case and this there is no resemblance whatever.

[3] The trial court, as we have stated, charged the jury that the certificate which appellants caused to be issued to Mrs. Lake is a "security" within the meaning of the Corporate Securities Act, and refused to give an abstract definition of the word "security" in the language of the statute. This was the proper course to pursue. Whether the certificate constituted a "security" under the conceded facts of the case was a question of law for the court and did not involve any question of fact whatever. The requested instruction would have left it to the jury to determine as a question of fact what the court rightfully disposed of as a question of law for its sole determination.

[4] As has been pointed out, an offer was made by the appellant E. E. McCalla to show that when he issued the certificate to Mrs. Lake he was acting in good faith, relying upon the advice of counsel that the instrument was not a "security" within the meaning of the act; but he was refused permission to present such evidence to the jury. The section of the act under which McCalla was prosecuted, section 14, declares

that every person who "knowingly" issues or sells or aids in the issue or sale of any security without a permit from the corporation commissioner is guilty of the offense denounced by the statute. Because the statute uses the word "knowingly," it is claimed that if there be no specific evil intent to violate the act the issue or sale of the security is not within the penal clause of the statute. Wherefore it is argued that good faith, based on advice received from counsel, should be considered as a factor in the determination of the defendant's guilt. There is no force in this contention.

The term "knowingly" means "with knowledge," and when used in a prohibitory statute is usually held to refer to a knowledge of the essential facts; and from such knowledge of the facts the law presumes a knowledge of the legal consequences arising from the performance of the prohibited act. According to the express definition of the word, as given by our Penal Code, "knowingly" imports "only a knowledge that the facts exist which bring the act or omission within the provisions of this Code. It does not require any knowledge of the unlawfulness of such act or omission." Pen. Code, § 7, subd. 5. Thus in *People v. Burns*, 75 Cal. 627, 17 Pac. 646, it was held that the defendant, charged with having refused, as election inspector, to administer the oath to an elector whose right to vote was challenged, was presumed, at his peril, to know what the law was. Nor does the word "willfully," as defined by the Code, import any intent to violate the law. When applied to the intent with which an act is done or omitted, "willfully," according to the Code definition, "implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." Pen. Code, § 7, subd. 1.

It has been held that one who marries a second time under an honest but erroneous belief that a decree of divorce which had been granted was valid is afforded no protection by the invalid decree, and that evidence of his good faith will be excluded. The same principle is applied to many cases, such as selling intoxicating liquors to minors, abducting girls under a certain age, usurping an office under the belief that the usurper was truly elected, illegal voting under the belief that the voter is a qualified elector, publishing a libel in ignorance of its contents, storing gunpowder, and the like. *People v. O'Brien*, 96 Cal. 178, 31 Pac. 45. See, also, *People v. Burns*, supra, and *People v. Hartman*, 130 Cal. 487, 62 Pac. 823.

[5] When the intent is not made an affirmative element of the crime, the law imputes that the act done knowingly was done with criminal intent. Or, to state the same proposition in a different form, when the stat-

ute plainly forbids an act, and the forbidden act is done by the accused, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. Here the penal clause under which McCalla was convicted does not make an unlawful or evil intent a specific element of the crime. The statute clearly forbids the acts denounced by it, and its language is plain and positive. Innocence of any intent to violate the terms of the statute is, therefore, no excuse for its violation, where the defendant does the prohibited act with a knowledge of the facts which bring his act within the provisions of the statute. For the effective protection of the public, the burden is placed upon the individual to ascertain at his peril whether his act is prohibited by the statute.

In *People v. O'Brien*, supra, the defendant altered a public record, apparently to make it speak the truth. In any event it was admitted by the Attorney General that the evidence failed to show any fraudulent intent on the part of the defendant. The court held that, inasmuch as the section defining the crime there in question did not make the intent with which the act was done an essential element of the crime, it was not necessary to show that the defendant had acted with such intent. In that case the question is elaborately discussed, and a number of cases are cited. The conclusion of the court on this point, as stated in the syllabus, is:

"It is not necessary, in making out the offense of altering a public record, to prove any fraudulent intention upon the part of the defendant; nor is ignorance of the law and innocence of any intent to violate its terms any excuse for a violation thereof. When an act in general terms is made indictable, a criminal intent need not be shown, unless from the language or effects of the law a purpose to require the existence of such intent can be discovered."

The court also quotes with approval the following language from *State v. McBrayer*, 98 N. C. 623, 2 S. E. 756:

"It is a mistaken notion that positive, willful intent * * * to violate the criminal law is an essential ingredient in every criminal offense, and that where there is the absence of such intent there is no offense; this is especially so as to statutory offenses. When the statute plainly forbids an act to be done, and it is done by some person, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. When the language is plain and positive, and the offense is not made to depend upon the positive, willful intent and purpose, nothing is left to interpretation."

Tested by the foregoing it must be held that the court's refusal to permit McCalla to show that he acted on the advice of counsel was right and proper. He possessed knowledge of all the facts which brought his

act—the issuance of the certificate to Mrs. Lake—within the penal provisions of the statute. As we have pointed out, it was admitted at the trial that the E. E. McCalla Company is a California corporation; that it never received any permit from the corporation commission; and that E. E. McCalla, who was its president, knew that no permit to sell or issue securities had been granted to his corporation, but that nevertheless he, as president of the company, issued the certificate to Mrs. Lake. These facts being admitted, there was left but one question in the case, and that a question of law, pure and simple, namely: Is the certificate issued to Mrs. Lake a “security,” as that term is defined by the act?

If the advice of counsel could afford immunity to one accused of the violation of a penal statute, it would result in the advice of an attorney being paramount to the law. “Ignorance of the law,” says the Rhode Island Supreme Court in *State v. Foster*, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339, “will not excuse its violation, even when one endeavors to ascertain the law and is misled by the advice of counsel.” In that case it was held that a violation of a statute against engaging without a license in the temporary or transient sale of goods is not excused by advice of a state official to the effect that the law did not apply to the person who is charged with its violation, and who was not misled as to the facts but only as to the law. See, also, *Wharton's Criminal Law*, vol. 1 (11th Ed.) § 379.

[6] The instruction to the effect that both the corporation and McCalla are conclusively presumed to know whether a permit had been issued or not could not possibly have injured appellants. The conceded facts established beyond peradventure that the corporation and its president did know that the corporation commissioner had issued no permit to sell or otherwise dispose of any of the company's securities.

[7] Finally, it is contended that the E. E. McCalla Company was not given a preliminary hearing before the committing magistrate and that therefore the order holding it to answer was void and afforded no foundation for the filing of an information against the corporation. To say that the proceedings in this case bristle with anomalies is putting it mildly. Not only was the corporation not given a preliminary hearing before the committing magistrate, but it was not even named as a defendant in the complaint lodged with that officer. No summons was issued by the magistrate requiring the corporation to appear before him—a procedure provided for by section 1390 et seq. of the Penal Code. No appearance, voluntary or involuntary, was made by the corporation before the committing magistrate. It was not until the trial was commenced in

the superior court that the corporation made any appearance in the case. At the commencement of the trial in the latter court the corporation, for the first time, appeared and by its attorney moved that as to it the first count in the information be set aside on the ground that it had not had a preliminary examination before a committing magistrate as required by law. The motion was denied, and thereupon the trial proceeded before the jury without even the entry of a plea by or on behalf of the corporation, though all parties evidently assumed that a plea of “not guilty” had been formally entered and the case seems to have been tried with that understanding.

[8] That these gross irregularities and unpardonably loose methods of procedure would unquestionably have necessitated a reversal as to the corporation had this appeal come before this court prior to the adoption of section 4½ of article 6 of the Constitution, is a proposition fully borne out by such authorities as *Western Meat Co. v. Superior Court*, 9 Cal. App. 538, 99 Pac. 976; *People v. Western Meat Co.*, 13 Cal. App. 539, 110 Pac. 338; *People v. Corbett*, 28 Cal. 328; *People v. Gaines*, 52 Cal. 479, and *People v. Monaghan*, 102 Cal. 229, 36 Pac. 511. But since section 4½ was added to article 6, the organic law of this state has declared, in terms not to be mistaken, that no judgment shall be set aside or new trial granted, in any case, for error as to any matter of procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. The scope of this provision is very broad and sweeping. It does not pretend to describe specifically the character of the errors coming within its purview. Nor does it purport to limit the right of the court to determine and say that any error, whatever its nature, has not resulted in a miscarriage of justice. Since its adoption, not every invasion of even a constitutional right will necessarily require a reversal. The mere fact that the assignment of error is based upon a provision of the Constitution is not conclusive. *People v. O'Bryan*, 165 Cal. 66, 130 Pac. 1042. The appellate court is not to determine, as an original inquiry, the question of the defendant's guilt or innocence. But when he has been found guilty that court, upon a review of the entire record, must determine whether in its judgment an error committed in the trial court has led to the verdict. If it appear, to the satisfaction of the court reviewing the judgment, that the result is just and that it would have been reached if the error had not been committed, a new trial is not to be ordered. *People v. O'Bryan*, supra.

Here the district attorney filed an information based upon what purports to be a

commitment holding the corporation to answer. The information alleges facts which show that the E. E. McCalla Company committed one of the offenses denounced by the Corporate Securities Act. The company appeared by counsel in the superior court and was there ably, if unsuccessfully, defended. The trial went on without any objection from the corporation other than that it had not had a preliminary examination before a committing magistrate prior to the filing of the information in the superior court. In the latter court the corporation secured all the benefit of a formal plea of "not guilty," and had every advantage that it would have had if it had been given a preliminary hearing prior to the order holding it to answer. Indeed, no fair-minded person could read the record before us without reaching the conclusion that the evidence shows beyond all shadow of doubt that the corporation was guilty of the offense described in count 1 of the information—the count upon which it was found guilty.

The verdict was just, and we fail to see how a different result could have been reached had the commitment upon which the information was based been made only after the corporation had been given a preliminary hearing before a magistrate and a plea of "not guilty" had been formally made by it in the superior court. See *People v. Tomsky*, 20 Cal. App. 672, 130 Pac. 184, where it was held that section 4½ is applicable, even though no plea to the information be made by or on behalf of the defendant. Our conclusion, after a careful examination of the entire record, is that the irregularities complained of have not resulted in a "miscarriage of justice," and that section 4½ could not be applied with more propriety than in the instant case.

The appeal from the order denying the motion in arrest of judgment is dismissed. The judgment against each appellant and the orders denying their respective motions for a new trial are affirmed.

We concur: WORKS, J.; CRAIG, J.

(64 Cal. App. 97)

PEOPLE v. SIMONSEN et al. (Cr. 973.)

(District Court of Appeal, Second District, Division 2, California. Oct. 9, 1923.)

1. Criminal law — 1159(3)—Finding on conflicting evidence conclusive.

Jury's finding on conflicting evidence is conclusive on appeal.

2. Licenses — 42(4)—Statement by corporation commissioner held not admissible in prosecution of partners.

In a prosecution of partners for selling securities without a permit from the commis-

sioner of corporations, in violation of Corporate Securities Act, evidence that the defendants had presented a form of contract to the corporation commissioner and had stated to the commissioner that the plan was similar to one wherein an individual sold profit-sharing certificates, and that the commissioner stated that such plan did not come within his jurisdiction, held not admissible, since the defendants were under prosecution as partners, and not as individuals.

3. Constitutional law — 230(1)—Licenses — 7(1)—Corporate Securities Act held not to deny to partnerships the equal protection of the laws.

The Corporate Securities Act, § 2, subd. 3, as amended by St. 1921, p. 1115, § 1, prohibiting companies, defined to include partnerships, from selling securities without a permit from the corporation commissioner, without making the same requirement applicable to individuals, held not to deny to partnerships the equal protection of the laws in violation of the Constitution, as against contention that it discriminates in favor of individuals and against partnerships.

4. Licenses — 7(1)—Statute prohibiting sale of corporate securities without permit constitutional.

Statutes forbidding the sale of corporate stocks and bonds without a permit are constitutional.

5. Constitutional law — 48—Legislature presumed to have found facts warranting classification.

In a prosecution of partners for violating the Corporate Securities Act, involving a question as to whether the act was unconstitutional on the ground that it discriminated against partners in favor of individuals, it will be presumed that the Legislature ascertained as to the subject-matter of the statute that a mischief sought to be corrected was being done through the sale of the partnership securities and not through the sale of securities issued by individual natural persons.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

J. P. Simonsen and another were convicted of selling securities without a permit, and the named defendant appeals from the judgment of conviction and from an order denying his motion for a new trial. Affirmed.

Carl B. Sturzenacker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

WORKS, J. The defendants were convicted of the crime of selling a copartnership "security" without a permit from the commissioner of corporations so to do. Defendant Simonsen appeals from the judgment of conviction and from an order denying his motion for a new trial.

[1] It is contended that defendants were not partners and that therefore they are

not within the provisions of the Corporate Securities Act (St. 1917, p. 673, as amended). There was, however, much evidence at the trial which tended to fasten the partnership relation upon them. In fact, the record is so replete in that regard that it is not worth while here to reproduce the showing made. There was some evidence to the contrary, it is true, but the record presents nothing more than a conflict of evidence upon the question. The jury was, of course, within its province in resolving this conflict as it saw fit, and its conclusion upon the subject is final.

[2] At the trial defendants offered to prove that they, "prior to the time that any securities were sold or offered for sale, had prepared the form of contract" for such sales; "that they submitted this form of contract to the corporation commissioner; * * * that they stated to the corporation commissioner at that time that the plan that they were developing was exactly the same plan that had been successfully employed by one Leighton in San Francisco, which plan was known to the corporation commissioner and which plan was a plan whereby one Leighton as an individual (italics ours) sold profit-sharing certificates; * * * and that * * * the corporation commissioner stated that he had been advised that the Leighton plan had been passed upon by the superior court of San Francisco, and that the Leighton plan did not come within the jurisdiction of the corporation commissioner." The court sustained an objection to the offer and appellant insists that the ruling was error. The evidence offered was plainly inadmissible, as defendants were under prosecution as partners and not as individuals. We are not to be understood as indicating that the evidence would have been proper if the "Leighton plan" had been said to be a partnership plan, or if defendants had been under a charge as individuals. In fact, we have recently announced a contrary rule in a case in which one sought to defend against a charge of violating the Corporate Securities Act by proving that his counsel had advised him in advance that a plan evolved by him and later put into execution would not violate the statute. *People v. McCalla*, 220 Pac. 436 decided September 28, 1923.

[3, 4] The securities which may not be sold without a permit from the corporation commissioner, under the Corporate Securities Act, are those of companies, and the word company, according to the terms of the act, "includes all domestic and foreign private corporations, associations, joint-stock companies, and partnerships, of every kind," certain classes of corporations excepted. Section 2, subd. 3, as amended Stats. 1921, p. 1115, § 1 (Deering's Consol. Supp. to Codes and Gen. Laws, 1917-21, p. 1447). It is

contended that the act is unconstitutional in that these provisions amount to class legislation, forbidding, as they do, the commission by partnerships of acts which may be committed with impunity by individuals. It is insisted that in the respect mentioned the enactment discriminates in favor of individuals and against partnerships, and that the latter by it are denied the equal protection of the laws. It is said that partnerships, within the purview of the legislation, cannot properly be segregated from individuals as a class. No authorities are cited to us as bearing directly on either side of this question, and we have found none. It is well settled, however, that legislation of this character is constitutional in so far as it forbids the sale without a permit of corporate stocks and bonds. *Ex parte Taylor*, 68 Fla. 61, 66 South. 292, Ann. Cas. 1916A, 701; *State v. Agey*, 171 N. C. 831, 88 S. E. 726; *Standard Home Co. v. Davis* (D. C.) 217 Fed. 904; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 37 Sup. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643; *Caldwell v. Sioux Falls Stockyards Co.*, 242 U. S. 559, 37 Sup. Ct. 224, 61 L. Ed. 493; *Merrick v. N. W. Halsey Co.*, 242 U. S. 568, 37 Sup. Ct. 227, 61 L. Ed. 498. The question which is kindred to the one here presented is not specifically discussed in any of these cases, it is true; that is, the courts have not in terms passed upon the question whether a corporation may be forbidden constitutionally to do a thing of the nature here in question which an individual is left free to do. Nevertheless, the treatment of the question of the constitutionality of "blue sky laws," so called, is so broad and comprehensive in the cases that the specific point may be said to be covered in effect. In truth, the general nature of the rule announced by the cited cases is such that the specific question just mentioned is of necessity answered by them. To say that the sale of corporate stocks and bonds may be forbidden by law unless a permit to sell them is procured from some duly constituted authority is to say that corporations stand in a class by themselves, as distinguished from individual natural persons, for such persons cannot issue corporate stocks and bonds. We have no difficulty in determining that partnerships may justly be placed in a similar classification. The cases as to corporations are authority upon this latter question, for in general it may with truth be said that the public requires protection against the indiscriminate sale of partnership securities in somewhat the same measure in which it requires protection against a similar sale of corporate securities. One judge has furnished us with language which justifies this statement. In *Bracey v. Darst* (D. C.) 218 Fed. 482, Circuit Judge Woods said in a dissenting opinion:

"Frauds or impositions in the sale of securities are not usually effected by sale to the public of the obligation of a single individual. Usually an organization is effected of two or more persons under an organization name to give the appearance of greater responsibility and to make such responsibility more illusory. When the whole or a constituent part of the business, either as a temporary measure or a permanent enterprise, is to raise money by the sale of the securities of such an organization to the public—that is, to any one who will buy—I am unable to find any ground for holding that the state may not in the exercise of its police power provide for such examination into the business of the organization as is reasonably necessary to protect its citizens against imposition."

[5] Our own Supreme Court has determined that the Corporate Securities Act is constitutional in the respect that it forbids the sale without a permit of the securities of common-law trust companies. In *re Girard*, 186 Cal. 718, 200 Pac. 593. This conclusion was reached under a contention that the enactment discriminates against such companies and in favor of trusts created by will or by order of court in a judicial proceeding. The court said in its opinion:

"We are satisfied that there is no just ground for declaring this to be an improper discrimination. We cannot declare a law unconstitutional in the matter of discrimination unless there is no rational doubt that it improperly discriminates between persons similarly situated. We must presume that the Legislature made inquiry to determine whether or not there were evils which required regulation, and that upon such inquiry it was ascertained that the mischief sought to be corrected was being done under the form of trusts created by private individuals and not under the form of testamentary trusts or trusts declared in judicial proceedings."

These views have a cogent application to the question which is now before us. We must presume, nothing suggesting itself to the contrary, that the Legislature ascertained, as to the subject-matter of the statute now in question, that a mischief sought to be corrected was being done through the sale of partnership securities, and not through the sale of securities issued by individual natural persons. This is in addition to the view, already expressed, that we ourselves can see a propriety in the segregation of partnerships, as a class, from individuals, for the purposes of the law. We are of the opinion that the statute is not unconstitutional in the respects claimed by appellant.

Other questions are presented by appellant, but they do not merit a specific consideration.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

(64 Cal. App. 126)

PEOPLE v. OLSEN et al. (Cr. 712.)

(District Court of Appeal, Third District, California. Oct. 16, 1923. Hearing Denied by Supreme Court Dec. 13, 1923.)

1. Indictment and information § 71—Protection against another prosecution is test of sufficiency of information.

An information is sufficient if it identifies the transaction so that accused by proper plea may protect himself against another prosecution for the same offense.

2. Criminal law § 1186(4)—Amendment of information during trial, as to name of owner of burglarized building proper.

In view of Pen. Code, §§ 956, 1008, and Const. art. 6, § 4½, an amendment to an information charging burglary, so as to clearly allege the ownership of the building burglarized, was properly permitted at the close of the introduction of testimony by the state, in the absence of a showing of substantial injury to accused.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Jens Olsen and Julius Black were convicted of burglary, and appeal. Affirmed.

Jas. R. Tapscott and James M. Allen, both of Yreka, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. [1,2] In this action the defendants were convicted of the crime of burglary in the superior court of the county of Siskiyou, and prosecute their appeal from the judgment of conviction therein made and entered. But one question is presented to this court for determination, to wit, the correctness of the order of the superior court permitting an amendment to the information pending the trial. The information as presented to the superior court by the district attorney of Siskiyou county, so far as material herein, reads as follows:

"The said Jens Olsen and Julius Black, on or about the 10th day of February, A. D. 1923, at Sisson in the county of Siskiyou, state of California, did then and there willfully, unlawfully, feloniously, and burglariously enter the store building of one J. M. Schuler at Sisson in said county of Siskiyou with the felonious intent then and there to commit the crime of larceny, contrary to the form, force, and effect of the statute in such case made and provided and against the peace and dignity of the People of the State of California."

During the course of the trial and at the conclusion of the introduction of testimony by the people the court, upon motion of the district attorney, permitted the district attorney to amend the information by striking out the name of J. M. Schuler and inserting the words Schuler-Knox Company, making the information read thereafter as follows:

" * * * Did then and there willfully, unlawfully, feloniously, and burglariously enter the store building of one Schuler-Knox Company at Sisson," etc.

The authority of the court to permit this motion is, as stated above, the question raised upon this appeal.

An examination of the testimony set forth in the transcript in this case shows that the defendants were discovered by the city marshal of the town of Sisson inside the store building known as the Schuler-Knox Company store in the town of Sisson, at about 3 o'clock of the morning of February 10th, that the defendants were engaged in ransacking the store and making collection of various articles. The defendants were arrested as they emerged from the store building, one escaping from the officer and running a short distance but thereafter apprehended. It appears from the transcript that the defendants had collected a number of articles from the store and had them in a blanket and knapsack. These articles included pocket knives, razors, suits of clothing, shoes, shirts, etc., all itemized and set forth in the testimony. The testimony of the arresting officer also shows that the defendants at the time of their arrest were emerging from the particular building herein referred to, being the general merchandise store belonging to the Schuler-Knox Company. It appears also from the testimony that the witnesses generally referred to the store as the Schuler store. It also appears in the testimony that J. M. Schuler is a stockholder in the Schuler-Knox Company and was at the time of the commission of the offense the manager in charge at Sisson. It further appears from the testimony that there is no other store known as the Schuler store or Schuler-Knox Company store at the town of Sisson, although there is a store at the town of Dunsuir in the county of Siskiyou known as the Schuler store.

After the testimony had all been introduced, counsel for the defendants moved the court for a directed verdict on the grounds of variance between the allegations of the information and the proof, to wit, that the proof shows the uncontradicted fact that the burglarized store belonged to the Schuler-Knox Company and not to J. M. Schuler individually. The district attorney thereupon moved the court for permission to amend the information as hereinbefore stated. Upon the information being amended the defendants rested their case without making any application whatever to the court for a continuance to introduce any additional evidence or any evidence, nor was there any showing made to the court as to how or in what manner the defendants would be or could be prejudiced by permitting the information to be amended to correspond with the proofs. There is no showing whatever that the defendants were deceived or misled by reason

of the error of the district attorney in naming the ownership of the burglarized building, nor is there anything in the transcript from which this court can conclude that their substantial rights were in any wise affected. As the case is presented to this court and also as it was presented to the trial court, it is a mere technical right or authority of the trial court to permit the amendment of the information to correspond with the testimony.

A number of authorities have been cited to this court having to do with the question of variance between an indictment or information and the proofs, but a review of these authorities would serve no useful purpose in view of the fact that the real question involved is not one of variance but of the right to amend an information pending the course of the trial.

Section 1008 of the Penal Code provides how and when informations and indictments may be amended, to wit:

"An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made at any time thereafter, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

The evidence taken after preliminary examination is not before this court, and there is nothing in the record to show that there was any suggestion made to the trial court that the information charged an offense different from that set forth in the evidence taken at the preliminary examination.

Though decided before the amendment known as section 4½ of article 6 of the state Constitution was adopted, the case of *People v. Nunley*, 142 Cal. 105, 75 Pac. 676, bears directly upon the question of the alleged prejudice to the defendants in this action. In that case the Supreme Court used the following language of section 956 of the Penal Code as follows:

"When an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material."

In the case of *People v. Edwards*, 59 Cal. 359, the crime charged was of burglary of the store of one S. Loupe and the proof was that the store belonged to S. Loupe, L. Loupe, and A. Haas, who were partners doing business therein. It was pointed out in the opinion that at common law the ownership of property upon which an offense was committed was an essential averment in an indictment and must be proved as alleged. If stolen goods were the property of partners or

joint owners, the names of all the partners or joint owners had to be stated if known; if not known, then it was necessary to state them to be the property of one, naming him, and of others unknown. Attention is called to section 956 of the Penal Code; it was then said:

"The defendants having been charged with having entered a store of a certain person with intent to commit larceny, the act and the intent were both alleged with sufficient precision and certainty to constitute the offense, and to enable the defendants to understand the accusation made against them, and which they were called upon to answer. The evidence identified the name of the store with that averred in the information. Both allegations and proof correspond, and were sufficient to identify the offense. It is true that the additional fact was elicited that other persons were interested with the party named in the information as owner of the store which had been broken into and entered; but if that fact had been recited in the information, it would not have identified the offense with any greater certainty, or enabled the defendants to understand more clearly the offense with which they were charged. It only showed that there was a partially erroneous description or allegation of the ownership of the store in which they had committed the offense. But the discrepancy did not in any respect affect the validity of the information, nor could it in any way have misled or prejudiced the defendants in their defense; it affected none of their substantial rights; the variance was therefore immaterial."

In *People v. Leong Quong*, 60 Cal. 107, the larceny of a horse alleged to belong to one Sang Hop. At the trial the owner testified that Sang Hop was his business name, and his personal name was Yup Chin. It was said the name of the owner of stolen property is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant by proper plea may protect himself against another prosecution for the same offense. Section 4½ of article 6 of the Constitution as amended provides that—

"No judgment shall be set aside, or new trial granted, * * * for any error as to any matter of pleading, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

In this case, to set aside the verdict for the technical reason that the information was amended during the course of the trial to allege correctly the ownership of the building burglarized by the defendants, and especially where the defendants were appre-

hended at the very time of the commission of the offense and were arrested at the door of the burglarized building as they were emerging therefrom, would be for this court to violate both the spirit and the words of that amendment. It would be for this court to create a miscarriage of justice. It would have been a miscarriage of justice for the court to have denied the amendment to the information to correspond with the proofs and direct the acquittal of the defendant, simply because the ownership of the building burglarized by them was not correctly stated, in view of the fact that every one connected with the case knew the building referred to and understood fully and clearly all the circumstances save and except as to the actual ownership of the building.

The attention of the court has been called to the case of *Baker v. State*, 88 Wis. 140, 59 N. W. 570. That was a case where the defendant Baker was charged with the crime of grand larceny, and the alleged variance between the proof and the allegation arose in the amount of money alleged to have been stolen and also the ownership. The court, in upholding the amendment to the information, used the following language:

"As the trial court properly held, there was but one offense * * * and that was the offense of grand larceny. The amendments, so far as Baker was concerned, all related to the amount of money stolen and the ownership of the same. Our statute expressly declares that: 'Any court of record in which the trial of an indictment or information is had, may forthwith allow amendment in case of variance between the statement in the indictment * * * and the proof, in the following cases: In the name or description of any person, place, or premises, or of anything, writing, or record, or the ownership of any property described in the indictment or information, and in all cases where the variance between the indictment or information and the proof are not material to the merits of the case.'"

Taking sections 956 and 1008 of the Penal Code and section 4½ of article 6 of the state Constitution all into consideration, we are of the opinion that the correct rule as to permitting amendments of informations should be held not less liberal in this state than as upheld in the *Baker Case*, and especially is this true when there is no showing whatever that the defendants have suffered any substantial injury, and that to hold otherwise cannot be but to defeat the ends of justice.

We think the judgment of the trial court should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

64 Cal. App. 91

PEOPLE v. BRENTA. (Cr. 705.)

(District Court of Appeal, Third District, California. Oct. 9, 1923. Hearing Denied by Supreme Court Dec. 6, 1923.)

1. Criminal law —94—Prosecution for unlawful sale of liquor held within jurisdiction of superior court.

Under Volstead Act, tit. 2, § 29, prescribing the punishment for the sale of liquor as a fine not exceeding \$1,000, or imprisonment not exceeding six months, and the Wright Act adopting the penal provisions of the Volstead Act, Pen. Code, § 1425; investing justices' courts with jurisdiction of all misdemeanors punishable by fine not exceeding \$500, or imprisonment not exceeding six months, and Const. art. 6, § 5, giving superior courts jurisdiction in misdemeanor cases not otherwise provided for, the superior court had jurisdiction of a prosecution for the unlawful sale of liquor, since the defendant could be fined in excess of \$500.

2. Indictment and information —131—Rule as to stating different "offenses" in separate counts applicable to misdemeanors.

Pen. Code, § 954, providing that the indictment or information may charge two or more different "offenses" under separate counts, held applicable to misdemeanors as well as felonies.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Offense.]

3. Indictment and information —130—Two unlawful sales of liquor may be charged in same information.

Under Pen. Code, § 954, providing that an information may charge two or more offenses under separate counts, an information may charge two unlawful sales of intoxicating liquor.

4. Criminal law —991(2)—Judgment held void only to extent of excessive imprisonment.

Judgment providing for one day's imprisonment for every \$2 of the fine, on default in payment of fine, without limiting duration of such imprisonment to the term for which the defendant might have been sentenced for the offense of which he was convicted, as required by Pen. Code, § 1205, held void only to the extent of the excessive imprisonment imposed.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

A. Brenta was convicted of unlawfully selling intoxicating liquors, and he appeals. Affirmed as modified.

H. L. Johnston and E. L. Webber, both of Napa, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. By separate counts in the information the defendant was charged with two unlawful sales of intoxicating liquor, one on April 1, 1923, and the other on the 6th of

the same month. On his arraignment the defendant entered a plea of guilty to both counts. By the judgment the defendant was sentenced to imprisonment in the county jail for a term of three months on the first count, and to pay a fine of \$500 on the second count, with the alternative "in default of the payment of said \$500 that he be confined in the county jail for the period of 1 day for each \$2 of said fine." From the judgment so rendered the defendant appeals.

[1] It is contended that the superior court was without jurisdiction of the offenses charged. Section 29 of title 2 of the Volstead Act (41 Stat. 316) provides:

"Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than \$1,000, or imprisoned not exceeding six months."

Section 1425 of the Penal Code invests justices' courts with jurisdiction of "all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment." Superior courts are given jurisdiction in "cases of misdemeanor not otherwise provided for." Const. art. 6, § 5. Since a defendant may be fined in excess of \$500 for the unlawful sale of intoxicating liquor, the justices' courts are not given jurisdiction of the offense, and consequently, under the constitutional provision quoted, jurisdiction thereof is in the superior court.

[2, 3] It is urged that there is no authority for charging the commission of two misdemeanors in one information. Section 954 of the Penal Code provides:

"The indictment or information may charge two or more different offenses * * * under separate counts."

This section makes no distinction between felonies and misdemeanors, and it does not appear by what authority courts may do so.

It is contended that the penalties provided in the penal statutes of this state are controlling, rather than those of the Volstead Act. It is sufficient to say that the Wright Act (St. 1921, p. 79), adopts the penal provisions of the Volstead Act, and thereby makes them a part of the penal statutes of this state.

[4] There is an error in the judgment which is not pointed out by appellant. The provision therein to the effect that in default of payment of the fine imposed, the defendant be imprisoned 1 day of every \$2 of the fine, or 250 days, is violative of section 1205 of the Penal Code to the effect that such alternative imprisonment shall not "extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted." This error does not render the judgment wholly void, but only to the extent of

the excessive imprisonment imposed. *People v. Goscinsky*, 52 Cal. App. 62, 198 Pac. 40.

The judgment upon the second count of the information is modified by adding thereto the words "provided, however, that the duration of such imprisonment for default in the payment of said fine shall not exceed 6 months." As so modified the judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

64 Cal. App. 39

PEOPLE v. CENCEVICH. (Cr. 715.)

(District Court of Appeal, Third District, California. Oct. 4, 1923. Rehearing Denied Nov. 3, 1923. Hearing Denied by Supreme Court Dec. 3, 1923.)

1. Criminal law §374—Record held not to show prior conviction a nullity.

In prosecution for the unlawful possession of intoxicating liquor, in which the defendant was found to have been previously convicted, record held not to show that prior conviction was a nullity.

2. Intoxicating liquors §236(6½)—Evidence held to show unlawful possession.

Evidence held to sustain conviction for unlawful possession of intoxicating liquor.

3. Criminal law §742(1)—Credibility of witness for jury.

The credibility of a witness was exclusively for the jury's determination.

4. Criminal law §956(13)—Evidence held insufficient to prove tampering with jury.

Evidence on motion for new trial held insufficient to show that the sheriff was guilty of tampering with the jury.

5. Criminal law §956(13)—Affidavit stating conclusion held not to require new trial.

Affidavit stating that a conversation between a juror and two witnesses was "secret," held not to require the granting of new trial, such statement being a mere conclusion of affiant, and not a statement of fact.

On Motion for Rehearing and To Set Aside Submission.

6. Criminal law §918(9)—Counsel's absence held not to excuse failure to appear at argument.

Affidavit of appellant's counsel that he was out of the state between certain dates, and did not know that the case was on the September calendar for oral argument, held not to excuse his failure to appear at the oral argument or to file a closing brief so as to entitle appellant to a rehearing and to have order of submission set aside, since inattention to client's case, because merely of voluntary absence from the state, does not constitute such inadvertence as to excuse counsel's neglect.

7. Intoxicating liquors §222—Information not required to allege that possession was not within exceptions.

Information charging unlawful possession of intoxicating liquor need not allege that the possession was not within the exceptions contained in the Volstead Act.

8. Criminal law §959—Oral testimony admissible on motion for new trial.

Oral testimony may under some circumstances be admitted on hearing of motion for new trial.

9. Criminal law §959—Oral testimony on motion for new trial waived by failure to object.

Objection to consideration of oral testimony on motion for new trial was waived by failure to object to its admission.

10. Criminal law §991(2)—Judgment for alternative imprisonment void only to extent of excessive imprisonment.

In prosecution for unlawful possession of liquor, judgment providing that defendant be imprisoned one day for every \$2 of the fine on default in payment of fine without limiting the duration of the imprisonment to the term for which the defendant could have been imprisoned, under Volstead Act, tit. 2, § 29, held void only to the extent of the excessive imprisonment, under Pen. Code, § 1205.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

M. Cencevich was convicted of unlawfully possessing intoxicating liquor, and from judgment of conviction and order denying a new trial, he appeals. Affirmed as modified.

A. H. Carpenter, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was charged with the unlawful possession of intoxicating liquor on the 20th day of March, 1923. The information further charges that the defendant was convicted on the 13th day of February, 1923, of the offense of having the unlawful possession of intoxicating liquor. [The jury found the defendant guilty as charged, and that he had suffered the alleged previous conviction. This appeal is from the judgment of conviction and the order denying defendant's motion for a new trial.

[1] Appellant contends that the prior conviction was a nullity. Relative to the prior conviction the record shows that the complaint on which it was based was filed in the justice's court February 13, 1923; that a warrant of arrest was issued, and that the defendant was arrested, taken into court, arraigned, and entered a plea of guilty to the charge on the day the complaint was filed; that he waived time for sentence, and was thereupon sentenced to pay a fine of \$100; and that on the 14th day of February he

paid the fine, and was discharged from custody. The complaint filed in the justice's court, which was introduced in evidence by the defendant, charges the defendant with the unlawful possession of intoxicating liquor on the 12th day of February, 1923. It is not perceived on what theory it can be held that the justice's court did not have jurisdiction or that the judgment therein was a nullity.

[2] It is urged that there is no credible evidence that the defendant had the unlawful possession of intoxicating liquor as charged in the information. Two witnesses testified positively that on the 20th day of March, 1923, they searched defendant's saloon, and found intoxicating liquor behind the bar, and another witness, produced by the defendant, testified on cross-examination that the defendant served him with intoxicating liquor over the bar on both the 19th and the 20th of March, 1923.

[3] The defendant attempted to impeach this witness by showing that, prior to taking the stand, he had made statements inconsistent with the testimony given. It is here claimed that the witness was tampered with, but there is no evidence to sustain the charge except such inconsistent statements and any contradictions appearing in the witness' testimony given at the trial. The credibility of the witness was exclusively for the jury's determination.

[4, 5] Finally, it is contended that there was tampering with the jury. In support of his motion for a new trial the defendant presented certain affidavits to the effect that Joseph Serra, a deputy sheriff, was the only officer sworn to take charge of the jury during the deliberations thereof; that, Joseph W. Zwinge, sheriff of the county, conducted the jury from the jury room to a restaurant for lunch; that Zwinge there engaged in conversation with members of the jury relative to the "enforcement of the prohibition law and kindred subjects"; that Zwinge ate lunch with the jurors, conducted them back to the courtroom, and conversed with them during their deliberations; that he was present in the jury room during the deliberations of the jury for several minutes on two different occasions; and that on the first day of the trial, after the jury had been selected, "one of said jurors was in secret conversation with * * * two of the prosecuting witnesses in said action in the corridor leading from the courthouse to the courthouse annex." Serra testified that he was in charge of the jury at all times when Zwinge was present; that Zwinge was present at the time the jurors were eating lunch, but that he ate at a different table from that of the jurors, and the defendant and his attorney and others were in the restaurant at the same time; that Zwinge said nothing there about the case or the prohibition law; that, during the deliberations of

the jury, Zwinge entered the jury room to build a fire, stepped out to get a can of coal oil and then re-entered with it; that he heard nothing said by Zwinge relative to the case while the latter was in the jury room, and that the witness thought that if anything had been said he would have heard it. The court was justified in treating the testimony of Serra as a sufficient denial of all improper conduct stated in the affidavits, except the alleged "secret conversation" of one of the jurors with two witnesses for the prosecution. The statement in the affidavit that the conversation between the juror and the two witnesses was "secret" is a mere conclusion of the affiant, and not a statement of fact. What one person would consider secret another might not. The length of the conversation, the surrounding circumstances, the presence or absence of other persons in immediate proximity are not stated. Certainly a verdict should not be set aside on the ground of a witness' mere conclusion.

The judgment and the order denying a new trial are affirmed.¹

We concur: PLUMMER, J.; HART, J.

On Motion for Rehearing and To Set Aside Submission.

PER CURIAM. Appellant has filed a petition for a rehearing and, in effect, has moved the court to set aside the order of submission herein on the ground that his counsel was, through inadvertence, deprived of the privilege of arguing the cause in this court and filing a closing brief and of moving to correct the transcript on appeal.

The transcript was filed June 22, 1923. Appellant's opening brief was filed June 25. The cause was placed on the September calendar, counsel for appellant duly notified thereof, and called for oral argument September 5. No appearance was made for appellant. Respondent was granted 10 days to file points and authorities, and appellant 10 days to reply, the cause then to stand submitted. Respondent's points and authorities were served by mail upon counsel for appellant, and filed September 14. Appellant failed to file a reply brief, and on the 4th of October the judgment was affirmed.

In the affidavit of A. H. Carpenter, counsel for appellant, attached to and filed with the notice of motion to set aside the order of submission, affiant states that at some time unknown to him, after appellant's opening brief had been written and served, the district attorney called J. A. Serra, the deputy sheriff who had charge of the jury during the deliberations thereof, as a witness in rebuttal of the affidavits produced by appellant on his motion for a new trial, and caused him to be examined in relation to the charges

¹ Modified in rehearing opinion appended below.

of misconduct specified in such affidavits, and that said oral testimony was afterwards wrongfully inserted in the transcript on appeal, without appellant's knowledge or consent. The transcript on appeal, however, shows that such oral testimony was taken at the hearing of defendant's motion for a new trial on the 25th of April, 1923, and on the hearing of the motion herein counsel for appellant admitted such to be the fact.

[6] In said affidavit, for the purpose of showing inadvertence on his part in failing to appear at the oral argument or to file a closing brief, affiant states that he was out of the state from June 8th to September 27th, and did not know that the case was on the September calendar for oral argument. Inattention to his client's case, because merely of voluntary absence from the state, does not constitute such inadvertence as to excuse counsel's neglect. Notwithstanding the neglect of counsel, however, he was permitted, on the hearing of the motion herein, to argue the appeal on its merits.

Counsel for appellant insists that the record fails to show that the justice's court had jurisdiction of the action in which the alleged prior conviction was had, and, in that connection, asserts that the complaint filed in the justice's court was "never admitted, but I had it inserted in the transcript to show it was necessary to be admitted to give the court jurisdiction." In making this statement counsel is again in error. At page 124 of the transcript appears the following taken from the examination of the justice of the peace in whose court the prior conviction was had:

"Mr. Carpenter: What is the next document? A. The complaint. Q. We offer the complaint in evidence. Mr. Huberty (District Attorney): No objection. The Court: Let it be accepted."

[7] It is urged that neither the aforesaid complaint in the justice's court nor the information herein stated a cause of action in that there is no allegation in either that the defendant's possession of intoxicating liquor was not within the exceptions contained in the Volstead Act (41 Stat. 305) making the possession of such liquors lawful under certain circumstances. It was not necessary to plead that the defendant's possession was not within such exceptions. *Matter of Lieritz*, 166 Cal. 298, 135 Pac. 1129; *Ex parte Horne*, 154 Cal. 355, 97 Pac. 891; *People v. Dial*, 28 Cal. App. 704, 153 Pac. 970.

[8, 9] It is contended that it was error to permit the district attorney to introduce oral testimony at the hearing of the motion for a new trial, because section 658 of the Code of Civil Procedure provides that a motion for a new trial on the ground of misconduct of the jury "must be made upon affidavits." There are circumstances under which oral testimony may be admitted in such hearings. *Saltzman v. Sunset Tel., etc., Co.*, 125 Cal. 501, 503, 58 Pac. 169. Whether it is generally permissible to introduce oral testimony in opposition to a motion for a new trial, or whether it would have been error to admit such testimony in this case over a proper objection by defendant, need not be decided, because such oral testimony was admitted without objection. Had such objection been made and sustained by the court, doubtless the district attorney would then have offered the testimony in the form of an affidavit. The defendant must be held to have waived any objection to the consideration of the oral testimony by the court by his failure to object to its admission.

[10] There is an error in the judgment which was not called to the attention of the court prior to the hearing of the motion to vacate the order of submission. The judgment provides that the defendant pay a fine of \$600, and "in default of the payment of the fine that he serve 1 day in the county jail for each \$2 of the fine that remains unpaid." The maximum imprisonment for a second offense of the possession of intoxicating liquor is 90 days. *Volstead Act*, tit. 2, § 29. The judgment, therefore, is void to the extent that it directs imprisonment beyond the period of 90 days. *Pen. Code*, § 1205; *People v. Goscinsky*, 52 Cal. App. 62, 198 Pac. 40; *People v. Brenta*, 220 Pac. 447.

The last paragraph of the opinion heretofore filed herein, stating "the judgment and the order denying a new trial are affirmed," is stricken out and the following inserted in lieu thereof:

"The judgment of the trial court is modified by adding thereto the words: 'Provided, however, that the duration of such imprisonment for default in the payment of said fine shall not exceed 90 days,' and the judgment, as so modified, and the order denying a new trial are affirmed."

The motion to vacate the order of submission and the petition for a rehearing are denied.

64 Cal. App. 58

PEOPLE v. WHEATON et al. (Cr. 945.)

(District Court of Appeal, Second District, Division 1, California. Oct. 4, 1923. Hearing Denied by Supreme Court Dec. 3, 1923.)

1. Criminal law §1158(4)—Question of admissibility of confession was for trial court.

In a murder prosecution, where there was ample evidence to support the trial court's ruling as to the admission of defendants' confessions, the question as to such admission being primarily for the trial court, its conclusion will not be disturbed on appeal.

2. Homicide §29—Defendants' participation in conspiracy to resist arrest held sufficient to create guilt of murder of policemen in attempt to escape.

Where there was an understanding among five men to commit robbery or burglary, and if detected by officers to resist arrest, all participating in such understanding or conspiracy were equally guilty of any crime the natural and probable consequence thereof; and hence, where policemen who were taking them to the police station were killed in an endeavor to escape, all were guilty.

3. Criminal law §683(1)—Admitting evidence of robbery three days previous to killing to impeach alibi testimony not error.

In a murder prosecution, where defendants' evidence showed one was at home and the other was at the home of a third person on the night of the killing and on the three nights prior, it was not error to permit the state, in rebuttal, to impeach such evidence, to show that defendants, on one of the nights, had held up a poker game, though tending to show defendants guilty of another offense.

4. Criminal law §371(4)—Evidence of robbery three days previous to killing admissible as tending to show motive for killing.

Evidence that defendants with others had held up a poker game three days prior to the killing held admissible as tending to show a motive for homicide of two policemen.

5. Homicide §174(1)—Evidence that defendant assumed different name after killing held admissible.

On a trial for murder it was not error to permit prosecution to prove on cross-examination of one defendant's wife that she and her husband went under an assumed name after the killing.

6. Criminal law §1158(3)—Ruling of court in excusing juror conclusive on appeal.

In a murder prosecution, where a juror was excused because opposed to the death penalty as punishment, and in her evidence as to qualifications she gave contradictory answers to questions propounded in respect thereto, the ruling of the court in excusing such juror is conclusive on appeal.

7. Criminal law §1166½(7)—Question as to juror's state of mind on death penalty immaterial, in view of verdict of life imprisonment.

In a murder prosecution, where the verdict was of conviction with imprisonment for life,

the question as to the state of mind of an excused juror as to the infliction of the death penalty became immaterial.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

James Wheaton and another were convicted of first degree murder, and they appeal. Affirmed.

Fred H. Thompson, C. S. Mauk, and Chas. I. Rosin, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and Thomas Lee Woolwine, Dist. Atty., and William Clark, Deputy Dist. Atty., both of Los Angeles, for the People.

CURTIS, J. The appellants James Wheaton and Calvin Rowell, together with William A. Bringham, Willard Thompson, and Jess Wendell, were indicted by the grand jury of the county of Los Angeles for the crime of murder, alleged to have been committed on the 6th day of December, 1921. Upon motion of appellants, the court ordered that Wheaton and Rowell be tried separately from their codefendants Bringham and Thompson. Wendell was never arrested. The jury found appellants guilty of murder in the first degree, and fixed their punishment at imprisonment in the state's prison for life. Prior to judgment, appellants made a motion for a new trial, which was denied. This appeal is from the judgment of conviction and from the order denying appellants' motion for a new trial.

The indictment was in two counts, and charged the five defendants with the murder of Harry Clester in one count and with the murder of W. L. Brett in the other. The deceased were policemen of the city of Los Angeles and were on duty at the time of their deaths.

The defendant Rowell, on the afternoon of December 6, 1921, met defendant Jess Wendell at Hermosa Beach, where they were both residing at the time. Rowell was driving a Ford touring car and the two rode in said car from Hermosa Beach to the city of Los Angeles. Somewhere in the vicinity of Eighth and Flower streets, in the last-named city, they met defendants James Wheaton, William A. Bringham, and Willard Thompson. Just prior to this meeting Wheaton had met Bringham at the corner of Seventh and Flower streets, and the latter proposed to Wheaton that they two go to Hollywood, and they were on their way to take a car to Hollywood when they met Rowell and Wendell in the former's Ford machine. In the meantime Thompson had joined the party. When they met Rowell and Wendell, Wheaton, Bringham, and Thompson got into Rowell's car, saying that they had a diamond job on in Hollywood, and

that they would give Rowell a "cut in the deal" for taking them out there. Rowell drove the five men, including himself, to Hollywood. They looked the place over at Hollywood, and concluded that they would not attempt to carry out their plans to rob the same, and started to return home.

On their way back to Los Angeles, either Thompson or Bringhurst suggested that they go look over a hardware store on Stephenson avenue, with the purpose of robbing it. Whichever of the defendants made the suggestion, remarked, "For Christ's sake let's get something over there as I am broke and my wife is working and my little children have nothing for Xmas." "We can probably get some guns which Jim can sell as he is a good salesman." They drove over onto Stephenson avenue, stopped the car in front of a hardware store, and Bringhurst and Thompson got out of the car and went around to the rear of the store building. The two then returned to the car and said the job was easy, if they only had a screwdriver or something they could get in the back window. A man came out on the porch of a house on the opposite side of the street, and Rowell suggested that they had better get out of there before they all got "pinched." Thompson spoke up and said, "We can't afford to go to the can. If officers should arrest us we will stick them up, tie them and leave them." They then started up Stephenson avenue, and after they had gone about three blocks they came to a furniture store and Wendell suggested that they stop and look it over, and that there were a lot of good rugs in the store. Rowell replied that he could not make a truck out of his car and that he was going home. At this juncture Thompson said, "Holy gee, the law is after us." Rowell replied, "I'll turn here and see if it is the law." He turned on to Lavena avenue and started north, when two officers drove up in a Ford touring car and told them to stop and that they were officers. After a short conversation between the occupants of the car and the officers, during which the officers asked the men in the car where they were going and also asked to see Rowell's certificate to operate the car, one of the officers told the men in the car that they would have to take the men to the police station. At the same time this officer stepped upon the running board of Rowell's car, threw one of his legs over the rear door of the car and told them to drive to the police station. At the same time he gave directions to the other officer to follow them in the other car. After going a short distance, Rowell says about 2½ blocks, some one in the back of the car said "Stop," and Rowell stopped the car. At this time Rowell and Wheaton were on the front seat and Thompson, Bringhurst, and Wendell occupied the rear seat of the car. A scuffle

then started in the back of the car. Thompson pulled his gun on the officer, and the latter drew his gun, when Wendell grabbed it and Bringhurst jerked it out of Wendell's hand. The officer said, "Oh, don't do that." Several shots were then fired, and the officer was either pushed off the car by Wendell or fell therefrom to the street. Thompson then jumped out of the car and started to run. In the meantime the other officer had driven up in his car and called to Thompson to halt and fired at him. At this time the second officer was slightly in front of Rowell's car, but nearer the sidewalk. Shots were then fired from the rear of the car and the second officer fell. Thompson also fired at the second officer from the street. Some of Thompson's shots broke the windshield of Rowell's car and one passed through the left coat sleeve and shirt cuff worn by Rowell. Something over 20 shots were fired. Some one said, "Let's go," and Rowell started up the car. After they started Bringhurst said he killed the officer with his own gun; that he had to do it. Rowell drove away from the scene of the shooting with Wheaton still in the front seat and Bringhurst and Wendell on the back seat of the car. Thompson left the car during the shooting. The four occupants of the car drove to the southern part of the city in the vicinity of Slauson avenue, where Bringhurst buried the officer's gun. At this point Bringhurst and Wheaton got out of the car, and Wheaton took a University car for his home. Bringhurst said he would walk home. Rowell, with Wendell, drove to Hermosa Beach and arrived at Wendell's home at about 11:30 p. m. To several persons at Wendell's home they told of their trouble with the police officers. Rowell still had on the coat and shirt showing the holes made by the shot from Thompson's gun. In one of the conversations regarding the affair, Rowell said that they could not stand going to the city jail, that they would not stand investigation, and that it just meant one thing or the other. There was also a conversation carried on at this time in which both Rowell and Wendell took part and in which they each said that all of them participated in the shooting. There is no evidence that Wheaton was armed, but Rowell had purchased a gun on that afternoon and was carrying it on the night of the shooting.

Rowell and Wendell remained in Hermosa Beach a few days, during which time Rowell had a new windshield put in his car. Wendell left Hermosa, saying that he was going to San Diego. Since then his whereabouts were never definitely known. There was evidence, however, introduced at the trial, to the effect that he had committed suicide after leaving Hermosa Beach. Later on Rowell went to San Diego with his wife and child and returned to Los Angeles and went

up to room 17 at 518 Grand avenue, occupied at the time by Wheaton and Thompson, where he was arrested on the evening of December 22, 1921. Rowell was frequently seen prior to December 6th at the room of Wheaton and Thompson on West Eighth street.

Wheaton, after leaving Rowell's car on the night of the shooting, went to his home on Eighth street in the city of Los Angeles between Grand avenue and Hope street, where he and Thompson were rooming at the time. Here he found Thompson. They remained in this room all the following day, receiving their meals through a window. Some time after this Wheaton and Thompson moved to room 17 at 517 South Grand avenue, where Wheaton was arrested on December 21, 1921. Officers had been stationed inside this room, and on the afternoon of December 21st some one approached the door of this room from the outside and gave a couple of knocks. Upon being told to come in by the officers waiting within Wheaton opened the door and entered the room and was placed under arrest. On the following day Rowell approached the room, giving similar knocks and, upon being told to come in by the officers, he entered and was also placed under arrest. Both Wheaton and Rowell told the same story as to why they had come to the room, saying that some one in the restaurant below had told them that they might find work by calling at this room.

Immediately after the shooting, the two officers, Brett and Clester, were taken to the hospital, where they were both found to be suffering from gunshot wounds, from the effects of which one of the officers died in about five minutes after reaching the hospital, and the other lived only about one hour thereafter. Neither officer made any statement regarding the shooting before his death.

It further appears that on the night of December 3d, three days before the killing of the two policemen, the five men, Rowell, Wheaton, Bringham, Thompson, and Wendell, together with a sixth man by the name of Pearson, had held up a poker game near the plant of the Goodyear Rubber Company at the southern outskirts of the city of Los Angeles, from which they received between \$300 and \$400, and later went to Hermosa Beach, where they divided the money, each receiving about \$62.

[1] After the arrest of the defendants Wheaton and Rowell they were taken to the police station, and they there made statements regarding the killing of the two officers on the night of December 6th. These statements were reduced to writing and signed by each of these defendants. Later on both Wheaton and Rowell appeared before the grand jury and told substantially

the same stories as were contained in their written statements made previously at the police station. These statements made by the defendants, both at the police station and before the grand jury, were, over the objection of the defendants, admitted in evidence at the trial and read to the jury. While neither of the defendants, either at the police station or before the grand jury, admitted that they had anything to do with the actual killing of the deceased officers, or either of them, it is claimed by the defendants that the statements contained much that was damaging to the defendants' case, and that defendants were materially injured by the admission of said statements in evidence before the jury. These statements are referred to both by counsel for appellants and for the respondent as "confessions," and they will be so treated for the purposes of this opinion.

The objection to their introduction was based upon the ground that no sufficient foundation had been laid showing that they were freely and voluntarily made and were not the result of threats and coercion on the part of the officers. It is claimed, in the first place, that the statements made at the police station were signed only after repeated threats had been made that unless the defendants sign such statements they would be shot and would never leave the station alive. It is further claimed that their testimony before the grand jury was given upon the promise of some of the officers that if defendants would testify before the grand jury to the facts contained in their written statements that they would be used as state witnesses, and that no indictment would be returned against them for the murder of the two policemen. The trial court went fully into the question as to the voluntary character of these statements or confessions, not only receiving evidence in behalf of the prosecution, but defendants each took the stand and testified fully as to the conditions under which they made these confessions and also introduced other witnesses in support of their claim that these confessions were not made freely and voluntarily. At the conclusion of the evidence as to the admissibility of the confessions the court ruled in favor of their admission. The officers before whom the written statements were made and signed, and those accused of having made threats against the defendants, and those who, according to the testimony of the defendants, had made the latter promises of immunity, also testified, and their testimony on the whole was to the effect that no threats had been made against the defendants, nor were any promises or inducements made to them to induce them to make these confessions. Each of the signed confessions made by the defendants, respectively, at the police station, contains a

statement that the defendant making the same was informed that he was under arrest charged with the crime of murder, and that any statement made by him would be used against him, and he was then asked whether, after being so informed, he wished to make a statement regarding the shooting of the two police officers, to which he replied in the affirmative, and then proceeded to give his version of the killing. On the occasions when the defendants were before the grand jury and prior to the giving of any testimony by either of them, each of said defendants was informed by the deputy district attorney conducting the case that the grand jury was then investigating the killing of two police officers in the city of Los Angeles, that said defendant with others was charged with the murder of said officers, and that it was the constitutional right of said defendant to refuse to testify at said investigation, but that, in case he did so testify, his testimony given before the grand jury might be used at the trial of the action against him. After being so admonished, each defendant gave his testimony before the grand jury.

Under these circumstances the record discloses ample evidence in support of the ruling of the trial court in admitting these confessions in evidence, and, as this question was one primarily for the consideration of the trial court, its conclusions will not be disturbed by the appellate court when substantial support therefor is found in the evidence. *People v. Fouts* (Cal. App.) 214 Pac. 657.

[2] It is next claimed by appellants that the evidence is insufficient to justify the verdict, in that it fails to connect either Wheaton or Rowell directly with the killing of either of the two policemen. It is true that there is no evidence that either of the appellants actually participated in the shooting of either of the two policemen, except in the testimony of Betty Quillette, who testified that in a conversation at the home of Wendell at Hermosa Beach, shortly after the shooting, both Rowell and Wendell said that all of the five men participated in the shooting. This evidence would not be binding upon defendant Wheaton, and it also appears to be contrary to the confessions of both Rowell and Wheaton, in which they stated that all the shooting was done by those in the rear of the car. The evidence in the case, however, establishes beyond controversy that the five defendants, on the night of the shooting, were jointly engaged in an expedition of crime. All were armed except Wheaton, and they set forth on their night's work bent upon robbery or burglary, or any other crime whereby they might obtain means for the support of themselves and families. First they tried the house at Hollywood, which, after investigation,

they determined it was not safe to attempt to rob. Then they drove to the hardware store at Stephenson avenue and were frightened away by a man coming out on the porch of the house on the opposite side of the street. Then a furniture store was suggested as a place where rugs could be procured. Up to this time there was no protest from any one of the five men against any of the criminal proposals of the others, but all apparently willingly participated in all that was done, and the only reasonable conclusion that can be drawn from their actions is that they all would readily have robbed the house at Hollywood or burglarized the store on Stephenson avenue, had it been safe to attempt to do either. Rowell did object to making a truck of his car, when the proposal was made that they rob the furniture store of rugs, and said that he was going home, but this objection on his part was not to the commission of the crime, but was to the use of his car in carrying away the plunder. It was at about this state of the proceedings that they became apprehensive that the police were on their trail and decided that it was wise to leave their field of operation and to make their escape from the police in case they were being followed. In their endeavor to effect their escape the police officers lost their lives.

Admitting that neither Wheaton nor Rowell fired the fatal shot that killed either officer, or fired any shots at any officer, we find that Rowell took a most active part, not only in the use of his car in conveying the other defendants to the different places that might be robbed, but also in endeavoring to escape from the officers after they were discovered. As driver of the car, he was to get a "cut" out of the Hollywood job if it were successful. It is only reasonable to infer that he had the same understanding, or at least expectation, regarding the Stephenson avenue jobs. He drove his car wherever the others directed, and he knew full well the purposes of their trips and anticipated a share in the proceeds of their ventures. After the officers were killed he and three others of the party made their escape in his car, driven by him.

Wheaton, while not as active as the others, was fully aware of their intentions and the purposes of their trip both to Hollywood and to Stephenson avenue. When one of the five made the suggestion that "We can probably get some guns and Jim can sell them," he evidently meant Wheaton, and the latter acquiesced in this scheme, at least by his silence. He was the roommate of Thompson, and was the friend and companion of all the others and with them, three nights before the murder of the two officers, he had held up a poker game near the Goodyear Rubber Works, and had participated in the spoils of the holdup. His

presence with the other defendants on the night of December 6th can only be accounted for upon the theory that he was one of them and stood ready to participate in any crime which they might decide to undertake. The evidence shows that on the night of December 6th there was a thorough understanding among the five men to commit the crime of robbery or burglary, or both such crimes, and if detected by the officers to resist arrest, even at the risk of taking the lives of those who should attempt to arrest them. Under such a state of facts, all who participated in any such understanding or conspiracy are equally guilty of any crime which is the natural and probable consequence of such an enterprise, whether he personally commits the act or whether its commission is done by any one of his associates in carrying out the common purpose. *People v. Vasquez*, 49 Cal. 560-562; *People v. Lawrence*, 143 Cal. 148, 76 Pac. 893, 68 L. R. A. 193; *People v. Woods*, 147 Cal. 265, 81 Pac. 652, 109 Am. St. Rep. 151; *People v. Kauffman*, 152 Cal. 331, 92 Pac. 861.

We would call attention particularly to the case of *People v. Kauffman*, supra, as a case very much in point. In that case six men in San Francisco decided to rob the safe of the Cypress Lawn Cemetery in San Mateo county. Upon arriving at the cemetery they found an armed man upon the premises and decided to return to San Francisco, taking with them the burglars' tools with which they had provided themselves for the purpose of breaking into the safe. On their return trip to San Francisco they separated into two groups of three men each for the purpose of lessening the danger of detection. All of the party were armed with the exception of Kauffman, who had attempted to procure a gun but had failed. At the time of the shooting, however, he was carrying part of the burglars' tools. During their return trip to San Francisco, an attempt was made to arrest them by an officer named Robinson. One of the six men, not the defendant, fired and killed Robinson. It was held that the killing of Robinson was an act in furtherance of a common design or conspiracy of the six defendants to commit an unlawful act, and that therefore Kauffman, as one of said conspirators, was criminally responsible for such killing, although he took no active part in the attack upon Robinson.

The case at bar presents a much stronger set of facts against the appellants than are to be found in the latter case against Kauffman. Measuring these facts by the principles enunciated in the Kauffman and other cases, they are sufficient to sustain the verdict of the jury finding the appellants guilty of murder.

[3, 4] There was no error on the part of the court in admitting evidence of the rob-

bery of the poker game on the night of December 3, 1921. The defendant Rowell and his wife both testified that Rowell was at his home at Hermosa Beach on the night of December 6, 1921. And on cross-examination they testified that he was at his home on the nights of December 3, 4, and 5, 1921. Other witnesses for the defense testified that the defendant Wheaton was at the home of one Patterson at 1036 Santee street, Los Angeles, from 7 o'clock until 11 o'clock on the night of December 6th. On cross-examination they testified that Wheaton was at this same place on the nights of December 3, 4, and 5, 1921. The prosecution in rebuttal, and for the purpose of impeaching the defendant Rowell and the other witnesses who testified as to the whereabouts of Rowell and Wheaton on the night of December 3d, then undertook to show that neither Wheaton nor Rowell were at the places testified to by these witnesses on the night of December 3d, but, on the other hand, that they, with four other men, on the night of December 3d, held up a poker game near the Good-year Rubber Works. It is true that this evidence tended to show that Wheaton and Rowell were guilty of an offense other than that set out in the indictment, but this did not render it inadmissible. *People v. Argentos*, 156 Cal. 720-725, 106 Pac. 65. This testimony was also admissible as tending to show a motive on the part of the defendants for the homicide of the two policemen. It explained why the defendants were so anxious to prevent arrest, and also explains Rowell's statement that they could not stand investigation. Knowing that they were all guilty of the crime of robbery, it is easy to understand why they might even take life before they would suffer themselves to be arrested, their crime found out, and the severe punishment meted out to them which the law affixes to the crime of robbery. *People v. Pool*, 27 Cal. 572; *People v. Prantikos*, 164 Cal. 113-116, 127 Pac. 1029.

[5] Neither was there error on the part of the court in permitting the prosecution to prove on cross-examination of Mrs. Rowell, wife of defendant Rowell, that she and her husband went under an assumed name between December 6, 1921, and the time of Rowell's arrest. This testimony was admissible as tending to show that said defendant was endeavoring to conceal his identity after the commission of the crime.

[6, 7] The juror, Mrs. Dohs, was excused by the court for the reason that she was opposed to the infliction of the death penalty as a punishment for crime. It is claimed by appellants that her evidence as to her opposition to the death penalty was based upon a matter of principle with her and not upon any conscientious opinion entertained by her as to this mode of punishment. The

juror, in her evidence as to her qualifications to serve on the jury, gave contradictory answers to questions propounded to her respecting her opinions regarding the infliction of the death penalty. On this evidence the court excused the juror. This ruling of the court is conclusive upon the appellate court. *People v. Riggins*, 159 Cal. 113, 112 Pac. 862; *People v. Ryan*, 152 Cal. 364, 92 Pac. 853; *People v. Schoon*, 177 Cal. 678, 171 Pac. 680. However, in view of the fact that the jury in their verdict fixed the punishment of the defendants by imprisonment in the state's prison for life, the question as to the state of mind of the jurors upon the infliction of the death penalty became immaterial.

A number of other objections are made by appellants against the judgment in this case, all of which have been considered by us, and we find no merit in any of them, neither do we find any error in the ruling of the court in giving instructions, or in refusing proposed instructions offered by the appellants.

The judgment and order denying a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

192 Cal. 398

JAMES ROLPH CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 10814.)

(Supreme Court of California. Nov. 14, 1923.)

1. Admiralty ⚓20—Constitutional law ⚓56 —Amendment of federal Judicial Code as to rights under state compensation laws held unconstitutional.

The amendment of Judicial Code, §§ 24, 256, by Act Cong. June 10, 1922, making rights conferred by state compensation laws exclusive and depriving the district court of jurisdiction over cases arising out of injuries to or death of persons other than the members of the crew, violates Const. U. S. art. 3, § 2, because it is discriminatory and attempts to deprive federal courts of jurisdiction over certain admiralty and maritime cases while vesting them with jurisdiction in others.

2. Admiralty ⚓20—Injuries to stevedores not within workmen's compensation acts.

A stevedore who works on a vessel upon navigable waters does not have a common-law right of action for an injury which may be withdrawn and he be permitted or required to take under a workmen's compensation act.

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Joseph Hayes and others for the death of Eugene Hayes, opposed by James Rolph Company, employer, and the General Accident, Fire & Life Assurance Corporation, Limited, insurance carrier. The Industrial Accident Commission made an order awarding compensation, and opponents bring certiorari. Award annulled.

Redman & Alexander, of San Francisco (W. C. Bacon, of San Francisco, of counsel), for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

WASTE, J. This is a proceeding in review to test the validity of an award made by the respondent Industrial Accident Commission to the dependents of Eugene Hayes, who died as the result of injuries sustained while working as a stevedore upon a vessel afloat on the navigable waters of the bay of San Francisco. His employer at the time, petitioner James Rolph Company, carried workmen's compensation insurance with General Accident, Fire & Life Assurance Corporation, Limited, who is the other petitioner. This policy is a combined employers' liability and workmen's compensation policy, which obligates the insurance carrier to pay the award made by the respondent Commission in this case, if the validity of such award shall be sustained.

Eugene Hayes, the deceased employee, at the time of his death, was in the temporary

employ of the James Rolph Company, which corporation was, among other things, an importer of coal. On September 5, 1922, Hayes was employed and was engaged in his capacity as stevedore upon a vessel, the West Islip, which was discharging a cargo of coal, brought from Newcastle to San Francisco, consigned to the James Rolph Company. The vessel was moored at pier 15, one of the piers in the navigable waters of the bay of San Francisco. The cargo of coal was being unloaded from the hold of the vessel by stevedores, of whom Hayes was one. On the morning of the accident Hayes had gone upon the vessel; but, before going below to the hold where he was required to work, he secured an iron plate used in the unloading process, and in attempting to throw the plate below, overbalanced and fell into the hold of the vessel, sustaining injuries from which he died. The Industrial Accident Commission found that Hayes, while employed as a stevedore, sustained injuries occurring in the course of and arising out of his employment. Over the objection of the petitioners that the Commission had no jurisdiction over the claim for death benefits, the Commission made an award in favor of the applicants below for a death benefit amounting to the sum of \$3,900. Within due time thereafter the defendants filed an application for a rehearing, alleging that the Commission in making the award acted without and in excess of its jurisdiction. A rehearing being denied, petitioners have brought this proceeding.

It is the contention of the petitioners that at the time of the accident and injury to Eugene Hayes he was engaged in the performance of a maritime contract, and in the actual performance of work of a maritime nature, thus divesting the respondent Industrial Accident Commission of jurisdiction in the premises. In response, and in opposition, to this contention that the Commission was without jurisdiction to make an award in this case under the State Workmen's Compensation Act (St. 1917, p. 831) by reason of a conflict of the provisions of such act with the federal law maritime, respondent advances five points. Briefly stated, the first four are: (1) That the Commission has jurisdiction in the premises in that the employer voluntarily elected, in the manner prescribed by section 70 of the California Workmen's Compensation Act, to bring its employees under said act; (2) that the petitioning insurance carrier is the sole party in interest, and is directly and primarily bound by its policy contract, and is estopped to repudiate an obligation voluntarily assumed for a valuable consideration; (3) that the Industrial Accident Commission has jurisdiction by virtue of sections 24 and 256 of the Federal Judicial Code, as originally enacted October 6, 1917

(chapter 97, 40 U. S. Stats. 395 [U. S. Comp. St. §§ 991, 1233]); (4) that the Commission has jurisdiction in that the application of the California Workmen's Compensation Act does not contravene the essential purpose and the characteristic harmony and uniformity of the general maritime law in its interstate and international aspects.

At the time this petition was filed there were pending in this court two proceedings in certiorari which have since been decided and which dispose of the issues raised by this petition and the four answering contentions of the respondent just stated. *Alaska Packers' Ass'n v. I. A. C. and J. Hansen* (Cal. Sup.) 218 Pac. 561, and *Zurich General Accident, etc., Co. v. I. A. C. and Jennie A. Denny* (Cal. Sup.) 218 Pac. 563. Because time for a rehearing had not elapsed when the respondent Commission filed its answer in this matter, it reasserted its contentions 1 and 2 referred to. Points 3 and 4 have been reasserted by the Commission to save them for the record in the case if the present proceeding should later be carried to the Supreme Court of the United States; its declared intention in that regard being to secure a reversal, if possible, of the rule laid down in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, and *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145. We are satisfied with the conclusions reached and announced in the *Alaska Packers Case* and in the *Zurich Case*, supra. They satisfactorily dispose of the contentions thus far noted in this proceeding.

The fifth and last contention of the respondent, while adverted to in the *Alaska Packers Case*, supra, was not directly decided. It is that the act of Congress, approved June 10, 1922 (42 Stat. 634), amending sections 24 and 256 of the Judicial Code, as enacted in 1917, confers jurisdiction upon the Industrial Accident Commission in cases like that involved in this proceeding. The Judicial Code, as it stood prior to October 6, 1917 (sections 24 and 256), vested the United States District Court with original jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," and provided that the jurisdiction thus vested in the courts of the United States in such cases and proceedings "shall be exclusive of the courts of the several states." In a proceeding involving an attempt of the Workmen's Compensation Commission of New York to assume jurisdiction in the case of a stevedore receiving injuries which resulted in his death, while unloading a ship lying in navigable waters, the Supreme Court of the United States held that the work of a stevedore, in which work the decedent Jensen

was engaged, was maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime, and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 217, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, citing *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59, 60, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157. Jurisdiction was, therefore, denied to the Workmen's Compensation Commission.

Following the *Jensen Case*, Congress, on October 6, 1917, amended the Judicial Code, sections 24 and 256, by the insertion in each section of a clause purporting to save "to claimants the rights and remedies under the workmen's compensation law of any state." Chapter 97, 40 U. S. Stats. 395. This amendment to the Judicial Code was held by this court to be unconstitutional in that it violated article III, section 2, of the federal Constitution extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction. *Sudden & Christenson v. I. A. C.*, 182 Cal. 437, 188 Pac. 803. In a case involving the same question the United States Supreme Court also held the amendment unconstitutional, declaring it beyond the power of Congress to authorize and sanction action by the states in prescribing and enforcing rights, obligations, liabilities, and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145.

[1] Following these decisions the Judicial Code was again amended. On June 10, 1922, Congress once more attempted by re-enactment of sections 24 and 256 of the Code to save to claimants for compensation for injuries to, or death of, persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation laws of the various states. The act provided that such rights and remedies when conferred by workmen's compensation laws should be exclusive, and "that the jurisdiction of the District Courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any state, district, territory, or possession of the United States." 42 U. S. Stats. 634. In our opinion the Judicial Code as last amended is still subject to the objections pointed out by this court in *Sudden & Christenson v. I. A. C.*, supra, and by the federal Supreme Court in *Knickerbocker Ice Co. v. Stewart*, supra. In effect, the last amendments do not differ from the earlier enactments, except that the master

and members of crews are excluded from their operation, and the state compensation laws are made the exclusive remedies. Because of these exceptions the statute is now more repugnant than it was before the last amendments, for the reason that it is discriminatory, and attempts to deprive the federal courts of jurisdiction over certain admiralty and maritime cases while vesting them with jurisdiction in others. As was pointed out in *Sudden & Christenson v. I. A. C.*, supra, the federal Constitution provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. It has been many times held that the work of a stevedore is maritime in its nature, and the rights and liabilities of the parties connected therewith are matters which are within the admiralty jurisdiction of the United States. *Southern Pacific Co. v. Jensen*, supra; *Atlantic Transport Co. v. Imbrovek*, supra.

Respondent admits that by this amendment "Congress retracts the scope of the law maritime and the jurisdiction of the United States courts in admiralty so that there is no longer either a substantive maritime law or an admiralty jurisdiction in the federal courts which shall conflict with the application of state workmen's compensation acts to longshoremen." In addition to what we have already said, an answer to this proposition is to be found in a decision of the Supreme Court of the state of Washington, which was recently called upon to consider the exact question. "By this amendment," says the Washington court, "Congress attempted to take from the District Courts jurisdiction where the workmen's compensation law of any state, district, or territory had given a remedy. It was an attempt, in effect, to bring within the workmen's compensation law of any state or territory a branch or a part of the admiralty jurisdiction of the United States. * * * But Congress has not the exclusive right in determining where matters which are within the admiralty jurisdiction of the United States shall be adjudicated. Article 3, § 2, of the federal Constitution, provides in part as follows: 'The judicial power shall extend to * * * all cases of admiralty and maritime jurisdiction.'" The court then goes on to review a number of leading cases decided by the Supreme Court of the United States relating to the subject, and says:

"In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, the 1917 amendment, as above stated, was held to be unconstitutional. The same reasons which defeated the constitutionality of that act would apply here to the effect that the state law cannot encroach upon admiralty matters, where to do so would work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in

its international and interstate relations. This court is not holding the 1922 amendment, wherein it attempts to divest the district court of jurisdiction, of no effect. The more precise question is whether the state has a right to encroach upon the general maritime law in a way that would affect its harmony and uniformity in its interstate relations. * * * The bringing of an employer engaged in the stevedore business within the provisions of the Industrial Insurance Act would take from the admiralty jurisdiction conferred by the federal Constitution upon the United States and vest it in the state. As we read the decisions of the federal Supreme Court, this may not be done, because to do so, as pointed out in *Southern Pacific Co. v. Jensen*, supra, and *Knickerbocker Ice Co. v. Stewart*, supra, would work material prejudice to the characteristic features of the general maritime law, and interfere with the proper harmony and uniformity of that law in its international and interstate relations." *State v. W. C. Dawson & Co.*, 122 Wash. 572, 211 Pac. 724.

The opinion of the Washington court, above quoted, was first rendered in department. On rehearing, the holding in the department opinion was adhered to. *State v. W. C. Dawson & Co.*, 122 Wash. 572, 212 Pac. 1059.

[2] In this case, as in the Washington case, reliance has been placed upon a line of decisions which hold that where a stevedore is working on the dock, which is but an extension of the land, and there receives his injury, he has a common-law right of action which may, under certain circumstances, be withdrawn and he be permitted or required to take under a workmen's compensation act. *State Ind. Comm. of N. Y. v. Nordenholt Corp.*, et al., 259 U. S. 263, 42 Sup. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013. That case clearly differentiates the contention made by respondent and points out the line of demarcation between those cases which fall strictly within the maritime jurisdiction and those which, because of their nature, are cognizable under state statutes. A stevedore who works upon a boat or upon navigable waters does not have a common-law right of action which may be withdrawn and he be permitted or required to take under a compensation act. In the *Nordenholt* case the distinction was pointed out, and the court said:

"When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty

ty jurisdiction; but not so when the accident occurs on land."

It follows, therefore, that the respondent Industrial Accident Commission acted without and in excess of its jurisdiction in this matter.

The award is annulled.

We concur: WILBUR, C. J.; LENNON, J.; KERRIGAN, J.; MYERS, J.; SEAWELL, J.; LAWLOR, J.

64 Cal. App. 81

HENDERSON et al. v. PALMER UNION OIL CO. et al. (Civ. 4731.)

(District Court of Appeal, First District, Division 2, California. Oct. 8, 1923. Hearing Denied by Supreme Court Dec. 6, 1923.)

Dismissal and nonsuit — 60(1)—Court without discretion to deny dismissal for nonprosecution for 5 years after answer, though verification defective.

Under Code Civ. Proc. § 583, requiring dismissal of an action not brought to trial within 5 years after answer filed, the court has no discretion but to grant a motion for dismissal after the lapse of 5 years, and is without jurisdiction to entertain plaintiff's motion to strike the answer because not properly verified.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by E. E. Henderson and others against the Palmer Union Oil Company and others. From an order dismissing the action, plaintiffs appeal. Affirmed.

Peck, Bunker & Cole and Henry C. McPike, all of Oakland, for appellants.

R. P. Henshall, of San Francisco, for respondents.

LANGDON, P. J. This is an appeal by the plaintiffs from an order of the trial court dismissing the action under the provisions of section 583, Code of Civil Procedure. The order was made upon the motion of the defendants based upon the fact that the cause had not been brought to trial within 5 years after the filing of answers to the complaint.

The following facts appear without dispute: The complaint joined several parties as defendants and on September 8, 1917, answers of the said defendants were filed. There had been no stipulation between the parties extending the time for the trial of the action beyond the period of 5 years after answer filed. In September, 1922, defendants made their motion for the dismissal of the action. Upon the hearing of the said motion the plaintiffs orally moved the court to strike from the files the answers of the defendants "upon the ground that the said original complaint being duly verified,

the same required a verified answer, and that none of said answers was verified according to law, and there was no verified answer on file by any defendant in said action." The trial court granted the motion of the defendants and denied the motion of the plaintiffs.

Upon this appeal, the appellants urge, first, that the verifications attached to the answers are defective; that "verified answers to verified complaints are not only a positive and mandatory requirement of the law, but they are jurisdictional; they are the condition precedent upon which the law admits defendants to the right to be heard; that the answers on file herein, lacking verification, are not answers and would not have interrupted default if plaintiffs had chosen to take it; they might have been stricken from the files and are not the answers contemplated by section 583, Code of Civil Procedure, and did not start running the period of limitation therein applied."

For the purpose of this appeal only, let us concede that the verifications attached to the answers did not comply with the statute. The question is then presented: Does the absence of a verification affect the jurisdiction of the court? In the case of *Butterfield v. Graves*, 138 Cal. 155, 158, 71 Pac. 510, 511, the court said:

"If the answers were not properly verified, that was not a reason for sustaining a demurrer to them. In such case the court could entertain a motion to strike out, but the answers, whether properly verified or not, are pleadings in the case."

In the case of *Security Trust & Savings Bank v. Fidelity & Deposit Co.*, 184 Cal. 173, 176, 193 Pac. 102, 103, it was said:

"The failure to verify the petition of appointment in accordance with the requirements of section 1763 of the Code of Civil Procedure amounted to no more than a defect in pleading, and the verification was not a jurisdictional requirement for the making of the appointment. Where parties proceed to trial upon an unverified petition or answer without objection thereto, they are held, by so doing, to waive their right to object to the want of verification. *People v. Reis*, 76 Cal. 269, 275, 18 Pac. 309; *Hill v. Nerle*, 29 Cal. App. 473, 156 Pac. 981. It appears that after the filing of the petition for appointment as guardian, notice was duly given and a hearing was regularly held, and the defect in pleading was therefore waived, and, no want of jurisdiction being disclosed on the face of the record, the order of appointment cannot be collaterally attacked. *Isaacs v. Jones*, 121 Cal. 257, 261, 53 Pac. 793, 1101; *In re Lundberg*, 143 Cal. 402, 77 Pac. 156."

The trial court had no discretion but to dismiss the action at the time the motion of defendants was made, because more than 5 years had elapsed from the time of the fil-

ing of the answers, and, had it refused to make such an order, would have been restrained by prohibition from proceeding to try the cause or compelled by writ of mandate to make an order of dismissal. *City of Los Angeles v. Superior Court*, 185 Cal. 405, 197 Pac. 79; *Larkin v. Superior Court*, 171 Cal. 719, 154 Pac. 841, Ann. Cas. 1917D, 670; *Boyd v. S. P. R. R. Co.*, 185 Cal. 344, 197 Pac. 58; *Anderson v. Superior Court*, 187 Cal. 95, 200 Pac. 963. Conceding that the verification of the answers was insufficient, the remedy of the plaintiffs was to move to strike out the answer or to move for judgment on the pleadings. *Butterfield v. Graves*, supra; *Silcox v. Lang*, 78 Cal. 118, 121, 20 Pac. 297. But such motion should have been made within the 5-year period. It involved judicial action, which the court had lost the power to take after the lapse of 5 years; its only power in said action after such lapse of time was to enter an order of dismissal. The order denying plaintiffs' motion to strike out the answers was properly denied therefore.

The order dismissing the action is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

64 Cal. App. 121

PEOPLE v. DEMERA. (Cr. 1106.)

(District Court of Appeal, First District, Division 2, California. Oct. 15, 1923. Hearing Denied by Supreme Court Dec. 13, 1923.)

1. Criminal law § 742(2)—Whether witness was accomplice held under conflicting evidence for jury.

In prosecution for arson, where there was conflict in evidence regarding the relations of witness, the question whether he was an accomplice was for jury.

2. Witnesses § 345(4)—Defense could show joint charge against witness and dismissal thereof as affecting credibility.

In prosecution for arson, where a witness had been jointly charged with defendant, and was shown to have been the originator of the crime, but the charge against him had been dismissed, defendant had the right, while such witness was on the stand, to bring those facts before the jury to attack his credibility.

3. Criminal law § 1186(4)—Controversy as to credibility of state witness held not to result in miscarriage of justice.

In prosecution for arson, where defense showed that a charge against witness had been dismissed as to him before taking the stand, and such examination thoroughly exploited witness' criminality, notwithstanding controversy of counsel thereon, in which defendant claimed the court came to the state's rescue and impressed on jury that defense was wrong, held,

that there was no miscarriage within Const. art. 6, § 4½.

4. Criminal law § 511(3)—Circumstantial evidence held sufficient to corroborate evidence of accomplice.

In prosecution for arson, circumstantial evidence, from which inferences could be drawn tending to connect defendant with the crime, held sufficient to corroborate evidence of an accomplice, within Pen. Code, § 1111.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Joe Demera was convicted of arson, and he appeals. Affirmed.

H. L. Meyers and Gallaher, Simpson & Hays, all of Fresno, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen. (Philip Conley, of Fresno, of counsel), for the People.

NOURSE, J. Defendant was convicted on an indictment charging the felony of burning his residence with the intent to defraud an insurance company.

The facts are that defendant owned a store in the city of Fresno, where he conducted a grocery business, and lived with his family in a house adjacent to and connecting with the store building and having a common wall. On the night of February 5th or the morning of February 6, 1922, at about 1:45 o'clock a. m., his house was discovered to be on fire from a fire originating in the basement of the house. The defendant and his family had gone to Sanger at 11 o'clock a. m. of the 5th day of February, being a Sunday, to visit some friends in that town. They arrived there about noon, and remained until about midnight or near 1 o'clock a. m. of February 6th, when they returned to Fresno and found their house on fire. The defendant, his wife, and two sons were immediately arrested and taken to headquarters, where they were interrogated concerning the origin of the fire, and released about 5 a. m. of that morning. On the 19th day of April one Caiazza and one Guisto were arrested, and charged with burning a house owned by one Holcomb. In the course of their trial it was shown that Caiazza, an insurance agent, had engaged Guisto to burn the home of Holcomb, in conspiracy with said Holcomb for the purpose of obtaining the insurance upon the premises, but that Holcomb had informed the police and fire authorities of the city of Fresno of the proposal, and all subsequent actions were taken under their directions. The fire was discovered soon after it started, and the two defendants, Caiazza and Guisto, were tried and convicted. See *People v. Caiazza* (Cal. App.) 215 Pac. 80. When the arrest of Caiazza and Guisto was made the police officers went to the deposit box of Caiazza, and procured his papers. Among them they found a receipt

signed by one Tresca for the burning of the house of defendant in this case. Upon obtaining this information the defendant Demera was arrested and indicted. In two former trials the jury failed to agree. Upon the third he was found guilty.

On this appeal it is urged that there was no independent corroborating evidence of the testimony of the accomplices sufficient to justify the conviction. The argument is that Guisto, having confessedly been employed to assist Tresca in the actual burning of the building, and having arranged with Tresca to meet with him at a particular hour of the night for that purpose, was an accomplice with Tresca, although at the last moment he backed out, pleading that he was too sleepy to attend to the affair that evening. In addition to this, the appellant complains of the conduct of the special prosecutor and of the trial judge, and cites many instances of statements of both which are claimed to have been prejudicial to the appellant.

[1] The further point is made that the trial court committed error in the instructions which were given regarding the subject of accomplices. Particular criticism is made of those instructions which told the jury that the witnesses Caiazza and Tresca were both accomplices in the commission of the crime, and of the court's refusal to give the same instruction regarding the witness Guisto. In lieu of the instruction requested by the appellant as to this witness the court instructed the jury that it was a question of fact for them to determine whether or not a witness was an accomplice. There was some conflict in the evidence regarding the relations of Guisto, and for that reason the trial court left the question with the jury. Though it must be conceded that the conflict is so slight that it is almost negligible, nevertheless, the rule is well established that where there is any conflict or where the facts are susceptible of different inferences the question as to whether the party is an accomplice must be left to the jury. 16 Corpus Juris, § 1370, pp. 677, 678.

[2, 3] Upon the second point the record shows that the feeling between the respective counsel was intense, and the verbal clashes were frequent and bitter. It is contended that in these controversies the trial court came to the rescue of the special prosecutor, and necessarily gave to the jury the impression that counsel for the defense were in the wrong. Particular stress is laid upon the occurrence relating to the witness Caiazza. He had been jointly charged with the appellant in this action, and was shown to have been the originator of the crime, but, before he took the stand to testify for the prosecution, the court had, on motion of the state, dismissed the charge against him. While he was upon the stand the counsel for the defense endeavored to bring these facts before

the jury in order to attack his credibility as a witness, which, of course, they had a right to do. It is contended that the court and the special prosecutor took offense at this, and that the controversy which arose was prejudicial to the defense. But here the examination had thoroughly exploited the criminality of the witness Caiazza, and we cannot believe that the jurors did not fully understand his record or that appellant's case was seriously prejudiced by the rulings of the court in this connection. Many other instances of misconduct on the part of the special prosecutor are referred to, but, while this conduct does not meet our approval, we are satisfied that, on the whole, the error complained of did not result in a miscarriage of justice within the meaning of section 4½ of article 6 of the Constitution.

[4] The first point relates to the sufficiency of the independent evidence offered to corroborate the testimony of the accomplices. It is conceded that, under section 1111 of the Penal Code, the conviction cannot be sustained upon the testimony of the accomplices, unless it is corroborated by other evidence tending to connect the appellant with the commission of the crime. It cannot be disputed that the testimony of the witness Guisto was sufficient for this purpose, but the appellant insists that the facts so clearly show that this witness was an accomplice that the jury could not take his testimony as corroborating that of the witnesses who are conceded to have been accomplices. Because we are inclined to agree with the appellant's position that the witness Guisto was in fact an accomplice, it is necessary to examine the other evidence, which was offered, to see whether there was sufficient evidence outside of the testimony of the witnesses Caiazza, Tresca, and Guisto to meet the demands of the code section.

The "other" evidence upon which the state relies consists of the showing that shortly before the fire the appellant obtained additional insurance upon his premises through the agency of the witness Caiazza; that the proofs of loss made by appellant after the fire were greatly in excess of the value of the property lost or damaged in the fire; that the appellant, contrary to his usual custom, closed his store and the adjoining home on the Sunday of the fire, and took his entire family on a visit to friends in the country; that, when he returned some time after 1 o'clock at night the fire had occurred, and he was arrested with a newly filed key in his possession; that the party or parties who started the fire had entered the premises with a key or keys belonging to the appellant; and, finally, that about two months after the fire the witness Tresca had acknowledged in writing the receipt from the appellant of \$250 in payment for the house "which I put fire the day 5-2-1922," meaning February

5, 1922, and that Calazza then loaned the appellant \$325, and received a note from the appellant for \$500, and later his postdated check in the same amount. This transaction was explained by Calazza as having been in payment for their services in firing the premises—that he advanced to Tresca \$175 as a part of the \$250 covered by Tresca's receipt, the balance being in goods delivered by appellant from his store, and that this sum of \$175, with the sum of \$325 which he loaned the appellant, was covered by the \$500 note and the check in the same amount which followed.

All this evidence is circumstantial, and is of value only when followed by the inferences which the jury might draw as tending to connect the appellant with the commission of the crime. Though the evidence is meager, we think it is sufficient to meet the demands of the statute.

Other points do not require consideration. Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

64 Cal. App. 144

PEOPLE v. WILLIAMS. (Cr. 1111.)

(District Court of Appeal, First District, Division 2, California. Oct. 17, 1923.)

1. Criminal law §111(5)—Showing on record as to grounds for new trial held to control over clerk's recital.

The clerk's recital that a new trial was granted because the verdict was contrary to law will not prevail over a record clearly showing that the parties at all times contemplated the issue of the sufficiency of the evidence, and questions of law only incidentally.

2. Criminal law §935(1)—Granting new trial held within province of trial court.

It is within the province of the trial court to grant a new trial for insufficiency of evidence to warrant conviction.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Charles T. Williams, alias James T. Williams, was convicted of failure to provide for his minor child, and the state appeals from an order granting a new trial. Affirmed.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and Ezra W. Decoto, Dist. Atty., and Charles Wade Snook, Deputy Dist. Atty., both of Oakland, for the People.

C. A. Cogswell, of Berkeley, and Wm. F. Cleary, of San Francisco, for respondent.

NOURSE, J. This is an appeal by the state from an order of the trial court granting the defendant a new trial after his conviction upon an information charging him with a violation of section 270 of the Penal

Code. A new trial was granted by the trial court upon the ground that the verdict was contrary to the law and the evidence. Defendant was charged under the section of the Code with a failure, without lawful excuse, to furnish his minor child with necessary food, clothing, shelter, and medical attendance. The prosecution thus assumed to prove the omission on the part of defendant to make provision for his minor child in the four instances specified in the information. At the close of the people's case the defendant moved the court to advise the jury to bring in a verdict in favor of the defendant, on the ground that the evidence was insufficient to convict the defendant. The court then charged the jury as follows:

"Ladies and gentlemen of the jury: The court in this case deems the evidence insufficient to warrant a conviction, and the court now advises you to acquit the defendant. You, however, are not bound by the advice of the court. The case is submitted to you under the advice of the court to acquit this defendant because of the insufficiency of the evidence, under the statute, to justify a conviction; but, as I have said, the jury is not bound by the advice of the court."

The court thus left the matter with the jury, without further instruction on the law of the case. The jury disregarded the advice of the trial court, and brought in a verdict of guilty.

[1] On this appeal the state assumes that the only question involved is one of law, and predicates its argument upon a misconception of the record. From the reporter's transcript it appears that respondent's motion was made upon the ground that the evidence was insufficient to convict the respondent, and from the clerk's transcript it appears that the charge to the jury, as above quoted, was made upon the same ground. Thereafter the respondent moved for a new trial upon the ground that the verdict was not sustained by the evidence. The trial court then asked counsel for the respondent if he did not mean that the verdict was contrary to the law and the evidence, and the motion was thus amended. In ruling upon the motion the trial judge then stated that it was his opinion that the evidence was insufficient to justify the verdict, and that the new trial was granted upon the ground that the verdict was contrary to the law and the evidence. By referring to a recital of the proceedings made by the clerk of the court, the state has made it appear that the new trial was granted only upon the ground that the verdict was contrary to law; but the record is so clear in showing the grounds of the motion when made, and the terms of the order of the trial court in granting the motion, that we must conclude that the clerk's recital was error. In fact, the entire record shows that the

parties at all times contemplated that the issue before the court was the insufficiency of the evidence and that questions of law were merely incidentally involved.

The story of the case, as developed by the people, is that the respondent and the complaining witness were married on July 3, 1921, and immediately took up their abode with the wife's parents. A child was born of this marriage on May 30, 1922. The respondent and his wife continued to live together at the home of the wife's parents until about June 23, 1922, when they separated for reasons which do not appear. A few months thereafter respondent's wife swore to the complaint which is the basis of the information on which he was tried. At that time the respondent was a young man of 19 years of age, his wife was 17, and the minor child was a baby of 3½ months. From the testimony of the wife and mother of the child it appeared that from the date of its birth it had nursed from its mother, and had required no food other than she was able to give it; that some time prior to its birth, and while the husband and wife were living amicably together, an aunt of the wife presented her with all the clothes which were necessary or required for the child; that at no time since its birth and until the time of the trial had the child required any medical attendance; that continuously since the birth of the child it had lived with its mother in the home of the mother's parents, and no charge had been made by them for the shelter of either the mother or child. It also appears that no specific request had at any time been made of the respondent to furnish to the child food, clothing, shelter, or medical attendance, and the respondent had never been informed that the child was in need of food, clothing, or medical attendance. On the other hand, it appeared from the state's own witnesses that the respondent was ready and willing, and had offered, to make a home for both the mother and child, if she would leave her parents and take up her abode with him.

It is said in the appellant's brief that the respondent informed his wife that he would rather go to jail than support his child. But this statement, appearing in respondent's letter to his wife, must be read with the entire letter, from which we quote in part:

"My Dearest Wife: Just a few lines to you, Esther, to let you know that I am still thinking of you and my son. I have been working right along, and I have got a nice job. If the Lord only will give me my wife back again, it would not be so lonesome for me; but what's the use of wishing and praying to get my wife back. * * * I have been a man to my wife all the time, and God cannot help me to be any more man than I am now, and, as I told you before, that I was willing to go through hell for you and my son, if you would come and live with me. No; you would rather listen to your mother.

* * * Well, I am sorry that I cannot come up to see my son, because the mother of the child don't love his father, or got any use for him, so therefore I shall stay back. So the child is yours, and I wou'nt trubble you at all. But, as I told you before, not to make any more trubble for me about that child, that I would leave town or go to jail first. I have told you already what I would do to support the child if you would come and live with me."

[2] On this showing the trial court reached the conclusion that the evidence was insufficient to justify a conviction, upon the theory that the prosecution failed to prove that the respondent had omitted, without lawful excuse, to furnish his child with necessary food, clothing, shelter, and medical attendance. It may be, also, that the trial court believed that the respondent had not been given a fair trial, because the jury had found him guilty without hearing his defense to the charge, and without having been given any instructions as to the law of the case. In any event, it was the province of the trial court to determine whether the respondent had been afforded a fair trial. As is said in *People v. Canfield*, 173 Cal. 309, 312, 159 Pac. 1046, 1048:

"We can hardly manufacture in fancy a hypothetical situation in which a reviewing court would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge."

The order granting a new trial is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

64 Cal. App. 46

REID et al. v. ROBINSON et al. (Civ. 4279.)

(District Court of Appeal, Second District, Division 1, California. Oct. 4, 1923. Hearing Denied by Supreme Court Dec. 3, 1923.)

1. Limitation of actions $\S$ 180(2)—Statute not available on demurrer unless complaint affirmatively shows bar.

Unless it clearly and affirmatively appears on the face of the complaint that action is barred by limitations, objection to the complaint cannot be taken by demurrer.

2. Limitation of actions $\S$ 100(1)—Action does not accrue until discovery of fraud.

Under Code Civ. Proc. $\S$ 338, a cause of action in fraud does not accrue until discovery by the aggrieved party of the facts constituting the fraud.

3. Limitation of actions $\S$ 55(1)—Action for fraud held brought within three years from accrual of cause of action.

In action by stockholders of a corporation to compel other stockholders and directors to account for alleged secret profits made by one of them, where the ultimate fraud was in retaining money received from sale of land belonging to the company, until such money was

converted to defendant's use on July 7, 1917, there was no fraud, and an action on June 16, 1920, was not barred by the three-year statute.

4. Appeal and error ⚡1008(1)—**Findings of court that certain plaintiffs had no notice of fraud of directors of corporation held conclusive.**

In action by stockholders of a corporation for accounting of secret profits by other stockholders and directors, facts found by the court that none of the plaintiffs had notice, either actual or constructive, that more than a named amount had been paid for a certain lot, or of any fact calculated to arouse suspicion that there had been misrepresentation by one defendant, *held* conclusive.

5. Corporations ⚡204—**Stockholder suing on behalf of corporation in no better position than corporation.**

Where a stockholder seeks to maintain an action for wrong done to the corporation, he occupies no better or different position with relation thereto than would the corporation itself suing in its own behalf.

6. Limitation of actions ⚡100(7)—**Action by stockholder for corporation for fraud of directors in control not affected by statutory limitation.**

Where the control of the corporation is by directors, who were personally concerned in fraud of which complaint is made, and where it would follow that no action could nor would be instituted by the corporation for redress of its wrongs, an action by a stockholder for the corporation will not be barred by statutory lapse of time.

7. Appeal and error ⚡1011(1)—**Question of conflict in evidence for trial court.**

In action for accounting of secret profits by directors of corporation, where there was a conflict in evidence as to whether one plaintiff had means of knowledge as to the fraud and whether the circumstances were such as to place him on inquiry to the end that he must have had notice of the fraud at so early a date as would start operation of limitations, the determination of the truth of the evidence rested with the trial court.

8. Limitation of actions ⚡100(11)—**Stockholder not bound to examine books of corporation to detect fraud of directors.**

In action by stockholders for accounting of secret profits by directors of a corporation, there being no duty or obligation incumbent on plaintiffs to examine the books of the corporation, either constantly or at intervals, to detect fraudulent acts or transactions, either as against stockholders generally or as against themselves in particular, the fact that they had the means of knowledge of the fraud of defendants did not start operation of limitations as bar to the action.

9. Appeal and error ⚡1011(1)—**Conclusions of court on conflicting evidence not disturbed on appeal.**

Where, in action for accounting of secret profits by directors of a corporation, the findings were upheld by ample evidence and as to

some of them there was conflict of evidence, the conclusions reached by the trial court will not be disturbed on appeal.

10. Corporations ⚡317(3)—**Passive acquiescence of director in fraud of other directors in taking secret profits held to create liability to stockholders.**

In suit by stockholders for accounting of secret profits by other stockholders and a director of the corporation, notwithstanding that one defendant reaped no benefit from the alleged illegal transaction, where it was his duty as a director to acquaint other officers with facts concerning the transaction and to use every effort to prevent consummation of the fraud, his passive acquiescence constituted neglect of duty rendering him liable therefor.

11. Corporations ⚡312(3)—**Fiduciary relation forbids director's consent to diversion of corporate property to private use.**

The fiduciary relationship between officers of a corporation and its stockholders forbids that a director either expressly or impliedly consent to a diversion of corporate property from corporate use to private purposes.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by S. J. Reid and others against Spencer Robinson and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Evans & Pearce, Carnahan & Clark, and W. T. Helms, all of Los Angeles, for appellants.

S. L. Carpenter and George L. Greer, both of Los Angeles, for respondents.

HOUSER, J. This action sounds in fraud. It is brought by certain persons who, during a portion of the time involved herein, were stockholders of a corporation. The purpose of the action is to compel certain other persons, who were likewise stockholders and directors of the corporation, to account for alleged secret profits made by one of them in which he was aided and abetted by the other of them (although not to his profit) in the sale of certain real property belonging to the corporation.

The following appear to be the facts: The Glendale-Verdugo Land Company was a domestic corporation formed in 1910, the existence of which was continued until March 4, 1916, when its charter was forfeited for failure to pay license tax; that defendants Robinson and Vesper and plaintiff Reid were directors of the corporation at the time its charter was forfeited and had been since before November, 1913; that Vesper became president of the corporation on November 1, 1913, and continued in that office until the corporation's demise; that Robinson was secretary of the corporation during all the period to which this controversy relates, collected the moneys coming to it, was

custodian of its funds, disbursed the same, and generally handled its affairs, and after the forfeiture of its charter performed like services in connection with the settlement of the corporate affairs; that from some time in 1910 until July 7, 1914, Glendale-Verdugo Land Company was the owner of a parcel of land briefly described as lot 3 of the Verdugo tract; that H. C. Tupper and the defendant Robinson conducted a real estate business in the city of Glendale by means of a corporation styled Tupper-Robinson Company, and of which corporation Robinson was the secretary.

The following additional facts are the findings of the court, numbered in accordance therewith:

"VI. On the 7th day of July, 1914, there was a meeting of the board of directors of Glendale-Verdugo Land Company. All the then members of the board, namely, F. H. Vesper, Spencer Robinson, and S. J. Reid, were present at this meeting. It was represented at this meeting by defendant Robinson that an offer of \$20,000 for the above-mentioned tract had been made by one Jacob Stern, that there had then been paid to Glendale-Verdugo Land Company by Stern the sum of \$2,000, which was applicable on the purchase price offered by him, and that he would secure payment of the \$18,000 balance in three years with interest at 6 per cent. per annum by mortgage of the land. This was agreed to by the directors and conveyance of the land authorized upon the terms thus specified. At the same meeting the directors authorized the assignment to Spencer Robinson of the \$18,000 mortgage when received to secure to him an indebtedness of \$11,862.30 owing him by the Glendale-Verdugo Land Company then secured by mortgage on the land which latter mortgage was to be released.

"VII. At the time the foregoing representations were made, there had been paid to defendant Robinson by Jacob Stern for Glendale-Verdugo Land Company divers sums of money aggregating \$4,000 to be applied on the purchase price of said land should the said Stern purchase the same and said Stern had theretofore offered to Tupper-Robinson Company and was then willing to purchase said land for \$33,000 to be paid as provided in a writing which Tupper-Robinson Company by its president and secretary, H. C. Tupper and the defendant Robinson, had, on the 6th day of July, 1914, executed in the name of Glendale-Verdugo Land Company and delivered to the said Stern, by the terms of which writing said land was to be conveyed to one Harry Ray for the consideration of \$33,000 to be made up of the \$4,000 paid as aforesaid by the said Jacob Stern, a promissory note for the sum of \$4,000 made by G. B. Willoughby and others secured by mortgage on 52 acres of land in Orange county, this state, bearing 6 per cent. interest per annum and due February 7, 1915, to be assigned to defendant Robinson, and a promissory note of Harry Ray for \$25,000 payable to Glendale-Verdugo Land Company three years from date with interest at 6 per cent. per annum payable semiannually and secured by mortgage of the land to be conveyed.

"VIII. On July 7, 1914, defendants Vesper and Robinson as president and secretary, respectively, of Glendale-Verdugo Land Company, executed the deed of said corporation conveying said land to Harry Ray, and the said Ray made his promissory note to Glendale-Verdugo Land Company for the sum of \$25,000 payable in three years with interest at the rate of 6 per cent. per annum payable semiannually and a mortgage of the said land to said corporation to secure payment of said note and delivered said note and mortgage to the defendant Robinson for Glendale-Verdugo Land Company; and at the same time the Willoughby note above mentioned and the mortgage securing same were assigned to the said defendant Robinson. On the 15th day of July, 1914, Vesper and Robinson as president and secretary, respectively of Glendale-Verdugo Land Company, executed in the name of that corporation an assignment to defendant Robinson of the Ray note for \$25,000 and the mortgage securing same.

"IX. On July 7, 1914, \$7,500 was paid to Robinson on the principal of the Ray note, and on about January 7, 1915, there was a further payment to Robinson of \$1,500 on the principal of this note. The balance of the principal, \$16,000, was paid to Robinson on or about the 7th day of March, 1920. Interest paid to him on the Ray note amounted to \$7,105. The Willoughby note for \$4,000 was paid to Robinson when it fell due, February 7, 1915. He also collected on this note \$140 interest. Altogether there was received by defendant Robinson from the sale of said lot 3, principal and interest, the sum of \$40,245.

"X. Defendant Robinson never disclosed to the plaintiffs that the true consideration for the sale and conveyance of said lot 3 was \$33,000, but at all times held out, pretended, and claimed to them that the same had been sold for \$20,000 and no more, that no more than the sum of \$2,000 of the purchase price had been paid before conveyance, and that the balance of \$18,000 was secured by mortgage on the land sold payable in three years with interest at 6 per cent. per annum. Plaintiffs relied on Robinson's statement that the land had been sold for \$20,000, of which sum \$2,000 had been paid in cash and \$18,000 secured to be paid by mortgage on the land and accepted the same as true without inquiry or investigation until the latter part of the month of March, 1920, after the defendant Robinson had rendered to each of them a statement dated March 16, 1920, accounting for but \$18,000. Plaintiff Reid was dissatisfied with the statement received by him, believing that \$19,000 should have been accounted for and distributed to the stockholders and requested Robinson to inform him as to the disposition of the \$1,000 not covered by the statement; whereupon Robinson referred him to the books of Glendale-Verdugo Land Company for such information. Reid examined a book purporting to contain the minutes of corporate meetings and in an entry under date of July 15, 1914, found a reference to the Ray note and mortgage for \$25,000. Prompted by this discovery, Reid made further inquiry and investigation whereby he learned that the price obtained for the said lot 3 was \$33,000 instead of \$20,000 as had

been claimed and represented all along by said Robinson. Until the knowledge had come to said Reid, as stated, that the consideration paid for the lot was \$33,000, neither he nor either of his complaintiffs had any notice or knowledge whatever, actual or constructive, that more than \$20,000 had been paid for the said lot 3, or of any fact or circumstance calculated to arouse suspicion that there had been misrepresentation on the part of Robinson as to the price paid.

"XI. At the time the representation that Jacob Stern's offer for said lot 3 was \$20,000 was made at the directors' meeting on July 7, 1914, it was known to the defendant Vesper that the aforementioned writing stipulating for the conveyance of said lot to Harry Ray for considerations amounting to \$33,000 had been executed by Tupper-Robinson Company in the name of Glendale-Verdugo Land Company; that the consideration and manner of payment thereof therein specified were acceptable to the said Jacob Stern; that if said lot were conveyed to Harry Ray the actual consideration therefor would be \$33,000 paid and delivered in way and manner provided in said writing; and that the misrepresentation at said directors' meeting as to the price to be paid for said lot was made with the intent and purpose that the defendant Robinson should make for himself a secret profit out of said transaction of sale. In his capacity as president of Glendale-Verdugo Land Company, said Vesper took part in the completion of the transaction of sale of said lot and knew that the consideration therefor hereinbefore mentioned, namely, \$4,000 cash, the Willoughby note and mortgage for \$4,000, and the Ray note and mortgage for \$25,000, had been paid and delivered to the defendant Robinson. It was also known to the said Vesper that the plaintiffs and each of them were and was wholly without knowledge or information that the actual price for which said lot was sold was \$33,000, or any sum in excess of \$20,000, and had accepted as true the representation that the land was being sold for \$20,000, and were resting on that belief, yet the said Vesper did not at any time disclose to the plaintiffs or any one of them that the actual price paid for said lot was \$33,000, but withheld and concealed from them that fact and permitted them and each of them to remain in the belief that the consideration for the sale and conveyance of said lot was but \$20,000; that such concealment by said Vesper of the true price received for said lot was for the purpose of aiding the said Robinson to make for himself a secret profit from the sale of said lot."

The first ground of appeal is that the court erred in overruling defendants' general demurrer to the complaint. It is urged that the complaint fails to state a cause of action against the defendants or either of them for the reason that fraud is not sufficiently alleged. An examination of the complaint, however, discloses the fact that it is sufficient not only in regard to allegations of necessary ultimate facts, but that specific fraudulent acts are set forth with such exactitude (and upon which the conclu-

sion of fraud rests) as to leave no firm foundation to support the objection which is made thereto.

[1, 2] As to the ground of demurrer that the action is barred by the statute of limitations, it is well settled that unless it clearly and affirmatively appears upon the face of the complaint that the action is barred by the statute of limitations, such objection to the complaint cannot be taken by demurrer. No such defect appears on the face of the complaint herein; besides, the statute (section 338, Code Civ. Proc.) contains a provision to the effect that a cause of action sounding in fraud is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud; and the allegations of the complaint show that the pleaded facts constituting the alleged fraud were not discovered by any of the plaintiffs within a time which would make the statute applicable to this action.

[3] Aside from a denial of the facts set forth in the complaint, and which facts are found by the court to be in substantial accordance therewith, the statute of limitations is set up in the answer. It is urged that the cause of action in favor of the corporation or of its stockholders arose at the time when the corporation was induced to and did part with its property, which was not later than July 7, 1914, and consequently that the time within which the action could be commenced was not later than July 7, 1917—assuming that there was either an immediate discovery or knowledge amounting to notice of the facts constituting the fraud.

The evidence shows that the Glendale-Verdugo Land Company owned the property in question subject to a mortgage of \$11,862.30 in favor of Robinson; that when a sale of the property was consummated this mortgage was released by Robinson and a new mortgage of \$25,000 was given to the Glendale-Verdugo Land Company by the purchaser, which mortgage, according to the minute book of the corporation, was assigned to Robinson for the several purposes of securing the payment to him of the \$11,862.30, plus interest thereon, the payment of \$7,000 to the agents who made the sale, the payment to the Tupper-Robinson Company of \$650, balance on its commission, and the payment of the remainder to the Glendale-Verdugo Land Company or to its stockholders; that Robinson had theretofore received \$4,000 in cash on account of the sale of the property, but that he had accounted to the Glendale-Verdugo Land Company for \$2,000 only; that unknown to plaintiffs he had also received in part payment of the property an assignment of a \$4,000 note and mortgage on 52 acres of land in Orange county, which had also been paid to him; that on July 7, 1917, the sum of \$7,500 was paid to Robinson on account of the \$25,000 note

which had been assigned to him; and that when the \$7,500 was paid to Robinson he had received a sufficient amount of money to discharge the debt of \$11,862.30, plus interest thereon, which was owing to him by the Glendale-Verdugo Land Company. Up to that time Robinson had a legal right to retain any and all moneys received by him in connection with the transaction and apply them to the satisfaction of the debt owing to him by the company. There must have been a misappropriation of money by Robinson before any fraud could have been perpetrated by him. Before Robinson had received more than sufficient money to pay to himself the indebtedness owing to him, he was under no obligation to render any accounting to the Glendale-Verdugo Land Company for any moneys theretofore received by him on its account. When the \$7,500 was paid to him, and which would overpay him for any balance due to him on account of the \$11,862.30 indebtedness in his favor, assuming that he had theretofore intended to defraud the Glendale-Verdugo Land Company, he might at that time have changed his mind and made an accurate accounting to the company for all the funds legally belonging to it which had come into his possession. Up to that time no action on the part of Robinson had resulted in any damage to the company; nor had any cause of action accrued as against Robinson and in favor of the land company or its stockholders. It certainly was not fraudulent to sell the land for more than the company was willing to take for it. The ultimate fraud consisted in retaining money received from the sale which belonged to the company. Until money in the hands of Robinson, which rightfully belonged to the company, was converted by Robinson to his own use, he was not actually guilty of any fraud, no matter what theretofore had been his plans and intentions with reference thereto. The effect of the statute is that an action for relief upon the ground of fraud shall not outlaw until three years shall have elapsed after the cause of action has accrued. The fraud in the instant case was not actually consummated until July 7, 1917, which (without considering certain exceptions not here applicable) would permit the bringing of an action at any time prior to July 7, 1920. As the complaint herein was filed on June 16, 1920, it follows that the bar of the statute does not apply.

[4-6] But even if the statute of limitations were here applicable, the facts as found by the court to the effect that none of the plaintiffs "had any notice or knowledge whatever, either actual or constructive, that more than \$20,000 had been paid for the said lot 3, or of any fact or circumstance calculated to arouse suspicion that there had been misrepresentation on the part of Robinson as to the price paid," are certainly

conclusive of the facts in favor of all the plaintiffs with the possible exception of plaintiff Reid. As to him it is especially contended that because he was a director of the land company and at all times had access to its books, he was in possession of such means of acquiring knowledge as would amount to notice of the facts concerning the sale of the property in question, and hence that under the provisions of subdivision 4 of section 338, Code of Civil Procedure, he must have commenced his action within three years following July 7, 1914. As a general rule of law it may be stated that where a stockholder of a corporation seeks to maintain an action for a wrong done to the corporation, such stockholder occupies no better or different position with relation thereto than would the corporation itself suing in its own behalf. *Smith v. Ferries & C. H. Ry. Co.*, 5 Cal. Unrep. 889, 51 Pac. 710. Like most rules, however, it has its limitations and its exceptions. Where the control of a corporation lies in a board of directors the members of which are personally concerned in the fraud of which complaint is made and where it would follow that no action could nor would be instituted by the corporation for redress of its wrongs, an action by a stockholder of the corporation will not be barred by reason of the lapse of time provided by the statute. *Whitten v. Dabney*, 171 Cal. 629, 154 Pac. 312; *Beal v. Smith*, 46 Cal. App. 271, 189 Pac. 341. Speaking to this point in the case first cited, it is said that—

"It is like the minority of an infant. His rights are not lost until he, after attaining majority, acquiesces for the prescribed time and by acquiescence affirms the acts done against his interests."

And in the second case cited the following language appears:

"But where, as alleged here, the corporation and its board of directors were wholly under the domination of those who committed the original fraud the corporation is deemed to be in the same position as an incompetent person or a minor without legal capacity either to know or to act in relation to the fraud so committed, and during such period of incapacity the statute of limitations does not run, at least, against an innocent stockholder who was without knowledge of the fraud. * * * Such a stockholder suing on behalf of the corporation is in the position of a guardian ad litem."

[7, 8] It is earnestly contended that Reid at least, being a director of the land company, had means of knowledge and that the circumstances were such as to place him on inquiry to the end that he must have had notice of the fraud at so early a date in connection with the transaction in question as would start the operation of the statute and bar the action before suit was commenced. It is true that the minutes of the

corporation do disclose such facts and inferences as, assuming that Reid actually read them, should have placed him as a prudent man on inquiry. He denied that he ever read the minutes until at a time very shortly before suit was commenced. There was other evidence, both for and against, as far as notice to Reid was concerned, but very little, if any, to show notice on the part of the other plaintiffs. The evidence was conflicting and the determination of the truth rested finally with the trial court. There was no duty or obligation incumbent upon either Reid or any of his coplaintiffs to examine the books or the minutes of the corporation either constantly or at intervals for the purpose of detecting fraudulent acts or transactions either as against the stockholders generally or as against themselves in particular. The case of *Prewitt v. Sunny-mead Orchard Co. (Cal.)* 209 Pac. 995, contains the declaration of law that—

"Inasmuch as respondent had no actual knowledge of circumstances which would lead her to examine the books or of the matters which appeared therein, and as there was no duty imposed upon her by law to examine them, she cannot be charged with constructive knowledge of the facts which an examination of the books might have led her to discover."

The same principle of law is announced in *Pacific Vinegar Works v. Smith*, 152 Cal. 507, 93 Pac. 85; and the following cases are also in point: *First National Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646; *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. 1046, 12 L. R. A. 473, 22 Am. St. Rep. 816; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662.

[9] Complaint is made that the evidence is insufficient to justify either the findings or the judgment. An examination of the transcript of the evidence however convinces this court to the contrary. Each of the findings is upheld by ample evidence, and while as to some of the findings there is a decided conflict in the evidence, the rule that in such circumstances the conclusions reached by the trial court shall not be disturbed by an appellate court is so well established as to require no citations to support the statement.

[10, 11] It is finally urged that because Vesper reaped none of the benefits of the illegal transaction he should escape the judgment against him. On this point the court's findings are in substance that Vesper knew just what was being done and, with such knowledge, assisted in carrying out some of the details and thereafter concealed the

facts from the plaintiffs. The evidence clearly supports the conclusion reached by the court in this regard. Mr. Vesper's duty as an officer of the corporation required of him that in all of his dealings for and on behalf of the corporation he exercise the utmost good faith. With knowledge on his part that the fraud was being attempted primarily as against the corporation and ultimately as against the stockholders, his duty to acquaint the other officers of the corporation with the facts concerning the transaction and to use every effort to prevent the consummation of the fraud was so plainly his path that it would seem impossible that he might fail to see it and to follow it, to the end that the stockholders of the corporation would suffer no detriment by reason of his negligence in performing his bounden duty to them. Even as a director of the corporation, without the added responsibility of president and manager thereof, it is plain that he could not remain silent and willingly permit, much less actively assist in, any act that would permit any part of the assets of the corporation to be fraudulently converted by one of the directors to his own use. The fiduciary relationship existing between the officers of the corporation and its stockholders forbids that a director, either expressly or impliedly, consent to a diversion of the corporate property from the corporate use to private purposes. The assumption on the part of Mr. Vesper that because the corporation was getting all it asked for the property, no damage resulted to it, even if Robinson and others received something in addition thereto, does not accord with the law affecting such transactions. He knew, or at least he should have known, that in the circumstances the corporation was entitled to every cent for which the property was sold, less legitimate expenses in connection therewith. His passive acquiescence, if not his active participation in the fraud, constituted a neglect of his duty to the corporation and to its stockholders which resulted in damage to them and for which, notwithstanding the fact that he personally did not profit financially thereby, he must respond. Aside from his trusteeship requiring at his peril absolute fidelity to his trust, the law of torts is to the effect that every person concerned in a wrong to another which results in damage is liable therefor, irrespective of the degree in which he therein participates and entirely without reference to the benefits which he may receive on account thereof.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

64 Cal. App. 107

In re WALLACE'S ESTATE.

HART et al. v. McALLEN.

(Civ. 4305; L. A. 7624.)

(District Court of Appeal, Second District, Division 2, California. Oct. 13, 1923. Hearing Denied by Supreme Court Dec. 10, 1923.)

1. Death ☞5—Collision between train and automobile a "calamity" within survivorship statute.

A collision between a railroad train and an automobile was a "calamity" within the meaning of Code Civ. Proc. § 1963, subd. 40, relating to presumptions of survivorship.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Calamity.]

2. Death ☞5—Statutory presumptions of survivorship when applicable.

The provisions of Code Civ. Proc. § 1963, subd. 40, relating to presumptions of survivorship where persons are killed in the same calamity, are applicable only when it is not shown "who died first," and there are "no particular circumstances from which it can be inferred"; that is, where the relative times when the comorientes died cannot be shown by direct evidence or by circumstantial evidence, or by both.

3. Evidence ☞587—When inferences established and not established by circumstantial evidence stated.

An inference cannot be said to be established by circumstantial evidence, unless the circumstances relied upon are of such a nature and so related to each other that it is the only inference which can fairly and reasonably be drawn from them, and, if other inferences may reasonably be drawn from the facts in evidence, the evidence does not support the inferences sought to be deduced from it.

4. Death ☞5—Statutory presumption of survivorship held applicable.

In proceeding for distribution of estate, where there was evidence that mother and daughter were riding in same automobile, and were both killed in collision with railroad train, and the daughter, 50 years of age, was literally ground to pieces, and the mother, over 60 years of age, received a broken neck, *held*, that there was no rational basis for the inference that the daughter expired before the mother, and that Code Civ. Proc. § 1963, subd. 40, relating to presumptions of survivorship should be applied.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge, directing final distribution.

In the matter of the estate of Ellen M. Wallace, deceased. Petition by Mrs. May Hart, as administratrix, and others against Andrew McAllen for distribution of estate. From a decree directing final distribution, defendant appeals. Reversed in the district court of appeal, and hearing denied in Supreme Court.

James, Pace & Smith, of Los Angeles, for appellant.

Thos. B. Reed, of Los Angeles, for respondents.

FINLAYSON, P. J. Andrew McAllen, the surviving husband of Effie W. McAllen, deceased, appeals from a decree of final distribution in the Matter of the Estate of Ellen M. Wallace, deceased, whereby the latter's estate was distributed to the devisees and legatees of Martha A. Allison, deceased.

Ellen M. Wallace was the mother of Effie W. McAllen. The two perished in the same calamity. Martha A. Allison, now deceased, was the mother of Ellen M. Wallace. She died subsequently to the tragedy in which her daughter and granddaughter were killed. Ellen M. Wallace left a last will, whereby she bequeathed and devised all of her property to her daughter Effie, who was her only child. If the latter survived her mother, even for an instant, she would take under her mother's will, and in that case the appellant here, as the surviving husband and only heir at law of Effie W. McAllen, would be entitled to have distributed to him the estate which was left by Mrs. Wallace, and which would have gone to Effie McAllen had the latter lived to receive it. If, however, Effie was survived by her mother, though but for an infinitesimal interval of time, then the bequests and devises which Mrs. Wallace made to Effie lapsed, and, in that event, the grandmother, Martha A. Allison, as Mrs. Wallace's sole heir, would inherit all of the latter's estate. The trial court found that Mrs. Wallace did survive her daughter Effie, and accordingly distributed her estate to the devisees and legatees of Martha A. Allison, who, as we have stated, died subsequently to the calamity in which Mrs. Wallace and her daughter lost their lives. The sole question therefore is: Do the facts warrant the finding that Mrs. Ellen M. Wallace survived her daughter, Effie W. McAllen?

[1] Ellen M. Wallace, Effie W. McAllen, and three other persons were killed in a collision between a railroad train and the automobile in which they were riding. Without doubt the disaster was a "calamity" within the meaning of the statute with reference to presumptions of survivorship where persons are killed in the same calamity. Code Civ. Proc. § 1963, subd. 40. At the date of the catastrophe Mrs. Wallace was over 60 and her daughter was over 15 but less than 60. Mrs. Wallace's age being 68, while her daughter was of the age of 50. Appellant contends that it is impossible to determine from the evidence with any satisfactory degree of accuracy whether Mrs. Wallace or Mrs. McAllen died first and that therefore the presumption of the statute should prevail. Subdivision 40 of section 1963 of the Code of

Civil Procedure, so far as it is applicable to the facts of this case, reads:

"When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules: * * * Fifth. If one be under fifteen, or over sixty, and the other between those ages, the latter is presumed to have survived."

[2] The provisions of the statute are applicable only when it is not shown "who died first," and there are "no particular circumstances from which it can be inferred." This is but another way of saying that the statutory presumption of survivorship is applicable only where the relative times when the commorientes died cannot be shown by direct evidence, or by circumstantial evidence, or by both. *Estate of Loucks*, 160 Cal. 551, 554, 117 Pac. 673, Ann. Cas. 1913A, 868. In the present case there is no direct evidence that one survived the other. But respondents claim that the evidence discloses circumstances from which it may be inferred that Effie McAllen perished before her mother.

When the statute speaks of "particular circumstances from which it can be inferred" that one died before the other, it means that there are circumstances from which the fact of death by one before the other may be inferred as a rational conclusion from the facts proven. The statute does not mean circumstances which would show, or which would tend to show, probably that one died before the other. *Grand Lodge A. O. U. W. v. Miller*, 8 Cal. App. 28, 96 Pac. 22. When, by circumstantial evidence alone, a party seeks to prove a survivorship contrary to the statutory presumption, the circumstances by which it is sought to prove the survivorship must be such as are competent and sufficient when tested by the general rules of evidence in civil cases. The inference of survivorship cannot rest upon mere surmise, speculation, or conjecture. As was said in *Grand Lodge v. Miller*, *supra*, "if the matter is left to probability, then the statute settles the presumption."

[3] An inference cannot be said to be established by circumstantial evidence, either in a civil or a criminal case, unless the circumstances relied upon are of such a nature and so related to each other that it is the only inference which can fairly or reasonably be drawn from them. If other inferences may reasonably be drawn from the facts in evidence, the evidence does not support the inference sought to be deduced from it. This rule is stated in *Neal v. Chicago, etc., Co.*, 129 Iowa, 5, 105 N. W. 197, 2 L. R. A. (N. S.) 905, as follows:

"If it appears that the facts and circumstances from which a conclusion is sought to be de-

duced, although consistent with that theory, are equally consistent with some other theory, they do not support the theory contended for."

In *Puckhaber v. Southern Pacific Co.*, 132 Cal. 366, 64 Pac. 480, the court quotes from *Stringert v. Ross Tp. (Pa.)* 36 Atl. 345, as follows:

"* * * The question then arises, whether the inference that the death was caused by the negligence of the defendant is the only inference that can be drawn from the facts that are in evidence. If it is not, and other inferences may be drawn from the same facts, then there is nothing for the jury but mere guesses or conjectures, and upon these no verdict can be founded."

See, also, 10 R. C. L. p. 1007.

With these principles in mind we proceed to a consideration of the evidence. The case is not one presenting a conflict of evidence. The evidence is without substantial conflict. And, as we have stated, there is no direct evidence that either decedent survived the other, the evidence being wholly circumstantial. The proved facts are substantially these: Ellen M. Wallace and her daughter, Effie W. McAllen, with three other persons—a Mr. Williams and a Mr. and Mrs. Clark—were riding in an automobile which was struck by a fast traveling train of the Santa Fé Railway Company at a place where the highway is crossed by the railroad tracks. All of the five occupants of the automobile were killed. The train, which was proceeding westerly toward the city of Los Angeles, was running at a speed of 50 miles an hour. The automobile, traveling along the highway in a northerly direction, was struck by the train while crossing the railroad tracks. It was struck at about its center, or a little back of its center. An instant before the collision the fireman on the engine saw a woman who was seated on the right-hand rear seat of the automobile rise up. She was on the side of the automobile next to the engine, and was directly in the path of the onrushing train. This woman was Mrs. Effie W. McAllen, the identity being established by means of a photograph shown to the witness. After striking the automobile the train traveled twice its length or approximately 600 feet, before it was brought to a stop. The five occupants of the automobile were knocked out of the vehicle, and their bodies scattered along the ground by the side of the railroad tracks. All five were dead when the first person to reach the scene of the collision arrived at the spot. The body of Mr. Williams was found nearest to but west of the crossing. Farther west—that being the direction in which the train was traveling—Mr. Clark's body was found. The third body from the crossing was that of Mrs. Wallace, and the fourth was that of Mrs. Clark. The remains of Mrs. McAllen were scattered along the track for quite a distance. Por-

tions of her remains were found nearer the highway crossing than the spot where Mrs. Wallace's body was found; other portions were found scattered along the track beyond the bodies of the four other victims. Mrs. McAllen's body was literally dismembered, and had to be gathered up in pieces. The head was so crushed that the features were unrecognizable, and the body was ground into pieces of about 25 pounds weight. Her skull and face were crushed, and the brains were pressed out of the top of the skull. The spinal cord was severed. The remains were identified by the clothing and rings which she had worn. The body of Mrs. Wallace was not dismembered, but was cut and bruised. The neck was broken, the chest was crushed and the face was crushed in at the nose. Most of the wreckage of the automobile was carried on the cowcatcher of the engine until the train was stopped and the wreckage removed.

A licensed and practicing physician, duly qualified to give an expert opinion in such matters, testified as follows:

"From my study and experience in the practice of medicine and surgery, it is my professional opinion that death would have been instantaneous in the case of a person whose body was struck by a railroad train and mangled into bits, with the spine severed and the head so badly crushed that the features were not recognizable. It is also my professional opinion that a person receiving a broken neck, crushed chest, and with head and face cut and the nose badly crushed in, occasioned from being struck by a train, would probably have also died instantly, although some cases of record show that a person has lived for some considerable length of time with a broken neck. In the great majority of cases, however, it is to be expected death ensues instantaneously from a broken neck, although some cases to the contrary are reported."

[4] We are unable to find in the circumstances attending the tragic death of the unfortunate victims of this shocking disaster a rational basis for the inference that one of them expired before the others. Unaided by any legal presumption of survivorship, it cannot be said that one gave up the ghost before the breath of life left the bodies of the others. It is argued by respondents that, because Mrs. McAllen was seen seated on the right side of the automobile, the side nearest the engine, she must have been struck by the engine before her mother was; that therefore her spinal cord must have been severed before her mother's neck was broken, and that, since a severed spinal cord produces instant death in all cases, Mrs. McAllen must have died before her mother. We think this conclusion is non sequitur. Unless there is reasonable ground for the inference that Mrs. McAllen's spinal cord was severed before her mother's neck was broken, it cannot be inferred that the mother survived her daughter, even for an infinitesimal fraction of time,

merely because a severed spinal cord always produces instant death while there are reported cases where death from a broken neck did not immediately ensue. All the probabilities favor the theory that Mrs. Wallace died the instant that her neck was broken. That is the hypothesis which accords with the general rule in such cases, the medical witness having testified that "in the great majority of cases it is to be expected death ensues instantaneously from a broken neck, although some cases to the contrary are reported." Respondents' theory, therefore, rests entirely upon the hypothesis that Mrs. McAllen was the first to be struck; that the first impact of the engine with her body was made by the forward part of the engine and that it was then that her spinal cord was severed. But unless this hypothesis be the only one which fairly and reasonably accords with the known circumstances of the case, as shown by the evidence, it cannot be said to be established as an inference from the proved facts. For, as we have shown, it is not sufficient that the circumstances of the case be consistent with respondents' theory. They must be inconsistent with any other reasonable theory equally deducible therefrom.

The fact that Mrs. McAllen was seen seated on the right side of the automobile an instant before it was crashed into by the on-rushing train and its five occupants hurled into eternity is entirely consistent with the theory that Mrs. Wallace was struck and her neck broken before her daughter's spinal cord was severed or before the latter received any instantaneously fatal injury. It is quite possible that the engine, striking the body of the automobile a fraction of a second before it actually contacted the person of any of its five occupants, may have violently projected some part of the broken framework of the small vehicle against Mrs. Wallace's neck, breaking it instantly, and even before Mrs. Wallace was actually hit by any part of the engine or by any part of the wrecked automobile. If it be objected that this hypothesis involves a too great refinement of the successive intervals of time between these supposedly succeeding events, our reply is that respondents' position is equally chargeable with the same criticism. The fact is that the death-dealing impacts occurring between some part or parts of the engine or of the broken automobile and the persons of these unfortunates were so nearly synchronous, in an absolute sense, that for all practical purposes it is impossible to regard them as discrete events separated in time. But, if they could be visualized as separate happenings—if those blows which caused instant death may be regarded as occurring successively—then we say that there is no way by which it can be judicially determined that one preceded the other. For example, it is possible that Mrs. McAllen, who was seen by the fireman to rise up in the back seat of the automobile,

may instinctively have hurled herself toward the left side of the automobile, away from the onrushing engine and its train of cars, and that, as a consequence, the mother, who was over 60 and therefore presumably less active, was struck first, and her neck broken by the engine a fraction of a second before the daughter received the injury which resulted in the severing of her spinal cord, or before the latter received any injury that produced instant death. Moreover, the hypothesis advanced by respondents assumes that Mrs. McAllen's spinal cord was severed by being struck by the extreme front part of the engine. It is possible that she may have been hurled from the automobile while life was in her body, and after her mother's neck was broken, and that, after being so hurled from the vehicle her spinal cord was severed under the grinding wheels of the engine, or by whatever part of the train it was which mangled her body and ground it into pieces. Furthermore, the evidence does not show where Mrs. Wallace was seated in the automobile. It is possible that she also was seated on the right-hand side of the automobile, i. e., on the side next to the engine. She may have been seated on the right-hand side of the front seat, directly in front of her daughter. If that was the seat occupied by the mother, then, if the engine hit the automobile at a certain angle, it would be possible for the mother to be struck a fraction of a second before the engine touched the daughter, notwithstanding the fact that the automobile was hit a little to the rear of its center. It follows, therefore, that the angle at which the engine hit the automobile and its occupants may be one of the essential factors which would have to be considered in any judicial determination of the question of survivorship. But the angle at which the engine struck the automobile is a matter upon which no light is thrown by the evidence. No witness gave any testimony showing what was the angle at which the engine struck the automobile. It may have struck the lighter vehicle at a right angle or at an acute angle, for aught we know.

Regardless of how the mother and daughter were seated in the automobile, there would at most be but 3 or 4 feet between them; while the train traveling at a speed of 50 miles per hour, was moving at the rate of more than 73 feet a second. Rushing upon the automobile and its luckless occupants at this terrific speed, the huge engine, with the combined weight of the cars behind it, snuffed out the lives of mother and daughter. In an instant, in the twinkling of an eye, all was over. Under such circumstances it was useless to speculate upon the problem of survivorship. In a second the scene passed beyond the vision of human penetration. What was said in *Newell v. Nichols*, 75 N. Y. 89, 31 Am. Rep. 424, is pertinent here:

"It is as unbecoming as it is idle for judicial tribunals to speculate or guess whether * * * one or the other may not have ceased to gasp first."

It doubtless is possible to imagine a number of hypotheses, all equally consistent with the proved facts of the case, and all consistent with the theory that Mrs. Wallace's neck was broken before her daughter's spinal cord was severed, or before the latter received any injury that would cause instant death. The three or four which we have presented as possible hypotheses alone suffice to show how every theory, including respondents', must in the end rest upon no firmer foundation than mere guesswork and filmy conjecture. Those of a speculative bent may guess or imagine or fancy, but the law requires evidence. Here there is an absolute dearth of evidence upon which to give a judicial decision that either survived the other.

It follows that the trial court, on the evidence which was presented to it, should have found the fact of survivorship according to the statutory presumption declared in subdivision 40 of section 1963 of the Code of Civil Procedure. Had it so found, appellant, as the sole heir of Mrs. Wallace's legatee, Effie W. McAllen, would have been entitled to have the balance of his deceased mother-in-law's estate distributed to him.

The statutory presumption of survivorship may be an arbitrary one, but the orderly disposition of property sometimes necessitates the application of arbitrary rules. In the absence of evidence from which the sequence of the deaths may be inferred as a fact, property rights necessarily must be settled upon some theory respecting survivorship, whether it be that of the common law, which, in the absence of evidence that one died first, disposes of the property as though the deaths had occurred simultaneously, or whether it be that of the Roman law—the prototype of our Code provisions upon the subject. The Legislature of this state has spoken. It has declared what presumptions shall be indulged when there is an absence of evidence from which survivorship may reasonably be inferred as a fact. Its fiat is final.

The decree is reversed.

We concur: WORKS, J.; CRAIG, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying a petition for transfer to this court we place our denial of the petition for transfer upon the ground stated by the District Court of Appeal, namely, that the question as to whether the mother or daughter died first is not ascertainable from the evidence and that the finding of the trial court that the daughter died first is not sustained by the evidence. We do not wish to be understood as approving the state-

ment of the rule by the District Court of Appeal as to the method of weighing circumstantial evidence when applied to a reviewing court on appeal. The rule is stated and applied in the recent cases of *Estate of Loucks*, 160 Cal. 551, 554, 556, 117 Pac. 673, Ann. Cas. 1913A, 868; *People v. Tom Woo*, 181 Cal. 815, 184 Pac. 389, and *Mah See v. North American Accident Insurance Co. (Cal.)* 213 Pac. 42, 26 A. L. R. 123.

64 Cal. App. 148

TERESI v. CAVALA et al. (Civ. 4676.)

(District Court of Appeal, First District, Division 2, California. Oct. 17, 1923. Hearing Denied by Supreme Court Dec. 13, 1923.)

1. Appeal and error — 931(1)—Evidence supporting finding on conflicting evidence presumed true.

In reviewing finding on conflicting evidence, testimony supporting the finding must be accepted as true.

2. Appeal and error — 1011(1)—Finding on conflicting evidence that land sale contract was accepted by vendee conclusive.

In action to recover money paid on account of purchase of land, where there was an issue as to whether one defendant, whose approval of the sale contract was a condition thereto, did approve it, the finding of the trial court on conflicting evidence that his approval was had, is conclusive on appeal.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Salvatore Teresi against Paul L. Cavala and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James M. Thomas, of San Francisco, and A. M. Free and F. H. Bloomingdale, both of San Jose, for appellant.

C. D. Cavallaro, Louis Oneal, and William F. James, all of San Jose, and John R. Jones, of San Francisco, for respondents.

LANGDON, P. J. [1] This appeal is by the plaintiff from a judgment against him in an action in which he sought to recover \$5,000 from the defendants. It was alleged that the money became due to the plaintiff because of the following facts: On December 19, 1919, the plaintiff, on behalf of defendant, Antonio Wm. Russo, entered into a written agreement with the defendant Paul L. Cavala, as agent for the defendants S. J. Mascovich and B. L. Mascovich, his wife, subject to the approval of said defendant Antonio Wm. Russo, for the purchase by said defendant Antonio Wm. Russo from said defendants S. J. Mascovich and B. L. Mascovich of a certain tract of land situated in the county

of Santa Clara, state of California, consisting of 126 acres of land, for the sum of \$135,000. By the terms of this contract \$5,000 was to be paid upon the execution and delivery of the agreement, and the balance in installments provided for in said agreement. Upon the execution and delivery of the agreement plaintiff paid to defendant Cavala \$5,000 upon the alleged express understanding that Cavala would hold said sum pending the receipt of the approval or disapproval of said agreement by said Russo, who was then residing in New York state, and that, in case said Russo disapproved of said agreement, Cavala would return to plaintiff said \$5,000, with interest thereon. It was alleged that Russo disapproved of the contract, and plaintiff demanded the return of the \$5,000, which was refused. Russo was made a defendant upon the theory that as the written agreement between plaintiff and defendants Mascovich recited that said payment of \$5,000 was received from Russo, an apparent interest in said sum was created in favor of Russo. Russo answered, admitting that he had no right or title to the money in question.

There appears to be no dispute about the facts surrounding the making of the contract between the parties and the payment of the money by plaintiff as alleged. The contract involved was introduced in evidence, and provides that the sale "is subject to the approval of Mr. A. Wm. Russo of New York." The controversy narrows down, as conceded by both appellant and respondents, to a question of whether or not Russo did in fact approve of the contract made on his behalf, thereby entitling the defendant Cavala to apply the \$5,000 as the initial payment under the contract. Upon this decisive question of fact the trial court found that Russo approved the said sale and the execution of the said agreement of sale and the payment of the said sum of \$5,000 so made by plaintiff. This finding is the point of attack by appellant, and a review of the same requires a consideration of all the evidence.

It appears that plaintiff, defendant Russo, one Horace B. Lanza, and the sons of plaintiff, designated in the record as the "Teresi boys," entered into an agreement among themselves to purchase the Mascovich ranch. Plaintiff was to own a one-fourth interest, Russo one-fourth, Lanza one-fourth, and the remaining one-fourth was to be held by the "Teresi boys." The property was visited and examined, and negotiations entered into for its purchase. Mascovich asked \$135,000 for the property, and Russo offered \$132,500. At this point a sharp conflict occurs in the testimony, Russo claiming that his offer of \$132,500 was conditioned upon an oral promise of Cavala to him that Cavala, who was a real estate dealer, would give

\$2,500 of his commission to the purchasers which would make the price \$130,000 net to them—while Cavala testified that Russo offered \$132,500, which Mascovich refused, and that, thereupon, he, Cavala, offered to give up \$2,500 of his commission, which would make the price \$132,500 net to the purchasers, and would meet the offer of Russo. In our review of a finding made upon conflicting evidence, we must accept as true the testimony which will support the finding, and so, for the purposes of this appeal, it must be considered that Russo offered \$132,500 net, with the understanding that Cavala would surrender \$2,500 of his commission, thus meeting the price demanded by Mascovich. These negotiations took place on December 17, 1919, and on the same evening Russo and Lanza left for New York and the matter of purchasing the ranch was intrusted to the plaintiff. Two days later the agreement involved here was signed by plaintiff as agent for Russo, the agreement on its face being between Russo and the owners of the land. This agreement recited a purchase price of \$135,000. Between Mascovich, Cavala, and plaintiff there was no dispute about the price of the land—the buyers were to pay \$132,500 net; they were to pay Mascovich \$135,000, but Cavala was to return to them \$2,500 of his commission for making the sale.

Before leaving for the east, Russo had approved of all terms of the contract except the price for the land, and that matter required his approval after he arrived at his home in New York. Accordingly, Cavala sent a telegram to Russo, signing the same with the name of Teresi. That telegram was dated December 20, 1919, and read:

"Have deposited five thousand dollars and contract duly signed for S. J. Mascovich ranch which you seen, price and terms as per your offer any further instructions send night letter. S. Teresi."

Bearing in mind that this court must accept as true the testimony to the effect that Russo had offered \$132,500 net for the ranch, in addition to which Cavala was to rebate \$2,500 from his commission to satisfy the seller, Russo must be held to have been informed by this telegram that the contract would insure the purchase of the ranch by him and his associates at \$132,500 net to them. Mr. Russo arrived at his home on December 24, 1919, and telegraphed Teresi as follows:

"Just arrived telegram received will write instructions tomorrow. A. William Russo."

However, Mr. Russo was suddenly called to Philadelphia by the illness of a business associate, and remained there for several days. In the meantime, Mr. Teresi had written to Russo fully, explaining that the con-

tract had been signed, and that it provided for a payment of \$135,000, because the seller could not be induced to take less for the property, but that Cavala had agreed to return to the purchasers \$2,500 of his commission, thus making the ranch \$132,500 net to the purchasers, as per Russo's previous offer. In Mr. Russo's absence this letter was read by Lanza, a brother-in-law and business associate of Russo, and also an associate in the particular venture of the purchase of this ranch. In response to this letter, Mr. Lanza telegraphed to plaintiff, on December 29th, as follows:

"Letter received. What you did is satisfactory. Happy New Year. H. O. Lanza."

It is true that Lanza testified he sent this telegram on his own initiative, and that it was only intended to apply to his interest in the transaction, and that he had no authority to approve the contract for Russo, and Russo maintains the same position. We shall not consider this telegram, therefore, as supporting the finding regarding Russo's approval of the contract. But, irrespective of this telegram, on January 4, 1920, Russo, learning the contents of Teresi's letter regarding the purchase of the ranch, wrote to him, in part, as follows:

"I have received your letter regarding the ranch and notice the contents, but its very true I did offer 132 thousand five hundred and not 135 thousand and according to the telegram that you send me on Dec. 20 which read as follows: Have deposit five thousand and contract duly signed for S. J. Mascovich ranch, which you seen, price and terms as per your offer any further instructions send night letter.

"Now, Mr. Teresi, you see according to this telegram we take it for granted that the deal was closed on Dec. 20 and price is \$132,500 and if your portion of your commission was \$2,500 or that bring it down to the price of \$130,000 and if this is not it, then some one as work you.

"My brother-in-law did not know anything about this telegram, and now he feel some what disappoint to find such a chance. He or I expect to in California on or about Feb. 1 and will bring with us the balance of the \$30,000 to fulfill our promise but we like to see a good clean deal.

"Kindly write and let us know all particular."

The above letter is not free from ambiguity, and more than one construction thereof might be urged with reason. Our inquiry, however, is as to whether or not the construction placed upon this letter by the trial court was one of which it was susceptible. In this connection, it must be borne in mind that one of the Teresi boys was employed by Cavala in his real estate business, and had worked upon the sale of this property, and would have been entitled to some commission therefor, the amount of which does not appear in the record. Mr. Russo states:

"We take it for granted that the deal was closed on Dec. 20 and price is \$132,500."

There is no disapproval of such a contract made on his behalf; on the contrary, it is accepted as a settled fact. The remaining portion of the sentence, "and if your portion of your commission was \$2,500 or that, bring it down to the price of \$130,000 and if this is not it, then some one has work you," cannot be construed as a disapproval of the purchase at \$132,500. It is, at most, a suggestion that, if Teresi has not arranged for an additional commission, he has been outwitted by some one, but there is no disapproval of the contract for that reason. The suggestion of appellant that Russo was referring to the commission of Cavala is not persuasive, because Russo had been fully informed by Teresi's letter that Cavala had agreed to reduce his commission by \$2,500, thus making the price \$132,500 net to the purchasers. As to this matter, Russo was not in doubt, and it is fair to conclude, under all the facts and circumstances appearing in the record, that Russo was merely urging Teresi not to waive his right to his commission, but this matter is not made a condition for the purchase of the property. On the contrary, Russo's letter not only accepts as a fact the purchase of the property at \$132,500, but goes on to say that he will be in California the following month, and will bring out \$30,000 to meet his obligation in the transaction. Russo's associates in this purchase, including the plaintiff herein, all of whom knew him very intimately, construed this letter as an acceptance of the contract, for, upon its receipt, they went to the sellers, and stated to them that Russo had approved of the contract, and that everything was all right, and secured possession of the ranch upon these representations. Mr. Mascovich stated that he would not allow plaintiff and his sons to take possession of the ranch until Mr. Russo had accepted the contract, but, when they stated that they had received a letter from Russo in which he accepted the contract, Mascovich allowed them to take possession of the ranch and live stock and other personal property covered by the contract. They remained in possession of the property for several weeks, when Lanza came to California, and, after making some investigations, which satisfied him that the property was not worth the purchase price agreed upon, repudiated the contract, plaintiff demanded back the deposit, and Russo formally notified the sellers that he disapproved of the contract.

[2] The appeal involves merely one question of fact, the determination of which was reached by the trial court upon conflicting evidence and the record presents what is colloquially characterized as a "close" case.

It is precisely in such a case that this court is bound by the findings.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

64 Cal. App. 117

REID v. KERR et al. (Civ. 4612.)

(District Court of Appeal, First District, Division 2, California. Oct. 15, 1923. Hearing Denied by Supreme Court Dec. 13, 1923.)

1. Trial $\S$ 396(2)—Findings on allegations not in issue nugatory.

Where, in action in equity, the finding on an allegation of a paragraph in the complaint was contradictory to other findings on allegations therein but there was no issue on the subject, the findings were nugatory.

2. Appeal and error $\S$ 907(2)—Presumed that evidence sustained finding where evidence not brought up.

Where, on appeal from judgment in action in equity, the evidence is not brought up, the court will presume in support of the judgment that certain findings attacked were sustained by the evidence.

3. Pleading $\S$ 17—Material allegations alleged directly.

When a certain allegation is altogether material, it should be alleged directly and positively and not by way of recital.

4. Appeal and error $\S$ 1071(1)—Form of findings held not to warrant reversal.

That the trial court, in framing its findings, refers to certain paragraphs in the complaint or answer and finds them to be true or untrue, as the case may be, does not warrant reversal of judgment.

5. Appeal and error $\S$ 907(3)—On appeal on judgment roll alone presumed that failure to find on new matter in answer not improper.

In action in equity, where, in answer, defendant set up new matter on which the trial court made no findings, on appeal upon the judgment roll alone it must be assumed in support of the judgment that the parties abandoned such matter and offered no evidence in support of such allegations, and hence no finding was necessary.

6. Appeal and error $\S$ 882(2)—Plaintiff held bound by his claim as to venue in the trial court.

In an action to cancel a deed in which, notwithstanding defendant's objection that the action should be brought where the land is situated, plaintiff continues to prosecute the suit in another county, it will be assumed on plaintiff's appeal that he claimed that the action was not one falling within Const. art. 6, § 5, which provides that certain actions must be tried in the county where property is located, and he cannot make a contrary claim on the appeal.

7. Venue ~~to~~ 5(4)—Action to cancel deed transitory.

An action to cancel a deed is transitory and not governed by Const. art. 6, § 5, providing that certain actions must be tried in the county where property is located.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action in equity by W. C. Reid against Edith Kerr and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Lasher B. Gallagher, of San Francisco, for appellant.

John Ralph Wilson, of San Francisco, and Arthur C. Huston, of Woodland, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants sounding in equity. A trial was had by the court sitting without a jury; the court found the facts in accordance with the theory of the defendants and entered a judgment accordingly; from that judgment the plaintiff has appealed, bringing up the judgment roll only.

[1] The first point made by the appellant is that some of the findings are contradictory. In paragraph VI of the complaint the plaintiff alleged:

"And said plaintiff did on the 8th day of February, 1921, make and execute to Edith Kerr a deed to the property described in paragraph I of this complaint, and said Edith Kerr did execute a deed to plaintiff herein for the property described in paragraph III."

That paragraph of the plaintiff's complaint was answered by the defendants in the fourth paragraph of their answer. But an examination of the paragraph shows no denial or traverse of the passage quoted from the complaint. In paragraph VIII of the complaint it was alleged:

"That thereafter on the 8th day of February, 1921, pursuant to said agreement plaintiff deeded to defendant Edith Kerr the real property described in paragraph I hereof."

In paragraph IX of the complaint it was alleged:

"That thereafter on the 8th day of February, 1921, said defendant, Edith Kerr, executed a deed to plaintiff herein for the land described in paragraph III of this complaint."

An examination of the answer discloses that neither of those paragraphs was denied. It therefore appears that the pleadings made no issue on the subject pleaded and quoted from paragraph VI of the complaint, or paragraph VIII, or paragraph IX. True it is that the trial court made a finding that the allegations of paragraph VI are untrue and that the court made a finding that the alle-

gations of paragraphs VIII and IX are true, but as there was no issue on the subject those findings are nugatory. 2 Hayne on New Trial and Appeal, § 242.

[2] The second point made by the appellant is stated by him, "Agency of Howard D. Kerr." Further on he stated:

"How, therefore, can the court find that Howard D. Kerr was not at any time the agent of Edith Kerr?"

That question we must answer by saying that the evidence was not brought up, and we are not in a position to answer the question; but in support of the judgment we are bound to presume that the evidence before the trial court sustained the finding. Moreover, it is very appropriate to call attention to the fact that plaintiff's complaint discloses on its face that Howard D. Kerr assumed to act as the agent of Edith Kerr, but there is no allegation in plaintiff's complaint that he was such agent; that is, the complaint nowhere contains an allegation in effect:

"That at all times herein mentioned Howard D. Kerr is and was the duly appointed, qualified and acting agent of Edith Kerr, etc."

[3] True it is that in many places there are recitals and inferences as to his agency. The want of an appropriate averment was clearly presented to the trial court by an amended demurrer in which the point was presented under an attack that the complaint was insufficient, and also under three several attacks that the complaint was in this respect uncertain. When, as here, a certain allegation is altogether material, it should be alleged directly and positively and not by way of recital. 31 Cyc. 71. Continuing on the same point, the appellant says:

"The finding of the court that these various allegations were untrue is simply a finding that the defendant Howard D. Kerr did not do—as the agent of the defendant Edith Kerr—the things alleged to have been done by him. It is not a finding that he did not do the things that the complaint alleges he did."

[4, 5] Conceding the force of this argument, it is still obvious that if he was not the agent of Edith Kerr, then she was not responsible for his acts. In making his argument under this point, the appellant complains because the trial court, in framing its findings referred to certain paragraphs of the answer, or certain paragraphs of the complaint, and found the same true, or untrue, as the case might be. Appellant calls to our attention that the practice is not commended. Davis v. Drew, 58 Cal. 152, 157. Be that as it may, such practice does not warrant a reversal of a judgment. Still continuing to present the same point, the appellant calls to our attention that in their answer the defendants set up some new mat-

ter on which the trial court made no findings, and the appellant contends that findings were necessary on all issues. But, when an appeal is supported by the judgment roll only and we find that certain new matter in the answer has no finding thereon, we must assume, in support of the judgment, that the parties in the trial court abandoned such matter and offered no evidence in support of such allegations and, for that reason, no finding was necessary.

[6, 7] In his last point the appellant contends that the action should have been tried in Contra Costa county, and that the superior court of Alameda county had no jurisdiction. There are two answers to the point. In the first place, by their answer filed August 2, 1921, the defendants in the second defense set forth by them raised the same point, but the appellant pressed his action for trial and tried it before the superior court of Alameda county, claiming, we must assume, that the action was not one falling within the provisions of section 5 of article 6 of the Constitution, wherein it is provided that certain actions must be tried in the county where the property is located. The second answer is that the action on its face purports to be an action to cancel a deed made by this plaintiff to Edith Kerr. Such an action is transitory and is not governed by the section cited from the Constitution. *Ishii v. Guarantee Mortgage Co.* (Cal. App.) 212 Pac. 937.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

64 Cal. App. 153

STONE et al. v. McCARTY. (Civ. 2614.)

(District Court of Appeal, Third District, California. Oct. 18, 1923.)

1. Appeal and error §1000—Verdict of jury and findings of trial court on conflicting evidence conclusive on appeal.

On appeal in an action for rescission of contract for purchase of real property, the verdict of the jury and the findings of the trial court are conclusive where the evidence was conflicting.

2. Vendor and purchaser §37(4)—Statements as to hardpan and value of nursery trees material facts.

Statement of seller of land that there was no hardpan and that young nursery trees had been and could be sold for \$1.50, and were budded trees, were statements of fact and not mere expressions of opinion.

3. Vendor and purchaser §119—Purchaser not guilty of laches in rescinding.

Two months' delay after discovery of falsity of vendor's representations as to the fertility of the soil, hardpan, etc., before offer to

rescind, did not constitute laches, where there was no showing that seller suffered material injury.

4. Vendor and purchaser §123—Laches in rescinding must be pleaded.

In action to rescind a contract of purchase of land, the defense of laches must be pleaded.

5. Fraud §62—\$600 damages on rescission of contract of purchase for fraud not excessive.

In an action for rescission of contract to purchase land for fraudulent representations and for damages, \$600 damages is not excessive, where testimony showed that plaintiffs had expended a sum somewhat in excess of \$900 in improving the premises.

6. Fraud §11(1)—Expression of opinion constituting "affirmation of fact."

When a statement concerning a subject-matter of a transaction which might otherwise be only an expression of opinion is affirmed as an existing fact material to the transaction, and reasonably induces the other party to consider and rely upon it, as a fact, the statement then becomes an "affirmation of fact" within the meaning of the general rule as to fraudulent representations under Civ. Code, § 1572, subd. 1.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Rosella Stone and another against H. E. McCarty. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. E. Kleinsorge, of Sacramento, for appellant.

Mark L. Burns, of Sacramento, for respondents.

PLUMMER, J. The action was brought by plaintiffs for rescission of a certain contract or agreement for the purchase of 15 acres of land situated, lying, and being in the county of Sacramento, state of California, made and entered into between the plaintiffs and the defendant on or about the 9th day of April, 1921. Cause of action, fraud and misrepresentations. The action was tried before the court sitting with a jury. The jury found in favor of the plaintiffs, the court approved the verdict of the jury, made findings of fact, drew its conclusions of law, and entered judgment in favor of the plaintiffs for the cancellation of the contract referred to for the return of the sum of \$1,000 paid by the plaintiffs on account of the purchase price of said land and also for the further sum of \$600 damages suffered by the plaintiffs. The points tendered for consideration on this appeal are, first: Are the findings supported by the evidence? Second, is the judgment supported by the findings? After finding the facts relating to entering into the agreement of purchase and price to be paid therefor, the court found as follows:

"That on or about the 20th day of March, 1921, while said plaintiff and defendant were

considering the aforesaid agreement and before the making thereof, defendant, H. E. McCarty, and his agent, W. A. De Sota, for the purpose of inducing said plaintiff to enter into said agreement to purchase the aforesaid property, among other things, represented to plaintiff, Rosella Stone, that the nursery trees growing on said land were of the value of \$1,500, and that said trees would soon be ready for market and were already budded, and, if they were properly irrigated the coming season, said plaintiff, Rosella Stone, could easily and readily sell same for not less than \$1,500; and among other statements made by defendant, H. E. McCarty, and his said agent, was that the soil was sandy loam soil, and was from five to six feet in depth and was particularly adapted to the growing of peach, apricot and all kinds of fruit trees, and that the pump aforesaid mentioned was sufficiently large to pump water to irrigate all of said land; and defendant further stated that during the rainy season of the year the said land was free of pools of water and reasonably dry and absorbed all the moisture.

"That plaintiff, Rosella Stone, relying upon the aforesaid representations, and believing them to be true, was induced thereby to enter into the aforesaid agreement with defendant, and, so relying upon said representations, did, on the 9th day of April, 1921, purchase and buy from defendant the aforesaid tract of land, together with the aforesaid personal property, and then and there paid to defendant the sum of \$1,000 of the present standard of value, and then and there entered into the aforesaid agreement to pay to defendant the balance of the purchase price of \$4,500, to wit, \$500 on or before the 9th day of April in every year hereafter until the total purchase price was paid for in full, together with interest on balance due on principal from date, at the rate of 6 per cent. per annum, payable annually. That thereafter, to wit, on or about the 25th day of May, 1921, the plaintiffs moved on, and took possession of, the aforesaid land and premises, and commenced to irrigate, cultivate and improve, a portion of the same; that, during their said residence on said premises, plaintiffs, still believing the aforesaid representations of the said defendant H. E. McCarty, and his agents, Roy Brooke and W. A. De Sota, to be true, and that the soil was from five to six feet deep, and of good quality for peaches, apricots and other kinds of fruit trees, and that the soil was a deep loam, and that the nursery trees were all budded and were of the value of \$1,500, and that the pump was sufficiently large to pump water to irrigate the entire tract of land, proceeded to plow and level the land and irrigate the fruit trees, repair the dwelling house on said premises and buying oil and gas for the pump, and were getting the place in condition to be set out in trees and farm in a farmlike manner.

"That during the month of September, 1921, plaintiffs discovered that all of the aforesaid representations made by the defendant H. E. McCarty and his agents, Roy Brooke and W. A. De Sota, to plaintiff, Rosella Stone, were false and fraudulent and were known or ought to have been known by defendant and his said agents at the time they were made, to be false and fraudulent, and were made by said de-

fendants for the purpose of inducing plaintiff, Rosella Stone, to enter into said contract.

"That on account of the fraudulent representations made to said plaintiff, Rosella Stone, by defendant H. E. McCarty and his agents, Roy Brooke and W. A. De Sota, said plaintiffs have been damaged in the following sum, to wit, \$600.

"That said plaintiffs, as soon as they discovered the falsity of the aforesaid representations, gave and served a notice of rescission of said contract on said defendant, and for that purpose said plaintiffs made a good and sufficient quitclaim deed for the conveyance of the land and premises aforesaid to the defendant, and on or about the 10th day of November, 1921, and before the commencement of this action, they tendered the said deed to defendant and offered to give the defendant the full and peaceable possession of said premises and of all personal property heretofore delivered to said plaintiff by defendant as aforesaid, and said plaintiffs then and there demanded of defendant the repayment by him to said plaintiffs, of the sum of \$1,000, part of the purchase price paid to defendant by said plaintiff as aforesaid, and also demanded the payment of \$945.50 for money expended on improvements and taking care of the premises, and for expenses of moving on said premises, and demanded of defendant the cancellation of their said agreement to purchase, made and executed by said plaintiff as aforesaid, but to return to plaintiffs the said sum of \$1,000, or to accept said quitclaim deed, or to pay said damages, the defendant refused and still refuses."

The testimony shows that plaintiffs were desirous of buying a small tract of land suitable for raising fruits of various kinds, that the transaction relative to the purchase of the tract of land on the part of the plaintiffs was conducted by Rosella Stone, that just preceding the purchase of the land in question the plaintiffs were living in the town of Colusa engaged in the rice business, that the plaintiff noticed an advertisement in the Sacramento Bee of a small place for sale in the Natomas district and thereupon entered into correspondence with the Brooke Realty Company in regard to the place, and upon calling on the Brooke Realty Company was informed by Mr. De Sota, an agent of the company, that the place had been sold, but that they had two other very nice little places, one about two miles above Perkins and the other half a mile on the other side of the Western Power house. "Mr. De Sota asked me if I was acquainted out in the country of Sacramento, I said, No, I was just acquainted in the city." After lunch De Sota and the witness, Rosella Stone, started out on the Placerville highway. On the way De Sota asked if the plaintiff, Rosella Stone, had ever been out in that part of the country. Her remark was that she had been out once in Fair Oaks but did not know the direction and was not familiar with the country.

"De Sota asked me who took me out to that part of the country, I told him Trainor & Des-

mond. He asked me did you like Fair Oaks. I replied: 'Well some parts of it I liked and some parts I did not like.' He says: 'Did you like the places he showed you?' I said: 'No, one place I did not like—I did not have the money to buy the other place, too much bed-rock.' He says: 'They are a bunco crowd anyway. They are all buncoing.' We came down to this little place above Perkins. I did not like the place. De Sota says: 'Well, we will go back to the Western Power Plant to Mr. McCarty's place.' I asked: 'What is this Mr. McCarty's place?' He says: 'There is a five-room bungalow that has to be finished. Any one that buys the place has got to finish the house. There is a pumping plant, a wood shed, a kind of a storeroom, a small barn, a garage on one side,' and he said it was an old nursery. He says, 'a very valuable stock of nursery trees on it, orange and lemon trees, all budded ready for market.' He says: 'They are worth \$1,500.' I asked him what Mr. McCarty asked for the place. He said he did not know. We drove up the road and went into Mr. McCarty's place. So we walked in opposite the orange and lemon trees. Mr. De Sota called my attention at the time, asked me if I saw those trees. I said, 'Yes.' He said: 'That is just like getting \$1,500 to buy that place.' We walked in, and Mr. McCarty was in the back yard. Mr. De Sota introduced me to him, and told Mr. McCarty I was looking at the place. Mr. McCarty asked me if I would like to go in the house. I says, 'Yes, I would like to look at the house.' So I went in the house, and Mr. McCarty introduced me to Mrs. McCarty, and Mr. De Sota and Mr. McCarty stayed out in the kitchen, and Mrs. McCarty took me around the house, showed me the house. When we came back in the kitchen, I says, 'Mr. McCarty now, I would like to ask is this land level?' Mr. McCarty says: 'Oh, yes, this land is all nice and level.' * * * Mr. McCarty asked me if I wanted to see the place: 'We can walk down across and see the land.' Mr. De Sota and Mr. McCarty and I walked down that ditch. Mr. McCarty pointed out the corners around where the stakes were with red flags, and I requested to see the pump, and we went back to the yard again, and we looked at the pumping plant; we looked at the barn; we looked at the garage; we walked over to the orange trees. I says: 'Mr. McCarty,' I says, 'Are those trees salable?' He says, 'Yes they are salable for one dollar and a half apiece.' I says, 'Are they all budded?' He says, 'Yes, we take them to the free market and sell them down there every morning. We get one dollar and a half a piece for them.' I says: 'Mr. Stone is a grain farmer and does not know absolutely nothing about trees.' I says, 'I am depending upon you.' Then I asked him about hardpan. He says the soil was six feet deep. I asked Mr. McCarty to get a shovel that we could dig down. Mr. McCarty said he was not able to get down, he had the rheumatism. I says: 'Well, Mr. De Sota is a big strong man, he could dig for him.' Mr. McCarty said he did not have any shovel, he would have to get one from the neighbors. He says: 'Come over here to the front yard, I can show you.'

"So we walked over to the front yard and it was all nice, sandy loam in the front yard. I made the remark to Mr. McCarty and Mr. De

Sota that I would have to depend on their honesty if we bought the place; that my husband had sent me alone; I did not know anything about buying land; I would have to depend on their honesty. Mr. De Sota raised up his hand. He said: 'Mrs. Stone, we have been in business for 20 years in Sacramento.' He says: 'We respect the name and our place of business too much to misrepresent this small piece of land of 15 acres.' He says: 'We can't generally handle small pieces like 15 acres.' He says that 'Mr. McCarty is very sick and has been ordered by his physician to go to Europe, and we are handling that land.' I says: 'Well, we have not got very much money. It will be a serious proposition to buy a proposition like this.' Mr. McCarty says: 'There is no trouble about the money, about making your payments with those orange trees here.' I says: 'Well, that is all we have to depend on were the orange trees.' I says: 'We have not any money. It will be three years before they get to raising of any value on the place.' He says: 'Mrs. Stone, I will guarantee you will never be sorry if you buy the place.' I says: 'I am going down to Stockton. I will consider the matter over.' We started, went back, and got in the automobile. When we got started back I says: 'Now, Mr. De Sota,' I says, 'now I want you to tell me the truth about this piece of land. I am a woman. I have not any experience in buying a place. I want to satisfy my husband.' He says: 'Mrs. Stone,' he says, 'You will never be sorry if you buy that place. You take that place and set it out in peaches and apricots, and in two years I will get you \$10,000 for the place.' He asked me if I wanted to put a deposit. I says: 'No, I am going down to Stockton. I will consider the matter over.' He says: 'When you get ready and you want to come, you call me up at my expense.' I says, 'Yes, I will.' I went down to Stockton next morning. On Saturday evening I called Mr. De Sota up at his expense, as he wanted me to do. I asked him if the place was sold. He says: 'No,' he says, 'there is a party had looked at it.' He says: 'You better come immediately, they might buy it.' I says, 'I will come in the morning.'

* * * He says: 'The train gets in Sacramento about 9 o'clock. I will be waiting for you at the office.' He says: 'Come to the office, will you?' I says: 'Yes.'

"I went to the office. Mr. De Sota was waiting, as he had promised over the telephone. We got in the car and drove out to the McCarty place. We had to leave the car out on the road again and walk in. Mr. De Sota made the remark that Mr. McCarty was not up yet, so we walked around the house and knocked at the door. Mr. McCarty came to the door. He did not recognize me. Mr. De Sota says to Mr. McCarty, 'This lady wants to see the place again.' McCarty says: 'Will you step in? My wife has not got her work done up.' I says: 'I will look the house over.' I went in. Mr. De Sota and Mr. McCarty went out in the back yard, had a little private talk. In the meantime, he came up. I asked Mr. De Sota if he had seen Mr. McCarty since the last time we looked at this place. He says: 'No, I have not seen Mr. McCarty since you were here.' He says: 'Mr. McCarty had a private conversation with Mr. De Sota—they went out and

talked; I walked over to a little porch, and Mr. De Sota came over to the porch, and Mr. McCarty says: 'Mrs. Stone, I am very glad you can take that place.' I told them I had to rely upon their honesty in buying that place. Mr. De Sota told me again, he says: 'Mrs. Stone, we have respect for our name too much.' I says, I have got to depend on their honesty, I did not know anything about buying. I asked Mr. McCarty about the orange and lemon trees. He said they were all ready for the market; all we had to do was to take them, to irrigate them in the summer; we could sell them for one dollar and a half apiece. We went back to Sacramento. After I got back to the office, I said to Mr. De Sota, 'Now,' I says, 'Mr. De Sota, now, tell me the truth again; do you think I am making a mistake in buying that place?' He said: 'No, Mrs. Stone, you are not. You will never be sorry for the money you put in that place, because,' he says, 'I can get you, after you set it out in peaches and apricots, and repair that house, I will get you \$10,000 for the place inside of two years.' I put up a deposit of \$100. He said he would get Mr. McCarty in town, fix up the papers, he would notify me and my husband, and we could come down from Colusa and sign the papers. Mr. De Sota had promised me faithfully he would be present when the deal was closed, and I went in Brooke's office, so I went up about 11:30, so I saw another man sitting back of the counter. I says: 'Is Mr. De Sota in?' He says: 'Is this Mrs. Stone from Colusa?' I said: 'Yes.' He says: 'Mr. De Sota is not in.' I says: 'When will Mr. De Sota come in?' He says: 'About 4 o'clock this afternoon.' I felt awfully disappointed because he promised me he would be here when the deal was closed. The gentleman said: 'Mrs. Stone, I am Roy Brooke. I know all about this deal.' He says: 'The papers are all written.' He says: 'I can close the deal.' Mr. Brooke asked me to sit. I sat down. So, Mr. McCarty was in there; he came and talked to me. I says: 'I asked Mr. Brooke, 'What do you know about this land out there?' He says: 'Mrs. Stone, I know that to be a very fine piece of land.' I says: 'What do you know about those orange and lemon trees?' He says: 'I know Mr. McCarty has made big money, made about fifteen or sixteen hundred dollars selling trees.' I says: 'How about the hardpan?' He says: 'There is no hardpan out there.' I says: 'My husband was very careful about getting in the Florin district. We have friends over there. They are always talking about their hardpan.' He says: 'Well, you are 15 or 16 miles from Florin; there is no water standing on the place.' I says: 'That is what Mr. McCarty and Mr. De Sota told me when I was there, that there was no water there; just observe the moisture.' Mr. McCarty came in, and we closed the deal."

[1] There was further testimony introduced tending to show that the hardpan underlying the 15 acres was anywhere from two inches to two feet from the surface, and other witnesses testified it was from eight inches to two feet, three feet, or four feet. The testimony also shows that the sandy loam to which the attention of the plaintiff, Rosella Stone, was called and which was examin-

ed by her at the request of the defendant in company with Mr. De Sota, was a small tract or parcel on which had been spread some 25 loads of sandy soil hauled there by a Japanese in order to enable him to raise vegetables. It also appears from the transcript that there was a sharp conflict of the evidence as to the statements and representations made by McCarty, De Sota, and Brooke; but the verdict of the jury and the findings of the court are conclusive upon appeal. The jury and the court had a right to believe the witnesses for the plaintiffs, render a verdict, and make findings accordingly. At the conclusion of the plaintiff's testimony, the defendant made a motion for nonsuit. This motion was denied. The court's action in this particular is also assigned as error.

[2] It is strongly insisted by appellant that the statements made by the defendant and his agents, if made, were merely expressions of opinion and were not such as to amount to fraudulent representations under the law and were not of such a character as to give rise to the cause of action herein, even though false. A number of cases are cited giving instances in which the courts have held representations to be merely matters of opinion in reference to the value, etc., of property. However, the recent case of *Scott v. Delta Land & Water Co.*, 57 Cal. App. 320, 207 Pac. 389, answers such contentions very clearly. The representations there made were that the land "was of the best quality, fertile, in every respect, free from alkali and noxious weeds, and suitable for growing thereon all kinds of crops of hay, grain and vegetables"; that the Delta Company owned all of the water flowing in Beaver river and that, according to the record kept by the United States government for 14 years, that river furnished sufficient average flow to irrigate 44,000 acres of land," etc. Other representations were made which are not material to be here set out. It was there held that the judgment may be sustained upon evidence supporting any one of the material representations set out in the complaint. To the same effect are *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047; *Thomas v. Hacker*, 179 Cal. 731, 178 Pac. 855. And also held that "the representations as to the productive quality of the soil and as to the adequacy of the water supply were material factors which, if they furnished an inducement to the vendees to enter into the contract made by them, would afford ground upon which to base a rescission when their falsity was established," citing *Bickel v. Munger*, 20 Cal. App. 633, 129 Pac. 958; *Tracy v. Smith*, 175 Cal. 161, 165 Pac. 535. Also, that "misinformation as to the material matters referred to would constitute representations as to existing facts and conditions, and would not fall within the category of mere opinion or speculation." In the case at bar the statement as to there being no hardpan was a statement of

a material fact affecting the fertility of the land in question and also of its capacity to raise trees or produce crops of commercial value. Statements also made in relation to the orange trees and the price for which they had and were being sold constituted material inducements for entering into agreement of purchase as well as the fact that the trees were budded stock which added to their commercial value and would necessarily be considered by any one in making purchase thereof.

[3, 4] It is further insisted that the plaintiffs are guilty of laches and are not entitled to recover, even though the representations were material and were all made as found by the court and the jury. An examination of the record fails to disclose that this question was brought to the attention of the trial court either by demurrer or answer, nor is there anything in the transcript which shows that the defendant suffered material injury on account of any delay on the part of plaintiffs in effecting rescission. The testimony shows, and it is found by the trial court, that the plaintiffs discovered the frauds complained of during the month of September, 1921, that the defendant was notified thereof some time during the month of October of that year, and that thereafter on or about the 10th day of November the plaintiffs gave their notice of rescission and tendered back the premises to the defendant, which offer was declined. It thus appears that a period of not over two months elapsed between the time when the court found that the plaintiffs discovered the fraud that had been practiced upon them and the rescission of the contract and offer to restore made by the plaintiffs.

The complaint in this action upon its face does not appear to the court to show laches, nor is there anything in the testimony from which we can conclude that the plaintiffs were negligent in effecting the rescission or allowed any unreasonable time to elapse. Certainly two months is not an unreasonable length of time when there is nothing to show that the defendant has thereby suffered material injury. It is also insisted by the appellant that the defense of laches need not be pleaded and that a court of equity will act upon this question without any pleading, citing *Harris v. Hillegass*, 66 Cal. 79, 4 Pac. 987; *Bell v. Hudson*, 73 Cal. 289, 14 Pac. 791, 2 Am. St. Rep. 791; *Sullivan v. Portland, etc., R. R. Co.*, 94 U. S. 811; *Hagerman v. Bates*, 24 Colo. 80, 49 Pac. 139; *Coon v. Seymour*, 71 Wis. 346, 37 N. W. 243. These cases, however, are not in accord with the later cases decided by the Supreme Court of this state. In the case of *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 Pac. 243, in a very exhaustive opinion written by Justice Olney, it is said:

"As to the defense of laches, the complaint, as we have stated, was not filed until nearly a year after the date at which it alleges a dis-

covery was had. The defendants furthermore contend that as early as 1912 an investigation was started resulting in a report in April, 1913, disclosing facts sufficient to charge the plaintiff with a discovery as of that time. It is not necessary to consider the accuracy of this contention. If it be true, the discovery was still within the period of limitation. Mere delay in bringing an action for a time less than the period of limitation does not amount to laches. There must be also present the element that the delay has been to the prejudice of the opposite party. [Citing a number of cases.] * * * We might also add that laches is a defense and not a condition of relief, and, if it does not appear on the face of the complaint, must be affirmatively pleaded and proven by the defendants. (16 Cyc. 176.) In the present case there was neither pleading nor corresponding proof of any prejudice suffered by the defendants through the delay of the plaintiff in not commencing its action more promptly upon the discovery of the fraud."

In *Tracy v. Smith*, 175 Cal. 161, 165 Pac. 535, it is said:

"The question of plaintiff's laches as a defense was not raised in the trial court, and hence should not, for the first time, be urged here. Indeed, objection to the rescission on that ground, since not pleaded, is deemed waived."

[5] As to the question whether the damages allowed were excessive it is sufficient to state that an examination of the testimony shows that the plaintiffs had expended a sum somewhat in excess of \$900 and had paid down as part of the purchase price for the premises \$1,000. It thus appears from a résumé of the whole case that the plaintiffs were grain farmers not familiar with the country in which the land about to be purchased is situated, knew nothing of the soil, knew nothing of orange trees, stated explicitly that they relied upon the honesty of the defendant and his agents, were informed that the land was free from hardpan, had standing upon it budded trees of the salable value of \$1,500, that the defendant had been selling the trees therefrom at \$1.50 each, whereas in fact the jury and court found from the testimony, which they had a right to believe, that none of those representations was true, that the plaintiffs relied upon such representations and statements and were induced thereby to purchase the premises.

[6] As to whether these representations were expressions of opinion or statements of facts or supposed facts, the case of *Herdan v. Hanson*, 182 Cal. 538, 189 Pac. 440, is pertinent. It is there said:

"With reference to the contention that the evidence does not support the findings in question because the alleged and found fraudulent misrepresentations were but mere expressions of opinion, it will suffice to say that, when a statement concerning a subject-matter of a transaction, which might otherwise be only an expression of opinion, is affirmed as an existing fact material to the transaction and reason-

ably induces the other party to consider and rely upon it as a fact the statement then becomes an affirmation of fact within the meaning of the general rule as to fraudulent representations."

We think all these circumstances bring this case within the provisions of subdivision of section 1572 of the Civil Code, to wit, "The suggestion, as a fact, of that which is not true, by one who does not believe it to be true," and that the judgment of the trial court should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

64 Cal. App. 141

RODRIGUEZ et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 4740.)

(District Court of Appeal, First District, Division 1, California. Oct. 17, 1923.)

Master and servant §417(7)—Decision on conflicting evidence in compensation case not reviewable.

A decision of the Industrial Accident Commission based on conflicting evidence is not subject to review.

Proceedings under the Workmen's Compensation Act by Christopher Rodriguez and others for the death of Joseph Rodriguez opposed by the Pacific Box Company, employer, and the Federal Mutual Liability Insurance Company, insurer. Compensation was denied by the Industrial Accident Commission, and claimants apply for a writ of review. Affirmed.

Emil G. Buehrer, of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Accident Commission.

Cooley & Crowley, of San Francisco, for respondents Pacific Box Factory and Federal Mut. Liability Ins. Co.

TYLER, P. J. Petition for a writ of review for the purpose of determining the lawfulness of an original award made by the Industrial Accident Commission in favor of respondents, and denying petitioners compensation for the death of one Joseph Rodriguez. The petition is also for the purpose of having determined the lawfulness of the order of the Commission denying applicants' petition for a rehearing in the matter of the award.

The applicants are the parents and the minor brothers and sisters of deceased, who was 17 years of age and was employed by respondent, Pacific Box Company, at its plant located at San Francisco. Both the employer and employee were subject to the provisions of the Compensation Act (St. 1917, p. 831), and the employer was insured against liability by respondent Federal Mutual Liability Insurance Company.

On the 11th day of December deceased, while attending to his duties in operating a

circular saw, was injured, so it is alleged, by a piece of timber which had caught in some machinery in the vicinity of where he was working and was thrown in the air in his direction. Shortly thereafter he sank to the floor on his hands and knees. No one saw him struck. He was conveyed to a hospital, where he was attended by a physician within a half hour after the accident. No indications of bruising or violence were noted at any time upon his body except that he had a laceration of the face about half an inch long. The examining physician found him dazed, and suspected a fracture of the skull. His blood pressure was abnormally high. The abdomen was examined and found to be rigid. After examination the physician diagnosed the case as a rupture of some abdominal organ with hemorrhage into the abdominal cavity. An operation was performed about four hours after the accident, and upon opening the abdomen a large amount of cloudy fluid was found in the abdominal cavity, indicating a diseased condition. An examination disclosed no rupture of the stomach or other abdominal organ. No indication was found of any ruptured blood vessel bleeding into the abdominal cavity, and the color of the fluid did not indicate a fresh hemorrhage. Pneumonia developed the day following the operation, which, complicated by acute peritonitis, caused death on December 13th.

It was stipulated that witnesses would testify that deceased attended a dance the Sunday previous to the day of the accident without any indication of sickness.

Petitioners contended before the Commission, and do here, that death resulted from acute peritonitis due to a blow upon the abdomen. The autopsy physician found a general peritonitis, but could find no signs of injury, either external or internal, or any signs of rupture of any abdominal organ. Dr. Rusk, pathologist of the University of California Medical School, reported upon specimens taken from the body, and gave as his condition that an infection was present before the injury which could not have been developed after it or as a result of it, and that the patient would in all probability have died from the infection had he had no injury. The reports of other physicians showed that the viscera failed to reveal any rupture or injury to any organ or evidence of injury, and that a complete and exhaustive search also failed to show any perforation or rupture of any viscus, and, further, that there was no evidence of any trauma of any sort except that produced by the surgical procedure. As against this evidence a physician, called on behalf of the claimants, who did not see the case during the boy's lifetime, testified that in his opinion the injury, if there was one, to the abdomen could have

caused an oozing of blood through the abdominal organs into the pelvic cavity without creating a rupture visible to the naked eye, and that this condition could cause the peritonitis even in as short a period as occurred in the case. This evidence was squarely disputed by other medical evidence.

The findings of the Commission were to the effect that the employee died from general peritonitis, but that the evidence was insufficient to establish as a fact that his death was proximately or at all caused by the injury.

In accordance with these findings it was ordered that the applicants take nothing by reason of their claim.

The situation here presented is one of a decision based upon conflicting evidence, and is therefore not subject to review. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; *Santa v. Industrial Accident Com.*, 175 Cal. 235, 165 Pac. 689.

The award is affirmed.

We concur: ST. SURE, J.; RICHARDS, J.

64 Cal. App. 154

GIMENO v. MARTIN. (Civ. 4630.)

(District Court of Appeal, First District, Division 2, California. Oct. 18, 1923.)

1. Appeal and error ⇨1010(1)—Court's findings supported by evidence conclusive.

Where case was submitted to the court without jury, its findings of fact, supported by substantial evidence, are conclusive on appeal.

2. Municipal corporations ⇨705(10)—Rule of last clear chance inapplicable where pedestrian darted in front of automobile.

Where, immediately before the infliction of injury to plaintiff by an automobile, he was in a position of safety, having crossed the road twice with the automobile slowly approaching him, when he darted from safety directly in front of it, there was no last clear chance for the driver to avoid the accident.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Jose Gimeno against Theodor E. Martin. Judgment for defendant, and plaintiff appeals. Affirmed.

Russell P. Tyler and Arthur Brand, both of San Francisco, for appellant.

J. Hampton Hoge, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him in an action brought by him to recover damages for personal injuries alleged to have

been caused by the careless and negligent operation by defendant of his automobile.

Upon conflicting stories of the accident told by the witnesses at the trial, the court has found that—

At the time of the accident the defendant was operating his automobile in Golden Gate Park, in San Francisco, Cal., "in an ordinarily reasonable, careful and prudent manner and with due regard for the protection and safety of other vehicles and pedestrians, including the plaintiff in this action; that at said time and place, plaintiff was proceeding in a general westerly direction along the footpath on the north side of the thoroughfare in Golden Gate Park, known as the 'South Drive'; that defendant at said time and place as aforesaid was driving his automobile in a general westerly direction on the right-hand side of said thoroughfare known as the 'South Drive'; that at said time, defendant was proceeding at a reasonable and moderate rate of speed; that as defendant reached a point about 20 or 25 feet from the east side of a one-way road leading to Stow Lake in said Golden Gate Park, which said road commences at said South Drive and runs in a general northwesterly direction from said South Drive to said Stow Lake, said defendant sounded the horn on his said machine and immediately retarded the speed of his machine to about 6 miles per hour, and proceeded to turn into said road leading up to Stow Lake; that at said time he saw plaintiff, who at said time was walking on said footpath as aforesaid, crossing said one-way road leading from the South Drive to Stow Lake; that at said time plaintiff was walking with his head down, and while crossing said road, did not look in either direction to see whether or not any vehicles were approaching or about to approach; that when defendant reached a point about 20 feet from plaintiff, plaintiff who at said time was within 3 feet of the west side of said Stow Lake Road, and in a position of safety, looked up for the first time and saw defendant's machine; that at said moment, plaintiff became bewildered and jumped back to the east side of Stow Lake Road; that when plaintiff had reached the east side of Stow Lake Road, he was also in a position of safety; that plaintiff, thereupon, negligently and carelessly again ran from the east side of said Stow Lake Road to the west side of said road; that as plaintiff was in the act of making the last run to the west side of said Stow Lake Road, the left front wheel of said automobile passed over the heel of plaintiff's left foot; that with the exception of the said left front wheel coming in contact with plaintiff's heel, no portion of said automobile struck plaintiff's body; that defendant at all the said times exercised the care of an ordinarily prudent person acting under the same circumstances; that said accident was proximately caused by plaintiff's negligence and his failure to exercise ordinary care in the following particulars, to wit: That plaintiff failed to look before crossing said Stow Lake Road and failed to hear, or, having heard, failed to heed, the defendant's warning signal, and that plaintiff left a place of safety and placed himself in such a position that the left front wheel of said automobile came in contact with the heel of plaintiff's left foot; that the defendant

at all the said times exercised ordinary and reasonable care and conducted himself in the operation of said automobile in a prudent manner."

[1] These findings of fact are supported by substantial evidence in the record. The case was submitted to the court without a jury, and under the circumstances these findings are conclusive. In view of the fact that the court found that the plaintiff's negligence was the proximate cause of his injury, he was not entitled to recover against the defendant.

[2] The only point made by the appellant, apart from the contention that the evidence does not support the findings, is that the doctrine of last clear chance applies to the facts of the case and that upon this theory the plaintiff was entitled to a judgment.

A complete answer to this contention is found in the recent case of *Palmer v. Tschudy* (Cal. Sup.) 218 Pac. 36, wherein it was said:

"The last clear chance rule presupposes: That the plaintiff has been negligent; that as a result thereof she is in a situation of danger from which she cannot escape by the exercise of ordinary care; that the defendant is aware of her dangerous situation under such circumstances that he realizes, or ought to realize, her inability to escape therefrom; that he then has a clear chance to avoid injuring her by the exercise of ordinary care, and fails to do so. If all of these elements are present, the rule applies and enables the plaintiff to recover, notwithstanding her own negligence. But if any of them be absent the rule does not apply, and the case is governed by the ordinary rules of negligence and contributory negligence. The rule does not require that the inability of the plaintiff to escape the danger shall be due to a situation which renders it physically impossible for her to do so. It applies equally when she is wholly unaware of the danger and for that reason unable to escape it. But the rule also requires that if she is aware of the danger, or becomes aware of it, she must thereafter exercise ordinary care for her own protection. If, being aware of the danger and able to escape it by exercising ordinary care, she neglects to do so, she cannot invoke the last clear chance rule to place the burden of the resulting loss upon the other party. 'Obviously, if both parties to an accident could, by the exercise of ordinary care, have avoided it, neither can be said to have had the last clear chance. It is only when a defendant charged with the negligent infliction of the injury, knowing plaintiff's peril, could and the injured plaintiff could not have avoided the injury that the defendant is liable. The liability is placed upon the party inflicting the injury only if immediately before the actual infliction of the injury the injured person was in such a situation as to be unable, by the exercise on his part of reasonable and ordinary care, to extricate himself, and vigilance on his part would not have averted the injury.' *Young v. Southern Pacific Co.* [64 Cal. Dec. 401, 407], 210 Pac. 259."

At the place of the accident, the road was only about 12 feet wide, and immediately before the actual infliction of the injury, plaintiff was in a position of safety on the east side of the road, after having crossed it twice with the automobile slowly approaching him, according to the findings. In that position he was not in danger, and the rule of the last clear chance doctrine did not call for any action on the part of the defendant. When plaintiff suddenly darted from this position of safety directly in front of the automobile, there was no last clear chance for the defendant to avoid the accident.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

64 Cal. App. 132

GOPCEVIC v. CALIFORNIA PACKING CORPORATION. (Civ. 4466.)

(District Court of Appeal, First District, Division 1, California. Oct. 17, 1923. Hearing Denied by Supreme Court Dec. 13, 1923.)

1. Sales §199—When title passes is question of intention.

When title to goods sold passes from seller to buyer is one of intention between them, and in absence of showing to the contrary the contract is controlling.

2. Sales §200(2), 202(1) — Weighing and payment of purchase price held conditions precedent to passing title.

Where sales contract for prunes provided that title was to pass on completion of weighing and payment of the purchase price, such weighing and payment were conditions precedent to passing of title.

3. Sales §202(4) — Fulfillment by buyer of concurrent condition with tender by seller necessary to pass title.

Where sales contract for prunes provided that payment was to be made on delivery, the tender of the undelivered portion of the crop implied that fulfillment of the concurrent condition of payment must have been complied with before title passed; not every tender transferring title.

4. Sales §197—When title transferred by executory agreement stated.

Under Civ. Code, § 1141, title is transferred by an executory agreement only when seller has prepared it for delivery and offered it to buyer with intent to transfer.

5. Sales §199—When title passes to thing offered in performance of obligation stated.

Under Civ. Code, § 1502, title to a thing offered in performance of an obligation passes to the creditor if debtor at the time signifies his intention to that effect.

6. Sales §340—Contract price not measure of seller's damages where title had not passed.

Where sales contract for prunes provided that title was to pass to buyer on completion of weighing and payment, on buyer's default after receiving part thereof, title to the remaining portion not having passed to buyer, it was error to apply, as the measure of seller's damages, the contract price, under Civ. Code, § 3310.

7. Sales §340, 384(1)—Remedy where title has not passed stated; damages for buyer's breach where title had not passed stated.

Where title to prunes contracted for had not passed, seller on buyer's breach had no cause of action on the contract for the purchase price, his remedy being under Civ. Code, § 3311, which establishes measure of damages where title to goods sold remains in seller, and if the prunes were not disposed of by seller in accordance with section 3049, his damages were the excess of the amount due under the contract over the value to seller, together with excess of expenses properly incurred in carrying them to market over those which would have been incurred for the carriage thereof if buyer had accepted.

8. Sales §340—Measure of damages for buyer's breach, where seller tenders with intent to pass title, stated.

Under Civ. Code, § 1141, if tender is made by seller with intent to pass title in the goods to buyer, title is thereby deemed to have passed, and vendor may sue for the contract price; but, if tender is made without such intent, title is not deemed to have passed, and seller's damages are measured by section 3311.

9. Sales §218½—Effect of tender f. o. b. as passing title held for jury.

Where sales contract for prunes provided that title passed on weighing and payment therefor by buyer, on buyer's breach, whether a tender f. o. b. of the remaining portion by seller passed title thereto was for jury.

10. Payment §38(1)—Buyer not deprived of credit for deposit money, though not fully performing contract.

In view of Civ. Code, § 3358, providing that one can recover no greater damages for breach of obligation than he could have gained for full performance, where a sales contract for prune crop provided that buyer was to have \$3,000 paid on entering into the contract applied on account of purchase price as deliveries were had and payments became due, the fact that buyer did not fully perform its contract did not deprive it of the right it had exercised to apply such payment on deliveries before breach.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by Milos Gopcevic against the California Packing Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

C. M. Crawford, of Lakeport, and Pillsbury, Madison & Sutro, of San Francisco

(Marshall P. Madison, of San Francisco, of counsel), for appellant.

Moran & Heer, of San Francisco, and Benjamin C. Jones, of Lakeport (Nathan Moran, of San Francisco, of counsel), for respondent.

TYLER, P. J. Action to recover damages for breach of contract. The controversy presents an ordinary agreement to buy and sell. The main contention presented by the appeal is whether or not title to the goods sold had passed to the defendant.

The complaint alleges that on June 18, 1920, plaintiff and defendant entered into a written contract whereby plaintiff agreed to sell and the defendant agreed to purchase the entire crop of prunes grown by plaintiff on his orchard situated in Lake county. The contract in substance provided that the seller was to harvest and properly dry and cure the crop, which was of the season of 1920, and deliver the same to defendant as drying was completed and the crop ready for shipment. The agreed price was \$262.50 per ton orchard run, provided, however, that the purchaser was not bound to accept delivery of the crop unless the same was in sound and merchantable condition as originally dried, without the addition of water and other foreign substances. The seller was required to give notice by mail to the buyer of not less than three days at its place of business in San Francisco when the crop was ready for delivery. For the purpose of determining the quality and weight of the fruit the buyer had the right to place an agent or inspector at the seller's dryhouse to be present when weighing was going on, and it was agreed by the parties that, unless objection was made by the purchaser to the merchantability of the prunes at the time of the weighing or sacking, all objections as to weight and quality were to be waived. The buyer agreed to promptly upon notice and according to custom furnish and deliver on seller's premises all necessary sacks for the crop. By the express terms of the contract title to the prunes was to pass to the buyer upon completion of weighing and payment, and thereafter the crop was to be at buyer's risk. As a part of the consideration of the contract the buyer was required to and did pay the sum of \$3,000, which sum it was agreed should be credited against the purchase price as payments became due thereon, provided the buyer fully performed all of the terms and conditions of the contract on its part to be performed.

It is further alleged that plaintiff properly dried and cured the prunes so that the same were ready for shipment; that the total weight of the crop was in excess of 105 tons, and that a portion thereof, amounting to some 51 tons, was delivered to and accepted by defendant; that on or about the 10th day of December plaintiff notified defendant that the undelivered portion, amounting to 54

tons, was ready for delivery, and he offered to deliver the same in accordance with the terms of the contract, but defendant refused to accept the same. Plaintiff then alleged that defendant had paid on account of the purchase price the sum of \$8,500, and that there was still due and owing from the defendant the further sum of \$19,226.83, for which sum judgment was prayed.

To this complaint defendant filed a demurrer on the grounds that plaintiff did not show any damage, for the reason that it did not appear therefrom what plaintiff had done with the undelivered 54 tons still in his possession, nor did it appear that they were worth less than the contract price. The demurrer therefore presented the question that inasmuch as it appeared from the complaint that title to the undelivered prunes had not passed to the defendant, plaintiff was not entitled to recover the contract price as damages, but was only entitled to recover the difference between the contract price and the market price of the undelivered portion of the crop. The demurrer was overruled.

Defendant company, answering, denied that the quality of any portion of the prunes was up to the contract requirements, it being averred that even the portion of the crop that had been delivered was undercured, and that the undelivered portion which it had declined to accept was not only undercured but was also moldy and skin-damaged by rain. It also alleged that in addition to the payment of the sum of \$8,500 it had paid the further sum of \$3,000, under the terms of the contract.

Thereafter the case came on for trial. A jury was had, and by stipulation the question of the quality of the undelivered portion of the prunes was submitted to it as a special issue, the court to decide the other issues. Trial was had, and it appeared in evidence that as the crop gradually ripened one portion and then another was harvested, treated, and delivered to defendant; that prior to December 10, 1920, plaintiff had delivered to defendant about 51 tons of the prunes, which at the contract price amounted to the sum of \$13,420, and plaintiff had received from defendant payments thereon amounting in the aggregate to the sum of \$11,500, which sum included the \$3,000 above mentioned. On December 10, 1920, plaintiff demanded that defendant accept and pay for the rest of the crop, amounting to about 54 tons. Defendant claimed that the prunes had been rained on while drying and that they had been damaged. Plaintiff insisted that they were sound and merchantable in every way, and demanded that defendant take them. Defendant had the prunes examined, and upon the report of its agents refused to accept the undelivered portion as above mentioned. Efforts were thereupon made by the defendant to have the question determined by

experts. Plaintiff refused to accede to this proposal, and made a final and, as he claims, an unconditional offer to deliver the balance of the crop under the terms of the contract in sacks f. o. b. defendant's trucks at plaintiff's dryhouse. Defendant refused to accept the prunes, and suit followed.

The complaint, as above indicated, contained no allegation that title to the crop had passed from the seller to the buyer. The evidence upon this subject consists of correspondence between the parties and the fact that plaintiff had not insisted upon a strict compliance with the terms of the contract with reference to payments for the delivered portions of the crop. The record shows that plaintiff advised defendant as follows:

"I have fully complied with my part of the contract, and expect you to do likewise, as regards your obligations thereunder, without further controversy or equivocation."

Again on January 2, 1921, he wrote defendant:

"The entire crop is absolutely sound and merchantable, and the decision is up to you whether you want to live up to the contract which you made with me or deliberately break it."

And again a week later he states in a letter to the defendant:

"The proposal contained in the last paragraph of your letter of January 2 I decline, preferring rather to stand upon the letter of the contract."

Finally he advised defendant:

"The weighing and sacking of my prune crop has been completed, and there now remains for delivery to you under the terms of your contract 996 sacks thereof or a total weight of 54½ tons."

With reference to the payments of the delivered portion of the crop it appears that a balance became due under the provisions of the contract which was not paid.

Upon the conclusion of the trial, and with the evidence as above narrated before it, the jury found in favor of the plaintiff upon the special issue. The court approved and adopted this verdict, and upon the issues presented to it found upon the question of tender that plaintiff had before the commencement of the action tendered and offered to deliver to defendant f. o. b. defendant's trucks at plaintiff's dryhouse the undelivered portion of the crop, which it further found was sound and merchantable; that, notwithstanding such tender and offer to deliver, defendant refused to accept the same; that defendant had paid on account of said crop the sum of \$8,500 and no more, and that the sum of \$3,000 deposited at the time of the entering into of the contract was forfeited by defendant for not having accepted the undelivered portion of the prunes. Judgment was

accordingly rendered for the sum of \$19,226.83. The judgment made no disposition of the 54 tons of undelivered prunes, and, so far as the record shows, they are still in plaintiff's possession.

Defendant thereupon moved for a new trial. The motion was denied, and this appeal is from the denial of the motion and from the judgment.

Appellant relies for a reversal upon several grounds. It is first claimed that the demurrer interposed to the complaint should have been sustained, and that the court erred in giving plaintiff as damages the contract price instead of the excess, if any, of the amount due from defendant on the contract price over the value of the undelivered prunes.

These contentions will be considered together as they both involve the controlling question in the case, namely, whether or not the court adopted the proper measure of damages in ascertaining the amount of damages to which plaintiff was entitled.

[1, 2] As a general rule it may be stated that the question of when title to goods sold passes from a seller to the buyer is one of intention between the parties. *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199. In the absence of a showing to the contrary, the contract of the parties is controlling upon the subject. Here the contract specifically provided that title was to pass upon completion of the weighing and payment of the purchase price, the crop thereafter to be at the buyer's risk. Under the terms of the contract, therefore, two things were necessary to be done before title to the prunes passed to defendant; and unless it can be said that the evidence shows a waiver of these conditions the contract is of course controlling.

[3-5] It is conceded that plaintiff tendered the undelivered portion of the crop in fulfillment of his contract, and upon this subject there is no dispute. Every tender, however, does not transfer title, and where, as here, the contract provides that payment is to be made upon delivery, the tender implies that the fulfillment of this concurrent condition must be complied with before title will pass from the seller to the buyer. *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853; *Katzenbach v. Breslauer*, 51 Cal. App. 756, 197 Pac. 967; *Wong Foo v. Southern Pacific Co.*, 41 Cal. App. 42, 181 Pac. 823. Title is transferred by an executory agreement of sale only when the seller has prepared it for delivery and offered it to the buyer with intent to transfer title. Civ. Code, § 1141. By section 1502 of the same Code it is provided that the title to a thing offered in performance of an obligation passes to the creditor if the debtor at the time signifies his intention to that effect. Here it is not alleged that the title passed, and there is noth-

ing in the evidence to show any intent on the part of the seller to transfer his title in the prunes to the buyer.

[6, 7] The question of the passing of title being one of intention of the parties, in the ascertainment of this intention resort must be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. The intention being the governing principle, the question in the main is one of fact. Here the correspondence between the parties shows conclusively that the seller intended to stand upon the letter of his contract. The only other circumstance from which an intention to relinquish title might be presumed is the fact that when deliveries were first made plaintiff did not insist upon full contemporaneous payments. This no doubt was due to the fact that a deposit had been made by the buyer which was to be applied in payment of deliveries. If the goods were delivered in the expectation that the price would immediately be paid the refusal to make payment would be such a failure on the part of the buyer to perform the contract as would entitle the seller to reclaim the goods. Whether or not this act constituted a waiver is not determined from the mere fact of delivery alone, but is itself again a question of fact. Had there been no intent to transfer title the seller could have recovered the goods, at least in the hands of the buyer, by an appropriate action. However, this fact becomes unimportant, for such of the goods as were delivered were used by defendant, and it clearly cannot be said that the question in any manner controls or affects the undelivered portion amounting to 54 tons, and especially so after a dispute had arisen between the parties and when plaintiff had informed defendant that he intended to stand on the strict letter of his contract. Here there is neither allegation nor proof of a waiver. The court did not attempt to find that title had passed, and there is no evidence upon which such a finding could be predicated.

Under this condition of the record the trial court committed error in applying the measure of damages as set forth in section 3310 of the Civil Code. That section applies only where the title to the goods sold has passed from the seller to the buyer. Where title to property contracted for has not passed, the vendor upon a breach can have no cause of action upon the contract for the purchase price, his remedy in such case being controlled by section 3311 of the same Code, which establishes the measure of damages where title to goods sold remains in the seller. The latter section further provides that in the event that property the subject of sale is not disposed of by the vendor in accordance with section 3049 of the same Code, the damages shall be the excess, if any, of the amount due from the buyer under the contract over the

value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to the market over those which would have been incurred for the carriage thereof if the buyer had accepted it. The vendor may or may not sell the goods, the advantage of complying with the privilege given him being that in such case the price obtained is conclusive evidence of their value. *Hewes v. Germain Fruit Co.*, supra; *Katzenbach v. Breslauer Co.*, supra.

[8] There are certain expressions in some opinions that have caused great confusion and lack of harmony in the decisions upon this subject, which confusion is due largely to a conflict in the laws of different jurisdictions. The result of the cases, however, in this state, in construing our statutes upon the subject as an exposition of the law of sales, is unmistakable as to the practical construction to be given questions of this character. They are to the effect that the measure of damages for the breach of an agreement to buy and sell is controlled by sections 3310 and 3311 of the Civil Code. If the seller transfers to the buyer the title to the property sold, he may under section 3310 recover the full purchase price. If, on the other hand, he retains title to the goods he is confined in his remedy to section 3311, under which he is entitled to recover the difference between the contract price and the market value at the time of performance, or, if he sell the goods as in the case of a pledge, he will be entitled to recover the difference between the price thus realized and that stipulated in the contract. If tender is made by the vendor with intent to pass title in the goods to the vendee, title is thereby deemed to have passed, and the vendor may sue for the contract price Civ. Code, § 1141. If tender is made without intent to pass title until payment is made, title is not deemed to have passed, and the situation is controlled by section 3311. This being true, it is obvious from what we have said that plaintiff has mistaken his remedy.

Appellant has cited us to the cases of *Phillips v. Stark*, 186 Cal. 369, 199 Pac. 509, and *Levy v. Kahn* (Cal. App.) 210 Pac. 40, in support of his further claim that defendant, having notified plaintiff before any tender was made that he would not accept the prunes, he should have offset against the value of the goods, and sued for the difference as provided for in section 3311 of the Code. A consideration of this contention is unnecessary. In both those cases the property the subject of the action had passed and had been resold, and of course under those circumstances the vendors were held not to be entitled to both the full purchase price and the property. No such question is here involved.

[9] It is urged by respondent that the tender "f. o. b." signified an intention to pass

title. While the expression "free on board" has a general meaning, it is not conclusive upon this question. *Gianelli v. Globe Milling Co.*, 48 Cal. App. 103, 191 Pac. 720. The offer was made to conform to the express provisions in the contract, but it still presents a question of fact as to the intention of the parties to pass title, and the subject is controlled by the same principles above expressed.

To the suggestion that the real reason for the rejection of the prunes was the depression in the market conditions, it is only necessary to say that the trial court found upon conflicting evidence that defendant had breached its contract, but this fact did not justify the application by the court of the wrong measure of damage. The law afforded a complete remedy if properly pursued.

[10] And, finally, appellant complains of the finding of the trial court to the effect that defendant was not entitled to a credit of the sum of \$3,000 paid by it when the contract was entered into. Under the express terms of the contract defendant was entitled to have this sum applied on account of the purchase price as deliveries were had and payments became due thereon, and the fact that it did not fully perform its contract did not deprive it of the right it had exercised to apply this payment to the first deliveries. This payment was a benefit accruing to plaintiff under the contract, and should be given effect as such, for the plaintiff can recover no greater amount in damages for a breach of the obligation than he could have gained by full performance thereof. Section 3358, Civ. Code.

Other questions raised by the appellant are unimportant, considering our conclusion.

For the reasons given the judgment is reversed.

We concur: RICHARDS, J.; ST. SURE, J.
